A

Background Paper*

on

ARTICLE 262 AND INTER-STATE DISPUTES RELATING TO WATER

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ARTICLE 262 AND INTER-STATE DISPUTES RELATING TO WATER

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CHAPTER 1

INTRODUCTION

1.1 Importance of the subject

Water covers more than 70% of the surface of the earth. It fills the oceans and the rivers; it resides underground and is also present in the air which we breathe. Great civilisations have risen where water was plentiful and have fallen, when the supply of water failed. Great cities have been born on the rivers and many have vanished when the rivers dried up. Today, more than ever, water is both slave and master to the people. It has more uses than can be counted on the fingers, and it is utilised in almost every activity of the civilised man. But one important fact about water is, that while our demand for it is increasing, it is not possible to increase the supply. Viewed in this light, water must be preserved and managed properly.

Disputes relating to water should therefore deserve our closest attention. This is particularly so, where the disputes are between two or more political units, because, then, the tensions between the people may mount.

1.2 Scope of the study

It has been considered desirable to prepare a separate study devoted to inter-State disputes relating to waters, rather than deal with it in the general study[i] relating to mechanism for the settlement of inter-State disputes. This course was considered desirable for several reasons, but three of them will be mentioned here.[ii]

1.3 Importance of water

In the first place, water is the most important natural resource for mankind. Great civilisations have been founded on the banks of rivers – the Egyptian civilisation (on the Nile), the Mesopotamian civilisation (on the Tigris and the Euphrates), the Indian civilisation (on the Indus) and the Chinese civilisation (on the Hwange He). Great civilisations have perished for scarcity of water – e.g., the Sumerian civilisation (Mesopotamia), which was destroyed because of salt built up in the soil.[iii]

In the Indian context, this aspect becomes still more important, because over 85 percent of Indian territory lies within its major and medium inter-State rivers.[iv] India has 14 major rivers[v], which are all inter-State rivers. (A “major” river is a river with a catchment area of 20,000 square kilometers or more).

India has 44 medium rivers, of which 9 are inter-State rivers. (A “medium” river is one with a catchment area of between 200 and 20,000 square kilometers).

1.4 Past experience

Secondly, past experience in India, in connection with the resolution of inter-State disputes relating to waters, has not been very happy.[vi] It is not easy to say whether this is due to the nature of the disputes, political factors or inadequacy of the constitutional provisions on the subject. Whether or not an effective solution can be found to the problem, is a different matter. But the subject does seem to require separate study.

1.5 The legal provisions – further action needed

Thirdly, there is prima facie need for considering the matter afresh. As Setalvad has observed.[vii]

"The tribunals appointed under the Inter-State Water Disputes Act to adjudicate upon them have so far produced no results. We know from the experience of other countries, how long drawn-out and expensive these adjudications can be; and our country cannot afford either the expense or the long delays. Our Constitution-makers, anticipating such situations, have provided ample power to the Union to enable it to deal with them. Why should not the Union, it is asked, exercise its powers of legislation under Entry 56 of List 1, which empowers it to legislate for the regulation and development of inter-State rivers and river valleys, to the extent, to which such regulation and development under the control of the State is declared by Parliament by law to be expedient in the public interest? Such action by the Union, it is urged, will have the advantage of ensuring a quick solution of these disputes arrived at from the national perspective".

1.6 Scheme of discussion

Taking into account this background, we shall now proceed to deal with various aspects of the problem, so as to cover the factual history and the law relevant to the problem.

CHAPTER 2

CONSTITUTIONAL PROVISIONS RELATING TO INTER-STATE WATERS AND THEIR HISTORY

2.1 Legislative competence

(a) Under the Indian Constitution, States have power to legislate (State list, entry 17), with respect to the following subject:

"Water, that is to say, water supplies, irrigation and canals, drainage and embankments, water storage and water power, subject to the provisions of Entry 56 of List 1."

(b) Union list, entry 56, reads as under:

"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 is declared by Parliament by law to be expedient in the public interest."

2.2 Article 262

Article 262 of the Constitution reads as under:

"262. Adjudication of disputes relating to waters of inter-State rivers or river valleys:

(1) 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, in any inter-State river or river valley.

(2) 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)"

[It should be noted that the "dispute" need not be between States, as such].

2.3 Act of 1956

(a) In exercise of the power conferred by article 262 of the Constitution, Parliament has enacted the Inter-State Water Disputes Act, 1956.[viii] Section 3 (and succeeding sections) of the Act contemplate the reference of a "water dispute" to a Tribunal. Section 2(c) of the Act defines "water dispute", as meaning any dispute or difference between two or more State Governments with reference to the specified matters. However, the word "complaint", used in article 262 of the Constitution, is not used in the Act of 1956.

(b) Under the provision of the 1956 Act quoted above, the request to the Central Government has to be made by a State Government. A citizen cannot directly make a "complaint", - though the Constitution, in article 262, mentions a dispute or a complaint without confining it to a dispute raised or a complaint made by a State Government.[ix]

2.4 Government of India Act, 1919

The subject has an interesting history. When dyarchy was introduced in the Provinces (in British India) under the Government of India Act, 1919, irrigation became a Provincial, but "reserved" subject. Before the Provincial Government could take up any project involving the interests of more than one Province, the prior approval of the Secretary of State had to be obtained.

2.5 Government of India Act, 1935

(a) The Government of India Act, 1935 (Provincial List, Entry 19) placed irrigation within the sole jurisdiction of the Provinces.

(b) However, sections 130 to 133 of the Act of 1935 made detailed provisions as to inter-Provincial, etc., disputes concerning water. The relevant provisions applied to "States" also, i.e., to those Indian States, which may ultimately join the contemplated federation. Any Province or State whose interests were perpetually affected in respect of water supplies from a natural source, owing to the action of another Province or State, could complain to the Governor General.

(c) The Governor General was required to appoint a Commission to investigate and report to him on the matters to which the complaint related (unless, in his opinion, the issues were not of sufficient importance).

(d) After consideration of the report, the Governor General was to give such decision as he deemed proper.

(e) The order of the Governor General was to be binding upon the parties. However, before the Governor General gave his decision, the Governor of any State (or the ruler of a Princely State), affected by the order, could require the Governor General to refer the matter to His Majesty in Council, which could give such decision as it deemed proper.

(f) Jurisdiction of the Federal Court (or any other court) was barred, if action to lodge a complaint had been taken by the Governor of a Province, etc.

2.6 Bill in the Constituent Assembly

In the draft Constitution, the corresponding provision (articles 239 – 242 of the draft) contained propositions substantially similar to those contained in sections 130 – 133 of the Government of India Act, 1935, except that the President was substituted for the Governor General and the reference of a dispute was to be by the President to the Supreme Court under the latter's advisory jurisdiction. (Jurisdiction of all other courts was barred).

2.7 Dr. Ambedkar's revised draft

For simplicity and effectiveness, Dr. Ambedkar recast the whole scheme. Article 242A (as revised by him), was in the same form as present article 262.[x]

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CHAPTER 3

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ENACTMENTS RELATING TO INTER-STATE WATERS

3.1 The Inter-State Water Disputes Act, 1956

Pursuant to the power conferred by the Constitution (article 262), Parliament has enacted the Inter-State Water Disputes Act, 1956. Its main features can be thus summarised:

(a) A State Government which has a water dispute with another State Government may request the Central Government to refer the dispute to a tribunal for adjudication.

(b) The Central Government, if it is of opinion that the dispute cannot be settled by negotiation, shall refer the dispute to a Tribunal.

(c) The Tribunal's composition is laid down in the Act. It consists of a Chairman and two other members, nominated by the Chief Justice of India from among persons who, at the time of such nomination, are Judges of the Supreme Court.

(d) The Tribunal can appoint assessors to advise it in the proceedings before it.

(e) On the reference being made by the Central Government, the Tribunal investigates the matter and makes its report, embodying its decision. The decision is to be published and is to be final and binding on the parties.

(f) Jurisdiction of the Supreme Court and other courts in respect of the dispute referred to the Tribunal is barred.

(g) The Central Government may frame a scheme, providing for all matters necessary to give effect to the decision of the Tribunal. The scheme may, *inter alia*, provide for establishing an authority for implementing (section 6A).

3.2 The River Boards Act 1956

(a) The River Boards Act, 1956, provides for the establishment of River Boards, for the regulation and development of inter-State rivers and river valleys.

On a request received from a State Government or otherwise, the Central Government may establish a Board for "advising the Government interested" in relation to such matters concerning the regulation or development of an inter-State river or river valley (or any specified part) as may be notified by the Central Government.

(b) Different Boards may be established for different inter-State rivers or river valleys.

(c) The Board is to consist of the Chairman and such other members as the Central Government thinks fit to appoint. They must be persons having special knowledge and experience in irrigation, electrical engineering, flood control, navigation, water conservation, soil conservation, administration or finance.

(d) Functions of the Board are set out in detail in section 13 of the Act. Subject-wise, they are very wide, covering conservation of the water resources of the inter-State river, schemes for irrigation and drainage, development of hydro-electric power, schemes for flood control, promotion of navigation, control of soil erosion and prevention of pollution.

But the functions of the Board are advisory and not adjudicatory.

(e) By section 14(3), the Board is directed to consult all the Governments concerned and to secure their agreement, as far as possible.

Thereafter, by section 15, the Board is empowered to frame schemes, obtain comments of the interested Governments and finalise a scheme. [Section 15(4)] But the schemes do not seem to have a mandatory force. It appears from section 15(5) and section 15(6) of the Act that:

(i) the Board can advise the Governments concerned as to execution of the scheme and

(ii) the Central Government can "assist the Governments interested", in taking such steps as may be necessary, for execution of the scheme.

CHAPTER 4

LEGAL DOCTRINES RELATING TO INTER-STATE WATERS

4.1 Scope of the Chapter

In the area of the law relating to waters flowing inter-State, there have emerged certain legal doctrines, which can be usefully considered at this stage. No doubt, these doctrines belong to the field of substantive law, rather than to the area of process for the adjudication of inter-State disputes. It is also true, that some the of them were evolved in the context of international disputes, rather than inter-State disputes. Nevertheless, a brief look at the subject may possess some utility, when examining the question of evolving an appropriate procedure for the settlement of such disputes.

4.2 The various doctrines

It would be convenient, to enumerate at the outset, the various doctrines that have emerged in this area. These are as under:

(1) Doctrine of riparian rights
(2) Doctrine of prior appropriation
(3) Doctrine of Territorial Sovereignty (Harmon doctrine)
(4) Doctrine of Community of interest
(5) Doctrine of equitable apportionment.

4.3 Doctrine rights of Riparian

The doctrine of riparian rights emphasises the recognition of equal rights to the use of water by all owners of land abutting a river, as long as there is no resulting interference with the rights of other riparian owners. The doctrine may not be of much use in the context of inter-State rivers[xi].

4.4 Doctrine of prior apportionment

The doctrine of prior apportionment has been applied in some decisions of the US Supreme Court.[xii] The cardinal rule of the doctrine is, that priority of appropriation gives seniority of rights.

As against this, there is the doctrine of equality – also applied in some cases in the US Supreme Court.[xiii]

4.5 The doctrine of territorial sovereignty (Harmon Doctrine)

This doctrine (not applied in inter-State disputes) was evolved by Attorney General Harmon, of the US[xiv] in 1896, to justify the action of the United States in reducing the flow of the river Rio Grande into Mexico. According to Harmon, the rules of international law imposed, upon the United States, no duty to deny to its inhabitants the use of the waters of that part of the Rio Grande which was lying wholly within the Unites States, although such use resulted in reducing the volume of water in the river below the point

where it ceased to be entirely within the United States. In his view, the supposition of the existence of such a duty was inconsistent with the sovereignjurisdiction of the United States over the national domain.

4.6 Doctrine of community of interest

According to the theory of community of interest, a river passing through several States is one unit and should be treated, as such, for securing the maximum utilization of its waters.[xv] This theory, if properly applied, would secure integrated development. Its smooth implementation would seem to require mutual agreement. The Kosi project (India and Nepal) is often cited as an example of the adoption of this approach.

4.7 Doctrine of equitable apportionment

(a) The doctrine of equitable apportionment seems to have originated in the United States, as is illustrated by the following decisions of the US Supreme Court:
   (i) *Connecticut Vs. Massachusetts*, (1931) 282 US 670.
   (ii) *New Jersey Vs. New York*, (1931) 283 US 336.
   (iii) *Nebraska Vs. Wyoming*, (1945) 332 US 54.

4.8 Legislation in US

The theory (equitable apportionment) is not applied (in the US) where, by legislation, an appropriation of the waters has been already made. [*Arizona Vs. California,* (1963) 373 US 541].

Thus, in *Arizona Vs. California,* (1963) 373 US 541, there was complete agreement for gross allocation of water to lower basin States, but no agreement could be arrived at, as to the precise quantum to be made available to each State. Consequently, the apportionment was made through legislation by Congress. The dispute was still raised before the Supreme Court, which held as under:

> "Where the Congress has so exercised its constitutional power over waters, courts have no power to substitute the notion of an equitable apportionment for the apportionment chosen by the Congress."

4.9 Equitable apportionment in India

The theory of equitable apportionment has been recognised in India also – though, at the same time, its vagueness has also been taken note of. Here are few examples[xvi]:

(a) The Indus Commission (1943) (Report, pages 5-75) recorded its views as under:

   (i) The most satisfactory settlement of such disputes is by agreement.

   (ii) Failing agreement, the rights of the parties must be determined by applying the rules of equitable apportionment, each unit getting a fair share of the water of the common river.

   (iii) However, equitable sharing, once made, may cease to be equitable, in the face of new circumstances

(b) The Krishna Water Disputes Tribunal [Report, pages 52 and 93][xvii] took note of the position, as under:

   "In India also, the rights of States in an inter-State water are determined by applying the rule of equitable apportionment, each unit getting a fair share of the waters of the common river.

   But the Krishna Tribunal also noted, that the concept does not lend itself to precise formulations and its meaning cannot be written into a code that can be applied to all situations and at the all

times. The standard of equitable apportionment requires an adaptation of the formula to the necessity of the particular situation.

(c) The same doctrine was noted by the Godavari Water Disputes Tribunal [Report (1979), Vol. 1, page 19].[xviii]

4.10 The Narmada Tribunal and equitable apportionment

The Narmada Water Disputes Tribunal[xix] [Report, 1978, Vol. 1, pages 109-113] did accept the doctrine of equitable apportionment[xx] as applicable. In fact, it acknowledged that the diversion of water of an inter-State river outside the river basin was legal and the need for diversion of water to another basin may be a relevant factor on the question of equitable apportionment, in the circumstances of a particular case.

The Narmada Tribunal (Report Vol. 1, pages 109, 113) contains an elaborate discussion of the doctrine and its application. It would be convenient (for the present purpose) to analyse the relevant passage and break it into propositions, as under:

(a) The doctrine of equitable apportionment cannot be put in a narrow strait jacket of fixed formula.

(b) In determining the just and reasonable shares of the interested States, regard must be had, in the first instance, to whatever agreements, judicial decisions, awards and customs that are binding upon the parties.

(c) As to any aspects not covered by these factors, the allocation may be made according to the relative economic and social needs of the interested States.

(d) The other matters to be considered, include the following:

(i) the volume of the stream;
(ii) the uses already being made by the concerned States;
(iii) respective areas of land, yet to be watered;
(iv) physical and climatic characteristics of the States;
(v) relative productivity of the land in the States;
(vi) State-wise drainage;
(vii) population which is dependent on the water supply and degree of their dependence;
(viii) alternative means of satisfying the needs;
(ix) amount of water, which each State contributes to the inter-State stream;
(x) extent of evaporation in each State; and
(xi) avoidance of unnecessary waste in the utilisation of water by the concerned States.

CHAPTER 5

DISPUTES IN INDIA, CONCERNING INTER-STATE WATERS

5.1 Scope of the Chapter

It is proposed to present in this Chapter a brief survey of the manner in which, in India, in the past, some of the notable disputes concerning inter-State rivers have been resolved.

5.2 Constitutional history

Some of the disputes concerning such rivers date back to the 19th century and relate to a period when (British) India was governed by enactments prior even to the Government of India Act, 1919. Some relate to the period when British India was governed by the Government of India Act, 1919 or the Government of India Act, 1935. Many such disputes have been adjudicated after the commencement of the

Constitution, by Tribunals constituted under article 262 of the Constitution, read with the Inter-State Water Disputes Act, 1956.

5.3 Common features

However, it seems that whatever may be the constitutional scenario applicable to each particular dispute, most disputes seem to have shared the features noted below –

(a) Vagueness regarding the legal doctrine applicable.
(b) Acrimonious tension between the parties.
(c) Overall delay in completion of the adjudication, due to various factors.
(d) Similar other unsatisfactory features.

There is, of course, an occasional silver lining. Some disputes have, for example, been resolved by mutual agreement – even if the parties reached agreement, only after the lapse of a long period.

5.4 The Indus Commission Report[xxi]

The Indus and its tributaries had been always a source of dispute among the concerned Provinces, from the early years of the 20th century. The root cause was the apprehension of the Punjab Province, and of Sind (which was then a part of Bombay Presidency), about the availability of adequate waters for the Bhakra Project of the Punjab and the Sukkur Project in Sind. Disputes arose, and the Central Government appointed a Committee in 1935, (the Indus Committee or the Anderson Committee). The Committee comprised eight experts, namely, six Chief Engineers of the concerned Provinces or States, and two independent Engineers, including the Chairman of the Committee, Sir. John Anderson. The basin Provinces/States were Punjab, Bombay (Sind), North West Forntier Province, Bahawalpur, Khairpur and Bikaner. The Committee submitted its recommendations in the same year (1935) and these were accepted by the Government of India. However, the change in status, of the subject of water supplies, irrigation cannals and water storage etc., from a 'reserved subject' (in the Government of India Act, 1919), to a "transferred subject" (in the 1935 Act), necessitated a further reference. Accordingly, the Governor-General appointed a Commission, in September 1941, on a complaint from Sind Province. (under the Chairmanship of B. N. Rau). Apart from Mr. Justice B.N.Rau, (then Judge of the Calcutta High Court), the Commission included P. F. B. Hickey, retired Chief Engineer, Irrigation, (United Provinces) and E.H.Chave, Chief Engineer, (Madras).

5.5 Consensus as to law (equitable apportionment)

At the stage of preliminary issue, it had been accepted by all the parties that the rule of "equitable apportionment" should be applied to determine the rights of the several units concerned in the dispute. The Commission recommended as under –

(a) An agreement arrived at among the various units concerned, on the present dispute, providing for final apportionment of waters of the Indus and its tributaries, would be the most satisfactory solution.

(b) A Technical committee be set up to examine the two barrage projects in Sind. The contemplated projects in the Punjab be restrained till 1-10-1945.

(c) If the recommendation for a Technical Committee was not accepted or the parties failed to come to an agreement, the Punjab Government was to be permitted, after the three years period, to proceed with the link and small storage schemes without any conditions.

(d) The Bhakra and Beas Dam Scheme could be taken up, subject to the regulation of the supplies and compensation for damage in lieu thereof.

5.6 Response of parties

The numerous recommendations made by the Indus Commission in its Report of July 1942, were accepted neither by Punjab nor by Sind. Both the Governments represented against the findings and recommendations of the Commission, to the Government of India, under section 131 of the Government of India Act, 1935. The matter was accordingly referred to His Majesty in Council. Though mutual consultations at the Chief Engineers' level were held in the meantime, and even a draft agreement prepared in September, 1945, nothing concrete materialized till 15 August, 1947. Through the enactment and operation of the Indian Independence Act, 1947, India and Pakistan emerged as two different Dominions, and the attempted settlement or resolution of the disputes proved abortive.

5.7 Detailed propositions (Indus Commission)

The Report pf the Indus Commission contains the following propositions –

(i) The most satisfactory settlement of such disputes is by agreement, the parties adopting the same technical solution of each problem, as if it were a single community, undivided by political or administrative frontiers. In the absence of such an agreement, the rights of the several parties must be determined by applying the rules of equitable apportionment, each unit getting a fair share of water of the common river. Equitable sharing, once made, may cease to be equitable in the face of new circumstances.

(ii) Priority of appropriation gives superiority of right. For the purposes of priority, the date of a project shall be the one on which it reaches finality.

(iii) As between projects of different kinds, the order of precedence must be:
1. Use for domestic and sanitary purposes,
2. Use for navigation,
3. Use for power and irrigation.

Even though the Indus Commission had claimed in its Report that all the parties accepted the principles formulated by it, the claim was belied by the parties, by contradicting it.

5.8 The Krishna Water Disputes Tribunal

(a) Krishna is the second largest river in the Penisular India.[xxii] Rising near Mahabaleswar, in the Mahadev range of the Western Ghats, it flows down a length of 1392 km, through Maharashtra, Mysore and Andhra Pradesh, before it drops into the Bay of Bengal. Out of a total catchment of 2,55,949 sq.km. 6821 sq.km. lie in Maharashtra, 1,11,959 sq.km in Karnataka and 75369 sq.km in Andhra Pradesh.

(b) In 1951, in the backdrop of major development proposals being formulated by the States of Bombay, Hyderabad, and Madras, (among the total of four riparian States, including Mysore), an agreement was drawn up, apportioning the available supply among them. However, disputes arose, Mysore refusing to ratify the agreement.

(c) Notwithstanding the best efforts of the Central Government towards convening several inter-State conferences, the disputes could not be settled. Further, the States moved for reference of the matter to a Tribunal. Accordingly, the Krishna Water Disputes Tribunal was constituted in April 1969, and the matter was referred to it.

5.9 Krishna dispute : Rival Contentions

(a) The contention of Karnataka, in essence, was, that the 1951 understanding, not-having matured into an agreement, was not binding, and therefore equitable distribution of the waters should be

made. The implementation of Andhra's projects and Maharashtra's proposal for West-ward diversion of Krishna waters in excess of 67.5 TMC, should be stayed.

(b) Maharashtra too disowned the Agreement of 1951. further, it objected to implementation of other States' projects without its prior consent. A fresh assessment of dependable flow as well as of equitable apportionment thereof, was sought.

(c) In contrast, Andhra affirmed the validity of the 1951 Agreement, and held Karnataka and Maharashtra guilty of breach thereof. It sought an injunction, restraining them from undertaking works involving utilization of more waters than anticipated as their respective shares. It also sought to restrain them from intercepting flows to the delta, as well as to other irrigation works of Andhra. A number of issues were framed. (Iit is not necessary to quote them).

5.10 Krishna Dispute : The award on various issues

(a) The Krishna Tribunal first dealt with the question whether there was a concluded agreement. It noted that the law on the subject was well settled. As B. K. Mukherjea J observed in *Jainarain Ram Lundia Vs. Surajmall Sagar*, (1949) FCR 379.

"When parties enter into an agreement on the clear understanding that some other persons should be a party to it, no perfected contract is possible, so long as this other person does not join the agreement. This would be the position in law, apart from any rule of equity."

As Mysore did not ratify the agreement, there was no concluded agreement between the other States.

(b) However, on some points, the party States did come to interlocutory agreements and the Krishna Tribunal was therefore relieved of the duty of deciding those issues. Certain other issues were decided by the Tribunal.

5.11 Duration of the Krishna Tribunal (1969 – 1976)

The Krishna Tribunal was set up in April 1969 and forwarded its Report to the Government of India in December 1973, in less then five years time. Within three months, however, all the party States and the Government of India made further references to the Tribunal. The Further Report of the Tribunal was forwarded in May 1976, giving therein, such explanation and guidance as it deemed fit, regarding regenerated flows. So, in all, it took seven years for the Tribunal, to consummate the process of adjudication.

5.12 Principles as emerging, formulated

The following principles of a general nature may be deemed to have emerged from the Report of the Krishna Water Disputes Tribunal:

(i) A river basin has to be treated as an indivisible physical unit.

(ii) The conflicts of interests of the riparian States must be resolved by agreement, judicial decree, legislation or administrative control, so as to evolve a fair and just distribution of water resources among the concerned States.

(iii) A State represents all its inhabitants and water-users within its territory, in a complaint filed by or against it under section 3, Act of 1956.

(iv) If there is enacted a central legislation on the subject of apportionment of inter-State rivers or river valleys, that law will bind all the States. The rights of States in inter-State rivers are determined by applying the rule of equitable apportionment, and that no State has a proprietary interest in a

particular volume of the water of an inter-State river on the basis of its contribution or irrigable area.

5.13 Final order

Final order of the Krishna Tribunal which was issued in 1976 includes the following stipulations:

"Clause XIV
(A) At any time after the 31st May 2000, this order may be reviewed or revised by a competent authority or Tribunal, but such a review or revision shall not, as far as possible, disturb any utilisation that may have been undertaken by any State within the limits of the allocation made to it under the foregoing clauses.

Clause XV
Nothing in this order of this Tribunal shall impair the right or power or authority of any State to regulate within its boundaries the use of water, or to enjoy the benefit of waters within the State in a manner not inconsistent with the order of this Tribunal."

5.14 Narmada Water Disputes Tribunal Report (1978)

Narmada, the largest West-ward flowing river of the peninsula, rises near Amarkantak in Madhya Pradesh. It has a length of 1312 km., draining a catchment of 98796 sq.km., of which 87% lies in Madhya Pradesh, 1.5% in Maharashtra and 11.5% in Gujarat.[xxiii]

In 1946, the then Government of Central Provinces and Berar, and the then Bombay Presidency requested the Central Waterways, Irrigation and Navigation Commission (CWINC) to take up investigations there, for basin-wise development. On a reconnaissance, excellent prospects were revealed, and detailed investigation on seven projects were recommended. An *ad hoc* Committee under Dr. A. N. Khosla, the then Chairman, CWINC, scrutinized the proposal and recommended detailed investigation in respect of:

(a) Bargi Project
(b) Tawa Project
(c) Punasa Project
(d) Broach Project

5.15 Narmada Dispute: The Preliminaries and Addition of Navagam

(a) The CWINC completed investigation of the Tawa, Punasa and Broach Projects by 1949 and prepared the Project Reports. Subsequently, the Central Water & Power Commission (C.W.& P.C), (which replaced the CWIMC, in 1955) resumed the investigation of Bargi Project which had been suspended for want of funds, in 1960 and the Project Report was prepared in 1963. The riparian States at this stage were Madhya Pradesh and the composite state of Bombay (later Maharashtra and Gujarat).

(b) The CW & PC made a closer scrutiny of the dam site at the Broach Project, and selected "Navagam" as against "Gora" and the Government of Bombay approved the proposal. The Navagam dam which was to have F.R.L. at 160 in the first stage, would be raised to 300, in the second stage. Certain revisions which were thus necessitated in the Project Report were accordingly incorporated.

5.16 Height of the dams

After bifurcation, Navagam fell in Gujarat (May 1960). An agreement between Gujarat and Madhya Pradesh (November 1963) about the height of the dam (Bhopal agreement) was later repudiated. Khosla Committee was constituted by the Centre, to suggest measures for integrated development. In the

meantime, Madhya Pradesh and Maharashtra reached agreement. (Jalsindhi agreement), about a dam between Navagam and Harinphal.

5.17 Khosla Committee

The Khosla Committee recommed a Master-Plan and one project (Navagam) and Gujarat broadly endorsed it.

5.18 Narmada Tribunal and equitable apportionment

(a) A series of inter-State meetings under the auspices of the Centre, thereafter ensued, but to no avail. Meanwhile, on 6th July, 1968, Gujarat asked for the appointment of a Tribunal under the Inter-State Water Disputes Act, 1956, and the Narmada Water Disputes Tribunal was constituted on 6 October 1969 and the disputes referred to that tribunal.

(b) Subsequently, on the 16th October 1969, the Government of India made another reference of certain issues raised by Rajasthan under section 5 (I) of the Inter-State Water Dispute Act, 1956.

(c) After hearing and examining the statements of case and the respective rejoinders to each other's statement by the concerned States, the Tribunal framed 24 issues in the first instance, but, on further consideration, the same were amended and modified. The issues need not be quoted here. All the States expressly made it clear that the correct legal principle applicable in the dispute was the doctrine of equitable apportionment.

5.19 Narmada Tribunal – Award on Preliminary Issues

(a) After hearing elaborate arguments of counsel on behalf of the party States, and the Attorney General on behalf of the Union of India, the Tribunal gave its judgment on preliminary issues. According to the Tribunal, reference of a matter raised by Rajasthan, a non-basin State was *ultra vires* of the 1956 Act, but reference of the one raised by Gujarat was not.

(b) Also, it had jurisdiction to give appropriate relief to direct Madhya Pradesh and Maharashtra to take steps, by way of acquisition or otherwise, for making sub-merged land available to Gujarat in order to enable Gujarat to execute the Navagam Project and to give consequential directions to Gujarat and other Party States regarding payment of compensation to Maharashtra and Madhya Pradesh and for the rehabilitation of displaced persons.

5.20 Appeal to Supreme Court and subsequent compromise

(a) Madhya Pradesh and Rajasthan appealed to the Supreme Court by special leave, against the decisions of the Tribunal, obtaining a limited stay of the proceedings of the Tribunal, in May/June, 1972. The Chief Ministers of Madhya Pradesh, Maharashtra, Gujarat and Rajasthan thereafter entered into an agreement to come to a compromise with the assistance of the Prime Minister of India. An adjournment of the proceedings was ordered by the Tribunal, as requested by the parties.

(b) In August, 1974, the parties jointly filed the Agreement of party States dated 12th July 1974 which sought deletion of issues 4,5,7, 7(a), 7(d), 7(e), 7(f), 8, 10, 11, 12 & 20 and modification of issues 6, 7 (b), 13 and 17. Only the remaining issues were to be determined by the Tribunal. The Tribunal adhered to the provisions of the Agreement produced by the parties. The appeals filed by Madhya Pradesh and Rajasthan naturally were withdrawn.

(c) The parties came to agreement on : (i) the quantity of water, (ii) requirements of Maharashtra and Rajasthan, (iii) the net available quantity of water for use in Madhya Pradesh and Gujarat, (iv)

apportionment by Tribunal between Madhya Pradesh and Gujarat, (v) the height of Navagam dam to be fixed by the Tribunal, and (vi) the level of the canal should be fixed by the Tribunal.

5.21 The Narmada Tribunal-Various Doctrines Considered

The Narmada Tribunal made an in-depth consideration of the law relating to equitable apportionment of the waters of inter-State rivers in India. Various competing doctrines and principles were examined.[xxiv]

(a) The Harmon Doctrine professes absolute territorial sovereignty of the upper riparian State, which could abstract any amount of water at the head reaches of a great river and make a desert of the State that was situated lower down.

(b) The English Common Law Principle of Riparian Right would on the other hand authorize a lower riparian to exercise a veto against abstractions upstream.

(c) In between, there are those like the Doctrine of Equitable Apportionment and the Equitable utilisation Theory.

The Tribunal itself (by agreement) accepted the doctrine of equitable apportionment.

5.22 Narmada Dispute-Allocation Made

(a) The Narmada Tribunal did apportion the waters among Madhya Pradesh and Gujarat. Madhya Pradesh with 97.59% of the drainage area and contributing 98.75% of the flow, was awarded 18.25 MAF (67%), while Gujarat with 0.56% of the drainage area contributing 0.26% of the flow, got 9 MAF (33%). It was also decided that excess as well as distress should be shared by the two States in the same proportion as their shares. Rajasthan's claim for a share in the excess flow was turned dwon. However, between Rajasthan and Maharasthra, excess or scarcity was decided to be distributed in the proportion of 1/56:1/12.

(b) In deference to the wishes of the parties, the Tribunal agreed that allocations be made subject to review and modicication after the lapse of a reasonable period of time. It was decided, accordingly, that the allocations should be subject to review after a period of 45 years from the date of order of the Tribunal.

(c) The Tribunal had also to elaborately deal with intricate technical questions, such as fixing the full supply level of Navagam Canal, its bed gradient, determination of the height of Sardar Sarovar Dam, the quantum of the re-generated flow and return flow etc. it also presented an exhustive scheme to set up a machinery for implementing its decisions.

5.23 Narmada Tribunal :duration (1969 – 1978)

The Narmada Tribunal had been constituted in October 1969. Its gave its Report in August 1978. Within three months thereafter, the Union of India and the States of Gujarat, Madhya Pradesh, Maharastra and Rajasthan, filed five separate references before the Tribunal, as stipulated in the statute, seeking explanation/guidance. The Tribunal, accordingly gave its Further Report, in December, 1979.

5.24 Narmada Tribunal Report: Significant Features

The Narmada Water Disputes Tribunal Report contained some significant features:

(a) It was held that Rajasthan, a non-riparian State, was not entitled for a share in the Narmada waters. The State was, nevertheless, favoured with an allocation, based on an agreement of Chief Ministers.

(b) The Tribunal observed that diversion of water of an inter-State river outside the river basin is legal; and the need for diversion of water to another watershed may therefore be a relevant factor on the question of equitable apportionment in the circumstances of a particular case.

(c) The Tribunal held that it had jurisdiction to limit the period of operation of the award. It observed:

"….We are therefore of opinion that the express power granted to the Tribunal by Parliament under this sectin (section 4 of the Inter-State Water Disputes Act, 1956) to investigate water disputes and to give decision thereon involves, by necessary implication, that the Tribunal has the power to prescribe whether the decision should be of permanent duration or whether the decision should be subject to review after a lapse of a reasonable period of time."

(d) The Narmada Tribunal not only adjudicated the inter-State water dispute between the party States, but also directed the establishment of a machinery for operating and implementing its award, with the object of accomplishing the optimum utilization of Narmada waters. This machinery (the Narmada Control Authority), was constituted subsequently, and was authorised to frame detailed rules and regulations and to carry out water accounting.

5.25 Godavari Water Disputes Tribunal Report (1979)

Godavari, the largest among the peninsular rivers, is held in reverence as "Vriddha Ganga". Rising in the Nasik District of Maharashtra, it joins the Bay of Bengal after traversing a length of 1465 km. Of its total catchment of 3, 12, 812 sq.km, 49% lies in Maharashtra, 21% in Madhya Pradesh, over 1% in Karnataka, over 5% in Orissa, and 24% in Andhra Pradesh.

5.26 The Godavari Disputes-Background

(a) Till the mid-nineteenth century, only minor irrigation works were to be found in the Godavari river basin. The first major one, The Godavari Delta Canal System, was completed in 1877.[xxv] Prior to Independence, the Provinces of Bombay, Madras, Orissa, Central Provinces, and the princely States of Hyderabad, Bastar and Kalahandi were the riparian States. After 15 August, 1947, the basin fell within the territorial jurisdiction of the States of Bombay, Madras, Madhya Pradesh, Hyderabad and Orissa. At the instance of the Central Government, after Indepedence, parleys were held among the party States and a memorandum of understanding was prepared in 1951, apportioning the available flow of roughly 1900 TMC. (Orissa had kept out of the memorandum).

(b) Subsequent to the enactment of the Andhra Pradesh Act, 1953, and the bifurcation of Bombay in 1960, the configurations and borders had changed and the States of Maharastra, Andhra Pradesh, Karnataka, Madhya Pradesh and Orissa became the party States. The Government of India formulated a scheme for-re-allocation, which was rejected by the States in a conference held in 1960.

(c) In 1961, the Government of India set up the Krishna Godavari Commission to deal with the problems in the Godavari, as also in the Krishna River. The Commission found that accurate assessment of dependable flow in the river could not be made without further data-collection and discharge observations. These were later started; in the meanwhile, the Government of India found, that the earlier Memorandum of Understanding was ineffective and unenforceable.

5.27 Godavari Tribunal (1969)

The Godavari Water Disputes Tribunal was constituted under the Inter-State Water Disputes Act, in April 1969. While referring to the Tribunal, for adjudication, the water disputes regarding the inter-State river

Godavari and the river valley thereof, the Government of India also requested the Godavari Tribunal to consider the representations of some of the States, concerning the possibility of diversion of the Godavari waters to the Krishna river and the objections thereto by some other States.

5.28 The Godavari Tribunal – Issues

Several issues were framed by the Godavari Tribunal : We need not quote them. The disputants had exhibited a spirit of accommodation, and continued to exert themselves in the interlocutory stage, to reach bilateral or multi-lateral agreements on several points of dispute.

5.29 Godavari Tribunal (Report)(1980) (Trans-basin diversion)

(a) The Report of the Godavari Tribunal (7 July, 1980) was mostly a formal consolidation of agreements arrived at by the parties themselves. The Tribunal, however was forthright on an important question of policy, namely of trans-basin diversion. It held:

Each of the States concerned will be at liberty to divert any part of the share of the Godavari waters, allocated to it from the Godavari basin, to any other basin.

(b) Though the Godavari Tribunal dealt with various uses of water, no order of priority among them was laid down. The final order of the Tribunal envisaged alteration, amendment or modification of all or any of its provisions, through agreements between parties or legislation by the Parliament.

5.30 Ravi and Beas Tribunal (Report 1986)

Ravi and Beas belong to the Indus system. That system comprises

(a) The Indus and its 3 Tributaries on the West (Kabul, Jhelum, Chenab) and
(b) Ravi, Beas and Sutlej on the East.

5.31 Ravi-Beas dispute; and Rao Commission

(a) Canal irrigation was extensively used in the Indus basin: By 1919, several projects were on blue print, including the Sutlej project, the Sukkur Barage project and the Bhakra project

(b) Despite Bahawalpur's objections, the Sutlej Valley Project was completed by 1932. Bahawalpur protested. The Government of India thereupon appointed a committee of experts, known as the Anderson Committee, to go into the disputes. The Committee made unanimous recommendations, which were accepted by the concerned party States and by the Government of India.

(c) On the complaints of Sind, the Rau Commission was appointed in 1941, which submitted its report in the subsequent year. But the contestants viz. Punjab and Sind, rejected the recommendations, and hence negotiations were held to solve their differences. By 1945, an agreement was reached, but, before a final decision could be taken, the country was partitioned.

5.32 Radcliffe Award and Indus Treaty

(a) Sir Cyril Radcliffe, the eminent King's Counsel, was entrusted with the task of demarcating an international boundary by piercing through the heart of undivided India. The upper reaches of the main River Indus and its East tributaries came to lie in India, while the lower reaches and a vast part of canal network found their place in Pakistan. But the installations that supplied water to these canals were situated in India. Naturally, Pakistan had its own apprehensions over supplies to its canals. Also, it had its misgivings about the proposed Bhakra-Nangal project restricting supply water to the Bahawlapur area.

(b) In 1951, the President of the World Bank offered the "good offices" of the Bank to help the two countries to find a solution. Negotiations started, but in vain. In 1954, the Bank proposed a plan under which the waters of the Western rivers (the Indus, the Jhelum and the Chenab) would be reserved for the exclusive use and benefit of Pakistan, whereas the entire flows of the three Eastern rivers (The Ravi, the Beas and the Sutlej) would be available for the exclusive use and benefit of India, except that, for a specified transitional period required for the construction of replacement canals in Pakistan (later fixed as ten years), India would continue to supply these rivers in accordance with an agreed schedule of withdrawals in Pakistan.

5.33 Indus Treaty (1960)

The Bank's proposal (with certain modifications) led to the signing of the Indus Treaty of 1960. Thus, so far as the Eastern rivers, namely, the Ravi, the Beas and the Sutlej are concerned, unrestricted rights of development and use of their waters came to be conferred on India, after the said transitional period ended on 31st March 1970.

5.34 Ravi Beas Disputes: Post Partition Developments

While the indus Treaty of 1960 was on the anvil, there was a parallel process on the domestic front. The State Governments of Punjab, Pepsu, Jammu and Kashmir and Rajasthan were required to prepare a development programme for the utilisation of the waters of the eastern rivers. The waters of the Sutlej had already been planned to be utilised in the States of Punjab, Pepsu and Rajasthan, through the Bhakra Nangal Project, but the surplus waters of the Ravi and the Beas (excluding the pre-partition use) had to be planned for utilisation by the States of Punjab, Pepsu, Jammu and Kashmir and Rajasthan. An agreement was reached, whereunder the party States were to have allocation thus:

Jammu and Kashmir : 0.65 MAF
Pepsu : 1.3 MAF
Punjab : 5.9 MAF
Rajasthan : 8.0 MAF

Punjab and Pepsu

Pepsu subsequently merged with Punjab, whose share thereby rose to 7.2 MAF. There was also bifurcation of the State of Punjab into separate entities, viz. Punjab and Haryana. Thus, the 7.2 MAF share from the Indus waters too became dispute-ridden, in the wake of the relevant provisions in the Punjab Reorganisaton Act, 1966.

5.35 The Ravi dispute

(a) The State of Haryana laid claim over 4.8 out of 7.2 MAF (which was the entitlement of the composite Punjab State), on the principle of equitable distribution. The new State of Punjab, on the other hand, conceded nothing to Haryana, mainly on the plea that, Haryana was not a riparian State. Acting under section 78 of the Punjab Reorganisation Act, 1966, the Union Government, allocated 3.5 MAF each to the parties and 0.2 MAF to Delhi. It was also observed that, on further exploitation, it would be possible to augment the allotment by 0.617 MAF, in which case Haryana would have a further entitlement. A scheme proposal, namely the Sutlej Yamuna Link (SYL), was mooted for the full utilisation of the of the water allotment to Haryana under this statutory decision.

(b) An aggrieved Punjab moved the Supreme Court against the statutory decision. Haryana, on the other hand, moved the same Court for compelling Punjab to implement it. In the meantime, Chief Ministers of the three States of Punjab, Haryana and Rajasthan arrived at an agreement on 31st December, 1981, whereunder it was agreed that out of the surplus waters of Ravi-Beas allocated to Rajasthan (namely, 8.5 MAF), until such time when that State was able to utilise its

full share, the unutilised portion could be used by Punjab, whose normal share would otherwise be 4.22 MAF, that of Haryana being 3.5 MAF. It was further stipulated that Punjab would complete the SYL canal within a period of two years. The suits pending in the Supreme Court were withdrawn, and Punjab issued a White paper on 23rd April, 1982, hailing the Agreement, which had resulted in increase of 1.32 MAF of waters to Punjab over the allocation made by the Central Government (the allocation to Haryana remaining unchanged).

5.36 Punjab settlement

But, in November, 1985, the Punjab Legislative Assembly passed a resolution, repudiating the Agreement of 31st December,1981 and declaring the White paper to be redundant and irrelevant. Prolonged negotiations then ensued, culminating in the Punjab settlement of 24th July, 1985. The political settlement referred to above, included three provisions relating to Ravi-Beas waters:

1. The farmers of Punjab, Haryana and Rajasthan would continue to get water from the Ravi-Beas system, to the same extent as on 01-07-1985. Waters used for purposes of consumption would also remain unaffected. Quantum of usage claimed should be verified by the Tribunal referred to below:

2. The claim of Punjab and Haryana regarding their shares in their remaining waters would be referred for adjudication by a Tribunal to be presided over by a Supreme Court Judge. The decision of this Tribunal would be rendered within six months and would be binding on both the parties.

3. The construction on the SYL canal should continue[xxvi] and should be completed by 15th August, 1986.

5.37 Ravi Beas Tribunal:Genesis (1986)

The President of India promulgated an Ordinance in January, 1986, setting up the Ravi-Beas Tribunal as above, but repealed it, on the notion that the object thereof could be better achieved by the constitution of a Tribunal under the Inter-State Water Disputes Act, 1956.[xxvii] The Act was accordingly amended by inserting the newly added section 14, with an explanation of the term "Punjab Settlement."[xxviii] On 2nd April, 1986, the Central Government constituted the Ravi and Beas Waters Tribunal, for the verification and adjudication of the matters referred to in the Punjab Settlement of 24th July, 1985 mentioned above.

The reference to the Ravi Beas Water Disputes Tribunal related to verification and adjudication of two matters:

1. The farmers of the Punjab, Haryana and Rajasthan will continue to get water not less than what they were using from the Ravi-Beas system as on 01-07-1985. Waters used for consumptive purposes will also remain unaffected. Quantum of usage shall be verified by the Tribunal.

2. The claim of Punjab and Haryana regarding the shares in their remaining waters will be adjudicated by the Tribunal.[xxix]

5.38 Ravi Beas Disputes:Contentions

The party States responded to the Tribunal's notice and filed the respective statements of case, and (subsequently) the counter-statements. The contentions of the parties were briefly thus:

(a) Punjab

The waters of the Ravi and the Beas belonged to the Punjab State. It was but a concession made by it to the farmers of Haryana and Rajasthan, to continue the committed uses as on 1st July, 1985. It was for the Tribunal to verify the quantum of usage in those States, as well as in the Punjab.

As to the second term of reference, the quantities of actual usage should be set apart as guaranteed for the users and the balance left out from the total available supply should be taken as the remaining waters. Haryana and Rajasthan, not being riparian States, should not claim any share from such balance, which was the entitlement of Punjab alone.

(b) Haryana

The Tribunal should first verify the quantum of usage as on the specified date and thereafter adjudicate on the claims of Punjab and Haryana as to the remaining waters. The Tribunal must verify the use of waters by the farmers at the farm gates and not at the canal heads. The basis of distribution should have been actually the water year ending 30th June, 1985. It would be reasonable, if verification of the use with reference to a period of four or five years (omitting the year 1984-85 when breaches had occurred), be made. The State of Haryana could not utilise its share of the Ravi-Beas waters, as the SYL canal had not been completed.

(c) Rajasthan

Jurisdiction of the Ravi Beas Tribunal was restricted to verification of the usage from the Ravi-Beas system as on 1july 1985. Since the State's share was settled by the 1955 Agreement and re-inforced by the 1981 Agreement, it was not concerned with the second term of reference. The State also prayed that the Tribunal should hold, that it had no jurisdiction under section 14 of the Act or under the terms of reference, to alter, vary or affect Rajasthan's share.

The Ravi-Beas Water disputes Tribunal felt that item I of the reference could be divided into three parts:

1. The farmers of the States would continue to get water not less than that as on 1 July, 1985.

2. Water used for consumption purposes remained unaffected.

3. The Tribunal was to verify the quantum of usage by the party States.

Item 2 of the reference called for adjudication of the claims of Punjab and Haryana, regarding their shares in the remaining waters.

5.39 Ravi Beas Disputes: Tribunal's Conclusions

(a) The Ravi Beas Tribunal did not agree with the plea of Punjab, that the use by farmers for one year should be counted on the basis of the release at the canal head as on 1 July 85, multiplied by 365. As the data of a single day (or even a single year) cannot give any true picture of the extent of use, the Tribunal thought that the most feasible course was to take an average of the figures for the years 1980-81 to 84-85 re-constructing the data for breach periods. In regard to Haryana's plea, the Tribunal came to the conclusion that as the actual deliveries to the farm were not being measured at the farmgates, it was not possible to verify the water used by farmers on that basis.

(b) The net result of the verification by the Ravi-BeasTribunal in accordance with the first term of reference, was the following:

Quantum of Ravi and Beas water used by Punjab as on 1 July, 1985, excluding pre-Partition use was 3.106 MAF, including 0.352 MAF of permissive use by Punjab out of Rajasthan's share. Quantum used by Rajasthan as on the date, excluding pre-Partition use, was 4.985 MAF. Use of Haryana as on the date was 1.62 MAF.

(c) By reference 2, the Tribunal was required to adjudicate the claims of Punjab and Haryana "in their remaining waters". The Tribunal agreed with the contention of Rajasthan, that its share had been settled by the previous Agreements and that it was not a party to the second reference.

(d) As to the plea of Punjab, that the waters of the Ravi and the Beas belonged to it absolutely, and in its entirety, to the exclusion of both Haryana and Rajasthan, the Tribunal held that the plea was not sustainable. It very relevantly pointed out that the Territorial Sovereignty Theory (canvassed by Punjab in the instant case), would not be to its benefit, it being the lower-most riparian, as the theory is generally invoked by the upper most riparians.

(e) Punjab's contention, that the State of Haryana was situated outside the basin, was also rejected by the Tribunal. It pointed out that the river courses changed, and so did the State boundaries, and that it was one such change which took place on 1 November, 1966, that gave rise to arguments. Before November, 1966, when Haryana was part of composite Punjab, it had the same right as the present day Punjab. The Tribunal thought it appropriate to quote from the decision of the U.S. Supreme Court, in *Missouri Vs. Holland*,[xxx] wherein water had been compared to migratory birds. It made an allocation of 5 MAF to Punjab, and 3.83 MAF to Haryana, the total quantity apportioned being 8.33 MAF, including 1.11 MAF surplus available. The fluctuations in flow were to be shared in the same ratio as the allocation. The claim of Delhi for additional supply over the existing 0.2 MAF of water was rejected, as falling outside the scope of the reference to the Tribunal.

5.40 Ravi Beas Tribunal Report: Comments

(a) It may be mentioned that the Ravi and Beas Waters Tribunal was constituted *suo motu* by the Central Government, through an amendment of the Inter-State Water Disputes Act, 1956 by way of insertion of the new section 14 which made express provision the on the subject.

(b) The Ravi-Beas Waters Tribunal upheld the legality and validity of prior Agreements that had been entered into, by the respective States. The Doctrine of Riparian Rights, as also the Theory of ownership Rights of a State in river waters, was rejected. The concept of integrity of river basin was also upheld, by rejecting the plea for treating Ravi and Beas as separate entities. They formed a part of the entire Indus basin and were treated accordingly.

CHAPTER 6

THE CAUVERY DISPUTE

6.1 Geography

(a) Cauvery, the Ganga of the South, rises at Thalakaveri, in the Brahmagiri range of hills of the Western Ghats, in the Coorg district of Karnataka, at an elevation of 1341m. After traversing a tumultuous course in the district, it receives the Harangi (which has been dammed at about 19 kms. North-West of Mysore). Two other tributaries-Hemavathy and Lakshmana theertha, - join the Cauvery into the Harangi reservoir. The main river continues to flow East-wards for 15 km upto Sreerangapatnam and then changes its course South-East wards.[xxxi]

(b) In its next 25Km. stretch, it receives Kabini, an important tributary that originates in the Wyanad district of Kerala and carries bounteous flows. Then, it joins with Suvarnavathy and takes a North-Easterly direction, piercing the Eastern Ghats at Sivasamudram.

(c) At Sivasamudram, the river dips by about 97m. in a series of falls and rapids and, after flowing through a very narrow gorge, continues its East-ward journey and forms the boundary between the States of Karnataka and Tamil Nadu for a distance of about 64km. Below Sivasamudram, it receives the Shimsha, and then Arkavathy, just before entering the territory of Tamil Nadu.

(d) In Tamil Nadu, the river Cauvery continues to flow East-wards upto Hogenakal Falls and takes a Southerly course and enters the Mettur reservoir. It leaves the Eastern Ghats below Mettur and is joined by Bhavani, about 45 km. downstream. This important tributary then turns West-ward in the Nilgiri District of Tamil Nadu and takes a detour in Kerala territory for about 38 km and turns back to Tamil Nadu, before joining the main river. Cauvery thereunder takes a more Easterly course there and is joined by Noyil, and then by Amaravathy.

(e) Amaravathy, an important tributary of the Cauvery, has its origin in the Idukki district of Kerala, where it is known as Pambar, and carries rich flows in Kerala. The main river then enters the Tiruchirappalli district and gets wider with a sandy bed in the reach. Just below Tiruchirappalli, the Cauvery splits into two branches, which are controlled by the Upper Anicut constructed in 1836. The Northern branch, called the Coleroon, [the main flood carrier on which is the Lower Coleroon Anicut (1836)] flows in a North-Easterly direction to enter the Bay of Bengal near Porto Novo. The Southern branch, however, continues to trek under the name of Cauvery itself.

(f) It further divides into Cauvery and Vennar below the Grand Anicut, which is said to have been built in the 2nd century AD, at the tail end of the Srirangam island, which has the upper Anicut at the upstream end. The Cauvery and Vennar channels are utilised as the main canals for irrugation in the delta. Some branches find their way to the Bay of Bengal, while others are lost in the deltaic plains.

(g) The Cauvery branch descends into the Bay at Pompuhar, 13km North of Tranqobar as an insignificant stream. The river has a total length of 802 km, and a catchment area of 81,155 sq. km, of which 2,866 sq.km.lie in Kerala, 34,273 sq.km. in Karnataka and 44,016 sq.km. in Tamil Nadu.

The Agreements of 1892 and 1924, mentioned below[xxxii] (relating to the Cauvery) are important land-marks in the history of this dispute.[xxxiii]

6.2 The Agreement of February 18, 1892

(a) Controversies between Mysore and Madras over the use of Cauvery waters had arisen, as early as 1807. But decades passed uneventfully. On the representation of the Mysore Government to the Government of India, the Mysore and Madras Governments held further discussions, which led to the Agreement of 1892.

(b) The Agreement of 1892 contained six rules. Rule I contained definitions of terms. Rule II laid down restrictions on Mysore in building any new irrigation reservoir on the scheduled main rivers or building any new anicut across any of the scheduled streams. Rule III enjoinded on Mysore to forward to Madras full details of any new reservoir or anicut and, on Madras, to accord consent therefore, except for the protection of its prescriptive rights. Rule IV provided that in case of difference of opinion, the matter would be referred for a final decision of joint arbitrators or of the Government of India. Rule V referred to the consent of Madras given for certain new irrigation reservoirs scheduled in the Agreement and for compensation by Mysore on account of inadequate maintenance to three named reservoirs. Rule VI stipulated that the foregoing rules would apply, as far as might be, to Madras, as regards streams flowing through British territory into Mysore.

6.3 Developments 1910-1924

(a) In 1910, Mysore Government proposed a reservoir at Kannambadi (Krishnarajasagar) with a capacity of 41.5 TMC which was objected to by Madras, the latter having its own project in view, namely, the Cauvery Mettur Project, with a storage of 80 TMC. After a reference to the Government of India, permission was accorded to Mysore, but for a reduced storage of 11TMC. But the latter, apparently accepting the condition, put up a dam, foundation, suiting the earlier desired full storage. The dispute continued.

(b) In view of the incompatible stands taken by Mysore and Madras, the Government of India referred the matter at issue to arbitration under Rule IV of the Agreement of 1892. Sir H. D. Griffin was appointed arbitrator and M. Nethersole, the Inspector General of Irrigation in India, was made the Assessor. They entered on the proceedings on 16 July 1913 and the Award was given on 12 May 1914.

(c) In giving the Award on 12 May 1914, Sir H. D. Griffin had given decisions on the various issues, making a significant observation as under:

> "In conclusion, I regret that it has been impossible to arrive at a settlement satisfactory to both the parties. Each party set out claims which, on examination, were found inadmissible in whole or in part. The claims of Madras, if allowed, would probably have resulted in making the Mysore Project impossible: those of Mysore, in seriously impairing the interests of Madras. Throughout the proceedings, there has been a regrettable lack of the spirit of compromise. The resolution we have arrived at, recognises the paramount importance of the existing Madras interests, has for its primary object the safeguarding of those interests and does, we believe, safeguard them effectually. At the same-time, it gives to Mysore the opportunity of utililzing for their own benefit their fair share of the surplus waters of the Cauvery."

6.4 The 1924 Agreement

On appeal by Madras, against the above award of 1914 relating to the Cauvery, the Secretary of State for India suspended the Award. Negotiations between the Governments of Mysore and Madras were re-started and a new Agreement was signed in February 1924. It is unnecessary to quote its terms.

6.5 Agreements of 1929 and 1933

(a) Subsequently, in June 1929, the parties signed supplementary agreements, incorporating certain modifications to the detailed rules of regulation. In consequence, Mysore could complete its Krishnarajasagar Project; and Madras was enabled to complete its Mettur Project. By virtue of a subsequent agreement reached in September, 1933, Madras and Mysore decided, *inter alia*, to construct some new anicuts and tanks to distribute water.[xxxiv]

(b) Agreement of 1924, relating to the Cauvery water, contemplated the re-consideration of certain arrangements after the lapse of fifty years. In the meantime, the Indian Independence Act and later developments marked the beginning of wide changes in the configuration of the political entities involved in the Cauvery basin. The State of Travancore ever remained a Cauvery basin State, with a major tributary originating in its territory and flowing therein, in the name of Pambar. Coorg, (which became a Part C State), Mysore, Madras and Pondicherry were the other entities in the basin.

(c) A change was, however, brought about by the States Reorganisation Act of 1956. The States of Kerala, Madras (subsequently, Tamil Nadu), Mysore (subsequently, Karnataka), and the Union Territory of Pondicherry, have since been the parties to the dispute regarding Cauvery.

6.6 The Kerala Stand

(a) The State of Kerala strove hard to assert its claims on the Cauvery waters and vigorously pursued investigations towards developing the basin resources, particularly of the Kabini and the Bhavani. Two major hydro-electric projects and a number of irrigation schemes were investigated and project reports prepared and forwarded to the Central Government for sanction. But they were rejected. Tamil Nadu and Karnataka were vigorously opposed giving clearance to the said schemes. Subsequently, however, during the Eighties, Kerala took up the Kuttiyadi Augmentation Scheme in Kabini basin, seeking to utilise about 6TMC for power generation and irrigation.

(b) As to Pondicherry, the traditional requirement of water for the Karaikal area, for agricultural purposes is its principal demand. Industrial and drinking purposes are also to be taken into account.

6.7 Central Government Efforts

(a) The dispute over Cauvery waters, in its totality, includes the above-mentioned aspects. By 1970, the Central as well as the concerned State Governments were seized of the urgent necessity for a final settlement.

(b) As a result, inter-State negotiations were started, apparently in right earnest. Even the suits filed by Tamil Nadu and Kerala in the Supreme Court, seeking direction to the Central Government to appoint an Inter-State Water Disputes Tribunal (as envisaged in the Inter-State Water Disputes Act of 1956), for adjudicating the disputes, were withdrawn.

(c) In the meantime, a Cauvery Fact Finding Committee (CFFC), constituted by the Central Government as per the understanding with the States, collected data on aspects such as, yield of the river, adequacy of supplies, excessive use of water for irrigation purposes etc. it submitted its first report in June 1972. It gave an additional report later in August 1973.[xxxv]

(d) A series of inter-State meetings based on CFFC's reports was held in 1973 and 1974 under the chairmanship of successive Union Ministers for Irrigation. At the final meeting of this series held in November 1974, and subsequently in February 1975, a draft agreement was discussed, but not adopted. In August, 1976, however, a draft agreement prepared by the Union was accepted by all the States, and the fact announced in the Parliament by the Minister for Agriculture. But in the next meeting of the Chief Ministers, Tamil Nadu backed out of the agreement. Karnataka followed suit. Kerala, with optimism about the impending possibility of commencing its long-pending development projects in the Cauvery basin; even agreed to forego about two-thirds of its contribution to the flow, but it was disappointed.

(e) Inter-State meetings under the auspices of the Union Government, and otherwise, went on in vain, till 1986 when a Farmer's Association of Tanjavur moved the Supreme Court, seeking a direction to the Central Government to constitute a Tribunal under the Inter-State Water Disputes Act, 1956, for adjudication of the disputes. During the pendency of this suit, negotiations were carried on for four more years, though fruitlessly. In the last of the inter-State meetings held in April 1990 the principal contestants viz. Tamil Nadu and Karnataka, predictably, agreed to differ.

6.8 Supreme Court Order (1990)

The Supreme Court, by its order of 24th April 1990, directed the Central Government to constitute a Tribunal as envisaged in the Inter-State Water Disputes Act, 1956 and refer the disputes to it. Thus, in June 1990, the Central Government issued orders constituting the Cauvery Water Disputes Tribunal and referring the disputes to it.

6.9 The Cauvery Tribunal

(a) The Cauvery Tribunal duly started functioning but, in the meanwhile, it had to consider quite a number of interlocutory applications, on various related matters. There was, one filed by Tamil Nadu, seeking a mandatory injunction on Karnataka for immediate release of water and other reliefs. The Tribunal dismissed it, as being beyond its purview, but was compelled to re-consider that stand, by the Supreme Court, at Tamil Nadu's instance.[xxxvi]

(b) Accordingly, the Tribunal heard the matter again and gave an interim award on 25th June 1991, favouring Tamil Nadu and enjoining upon Karnataka to release waters to Mettur reservoir on a stipulated pattern. Karnataka was also directed, not to increase its area of irrigation utilising Cauvery waters. Karnataka's reaction to this was extremely adverse. Negativing the effects of the Tribunal's order, it issued an Ordinance.

(c) At this juncture the President of India made a reference of the Cauvery matter to the Supreme Court, under Article 143 of the Constitution for its opinion. The opinion of the Supreme Court, rendered subsequently, upheld the interim award of the Tribunal and denounced the Ordinance issued by the Governor of Karnataka. As the Supreme Court rendered its opinion, favouring Tamil Nadu, the Central Government gazetted the interim award of the Tribunal, on 11th December, 1991. Demonstrations followed in Karnataka and Tamil Nadu.

6.10 Developments 1992-1995 (Cauvery Tribunal)

(a) During the interregnum (1992 to early 1995), the Cauvery basin was blessed with good Monsoon rains, and tranquility prevailed. In accordance with the earlier directions, the party States had come up before the Tribunal with lists of witnesses to be examined, and filed their affidavits. The examination of the witnesses started in early December 1993. Till December '96, only the examination of the nine experts presented by Tamil Nadu was over. Those in respect of the other two States and Pondicherry, remain to be examined.

(b) By the middle of 1995, the forebodings of a lean monsoon became a reality, and it paved the way for a further period of tension and anxiety. In December 1995, Tamil Nadu moved the Supreme Court, seeking an order for 30 TMC to be released by Karnataka from their reservoirs. The apex court passed it on to the Tribunal for appropriate decision, and the latter ordered 11TMC to be released by Karnataka. The State of Karnataka pleaded helplessness, its reservoirs too being short of enough water to cater to the needs of farmers in Karnataka.

6.11 Supreme Court Suggestion (1995) and Action Thereon

(a) Tamil Nadu again approached the Supreme Court, apprising it of the seriousness of the situation. The Supreme Court thought it expedient that the Prime Minster should intervene and bring about a compromise (1995). Accordingly, a Conference of the Chief Ministers of all the party States and of the Union Territory of Pondicherry, along with other political leaders, was convened by the Prime Minister on 30 December '95. The Prime Minister took keen interest in the matter, and, based on his parleys with the Chief Ministers of Tamil Nadu and Karnataka, gave his decision that Karnataka should make an immediate release of 6TMC for saving the standing crops in Tamil Nadu.

(b) Karnataka abided by the Prime Minister's decision. As to the actual situation existing in the areas in question (both in Tamil Nadu and in Karnataka), an expert committee was constituted, to make on the spot studies and report. The report was subsequently submitted.

(c) In the meantime, Karnataka approached the Cauvery Tribunal with a Civil Miscellaneous Petition (March 1996). But the other parties were quite opposed to the move and the petition was dismissed.

A scheduled sitting of the Cauvery Tribunal did not take place on 27 June, '96, and was postponed for 11, 12, of July '96, an order of the Tribunal was issued to the effect that the Chairman of the Cauvery Water Disputes Tribunal had resigned with effect from 1 July 1996. Later developments are not material, for the present purpose.

CHAPTER 7

TENTATIVE PROPOSALS

7.1 Some inference about present position

The brief resume of working of the Tribunals constituted under article 262 of the Constitution, read with the Inter-State Water Disputes Act, 1956, does not create, in the minds, any deep sense of satisfaction. Several factors stand out.

First, the proceedings before the Tribunals take a fairly long time. Even granting that the issues are complex in their character and technical in their nature and are surcharged with political feelings, delay should be avoidable, because the Tribunal is given full freedom to operate in its sphere and is not troubled with numerous humdrum controversies.

Secondly, the awards of the tribunals are often bulky – a situation partly due to the fact that (following the traditional style), a good deal of matter is devoted to a discussion of the competing doctrines of substantive law.

Thirdly, wherever the parties have been able to come to an agreement endorsed by the Tribunal, the situation has proved to be somewhat more satisfactory, than in other cases.

In this connection, one is reminded of what the Supreme Court of the United States said in a leading judgment relating to water disputes.[xxxvii]

> *"The reason for judicial caution in adjudicating the relative rights of States in such cases is that, while we have jurisdiction over such disputes, they involve the interests of quasi sovereigns, present complicated and delicate questions and due to the possibility of future change of conditions, necessitate expert administration, rather than judicial imposition of a hard and fast rule. We say of this case, as the court has said of inter-State differences of like nature, that such mutual accommodation and agreement should, if possible, be the medium of settlement, instead of invocation of our adjudicatory power."*

7.2 Difficulty of finding a solution: emphasis on negotiation

However, the question can be legitimately raised, as to what is the course to be adopted when negotiations fail? Section 4(1) of the Inter-State Water Disputes Act, 1956 does take note of the importance of negotiations. The Central Government is empowered to constitute a tribunal, only if negotiations fail. Once a tribunal is constituted, tempers run high. The adversary element takes over; and the natural desire of each party is to accentuate the differences and even to over-argue one's case. An able negotiator could be nominated and encouragement be given to sincere efforts made by him, for persuading the parties to come to a settlement.

7.3 An alternative to the Tribunal

Since the mechanism of a formal Tribunal has not proved to be very satisfactory[xxxviii], it should be considered whether some other alternative should not be adopted. We are aware, that it is easy to make an abstract, suggestion, but not so easy to work it out.

It appears to us, that as an alternative to the Tribunal, the mechanism contemplated by the Government of India Act, 1935 should be considered. We have already given an outline of the relevant provisions of the Act.[xxxix] The gist of the provision lies in two of its principal features:

(a) The Governor General was to constitute a Commission, to investigate the dispute.

(b) If the report of the Commission was not found acceptable by any party, the Governor General was to refer the matter to His Majesty in Council, whose decision was final.

This scheme could be adopted, of course, with suitable adaptations. The merit of the scheme chiefly lies in the fact, that what is contemplated, is not a Tribunal, but a Commission. It is true, that nomenclature does not always make a difference. But in this case, it will make a difference, because the change-over to a Commission and its substitution in place of "Tribunal" would highlight the fact that a functional change was intended.

7.4 Another alternative conferring the power on Parliament

Another – and more radical – alternative would be, to amplify the power of Parliament and also to enhance its responsibility. The scheme will have to be worked out. But some of its main features could be as under:

(a) Parliament's legislative power (Union List, entry 56) should not be constrained by the requirement, that Parliament should declare, that regulation by Parliament is in the public interest.

(b) Where an inter-State dispute relating to waters arises (and negotiations fail), the Central Government should appoint a Commission for the purpose.

(c) The Commission should give its report within three years. If the report is not forwarded within three years, the Central Government shall declare that the Commission *id funclus officio* and the matter should be placed before Parliament, which shall be free to enact appropriate legislation for resolving the controversy on appropriate lines.

(d) Whether or not the Commission's report is accepted by the disputing parties legislation, be enacted to give it Parliamentary sanctity.

7.5 Jurisdiction of courts barred

Jurisdiction of the Supreme Court and all other courts should be barred in respect of matters falling within the above proposals (whichever alternative is adopted).

7.6 Substantive law to be laid down by Parliament

Whichever alternative is adopted regarding resolution of the dispute in individual cases, Parliamentary legislation should be enacted, to lay down the substantive law for resolving disputes relating to inter-State waters.

Prima facie, the doctrine of equitable apportionment seems to be acceptable. Its vagueness could be removed, to a large extent, by specifying some of the important criteria.[xl]

LEGEND

[i] Consultation Paper No. 17.

[ii] Para 1.3 to 1.4, infra.

[iii] Valsalan, Inter-State Water Disputes in India (Central Board of Irrigation and Power), (1997), page 1 (hereinafter referred to as "Valsalan").

[iv] C.V.J. Varma, Foreword to Valsalan.

[v] Valsalan, pages 11-12, para 2.3, 2.4.

[vi] See Chapters 2-6, infra.

[vii] Setalvad, Union State Relations under the Indian Constitution (1974), pages 95-96.

[viii] See infra.

[ix] See para 2.1, supra.

[x] 9 Constituent Assembly Debates; Valsalan, pages 19, 20.

[xi] Krishna Water Disputes Tribunal Report (1973), Vol. 1, page 93, Valsalan, page 25.

[xii] *Wyoming Vs. Colorado*, (1922) 2 59 US 419.

[xiii] *Connecticut Vs. Massachusetts*, (1931) 282 US 670.

[xiv] Valsalan, pages 26, 27.

[xv] Valsalan, pages 27-28, para 4.12

[xvi] Cf. Valsalan, pages 31-38

[xvii] Valsalan, pages 31, 32, 44

[xviii] Valsalan, page 31

[xix] Valsalan, pages 31, 51

[xx] See also para 5.21, infra

[xxi] Some of the material in this chapter is compressed from Valsalan, pages 36-80.

[xxii] Report of the Krishna Water Disputes Tribunal, page 72.

[xxiii] Narmada Water Disputes Tribunal, Report, (Delhi, 1978) Vol. I, pages 39,27.

[xxiv] See also para 4.19, supra

[xxv] Godavari Water Disputes Tribunal, Report (1979), page 1.

[xxvi] The Punjab Settlement (July 1985), para, 9.

[xxvii] Ravi and Beas Report, page 3.

[xxviii] Section 2, Inter-State Water Disputes (Amendment) Act, 1986

[xxix] Ravi and Beas Report, page 5.

[xxx] *Missouri Vs. Holland*, 252 U.S., 415.

[xxxi] Chapter relating to Kaveri is based mainly on Valsalan Chapter 7 , pages 71-77.

[xxxii] Para 6.2, 6.3 and 6.4 infra

[xxxiii] Central Water Commission Publication: Agreements on Development of Inter-State and International Rivers (1978), page 200.

[xxxiv] ibid.

[xxxv] Guhan – The Cauvery River Disputes: Towards Conciliation (Madras) (1993), page 26; Valsalan, pages 77-78.`

[xxxvi] For various Supreme Court rulings relating to Cauvery see (a) *In the matter of Cauvery Water Disputes Tribunal*, AIR 1992 SC; (b) *T.N. Cauvery NPV Sangam Vs. Union of India,* AIR 1990 SC 1316; (c) *State of T.N. Vs. State of Karnataka*, (1997) 5 SCC 473.

[xxxvii] *Colorado Vs. Kansas*, (1943) 320 US 383.

[xxxviii] Para 7.1, supra.

[xxxix] Chapter 2, supra

[xl] See the Narmada Tribunal Award.