Chapter 4  

Role of Adjudicative Machinery

The enactment and enforcement of law depends upon determination and firmness of the executive. Many times legislature makes the law under public pressure but leaves loop holes which put hindrances in the implementation of law. In such circumstances judiciary comes forward to expound the law and enforce it. The judicial review of administrative decisions has been developed to appraise and scrutinise the tendencies of ignoring rules and adopting arbitrariness in implementing law and policy framed by the government and its administrative wings. De Smith, in his work Judicial Review of Administrative Action (1955) enlisted some of the factors leading to lethargy of the enforcement agencies. These include: bad faith, dishonesty, unreasonableness, reliance on extraneous circumstances, failure to reconsider relevant matter and disregard of public policy. Decisions relating to water resources management and conservation of water resources on many issues such as scientific material, technical data, socio economic factors, health hazard aspects and ecological mores of a region. "Without sufficient insight into these factors, a reviewing agency may fail to deliver the goods and to act in environment friendly manner. Enlightened opinion was quoted extensively in Nayudu case to show that the judicial system is increasingly unable to manage and adjudicate science and Technology issues." 1 Nevertheless, Judiciary has played pivotal role to provide remedies and reliefs to the sufferers. The practice adopted so far by the Supreme Court and High Courts in Judicial review of the complex issues relating to protection of environment and its various components including water and management of its resources has been conspicuous. Before taking a decision, they used to refer the matter to professional and technical bodies or commission for advise. The scenario is to be looked at and examined in this chapter.

The judiciary, a spectator to environment despoliation for more than three decades has recently assumed a pro-active role of public educator², policy maker³, super administrator⁴, and more generally.

One of the most encouraging trends during the past decades in the growing numbers of concerned individuals, citizen groups and non governmental organisations (NGOs) exerting pressure on state agencies through the courts.

Although the expanded Judicial role appears secure for the present, this trend is unlikely to continue beyond the near term. Court dockets are full and judges are conscious that systematic changes in a country as vast as India are unlikely to be brought about by Judicial intervention alone. If Judicial activism is to have a lasting budgetary allocation for environment and increase community pressure on enforcement machinery, are imperative user.

In many parts of India, industry, agriculturists and municipalities are increasing their dependence on ground water resources. For the use this is an attractive option since the source is continuous (unlike monsoon fed rivers and streams), the water is generally clean and the user need not depend on an external agency for the supply. The rights to the groundwater attach to the land and hence land owners may draw on the groundwater and use it as if it were their own private property⁵, this private ownership regime is inequitable because it leaves out all the landless and tribals who do not enjoy private ownership.⁶

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² M.C. Mehta V Union of India AIR 1992 SC 382 (Court directions to broadcast and telecast ecology programmes on the electronic media and include environmental study in school and college curriculum).
³ S. Jagannath V Union of India AIR 1997 SC 811 (directions prohibiting non traditional aquaculture along the cost), M.C. Mehta V Union of India AIR 1996 (2) SCALE 92 (Court directions for the introduction of unleaded petrol vehicles).
⁴ T.N. Godavarman Thirumulpad V Union of India AIR 1997 SC 1228 (Judicial Supervision over the implementation of national forest laws). M.C. Mehta V Union of India 1992 (Supp. 2) SCC 633 (directions in the Ganga Pollution case to riparian industries, tanneries and distilleries regarding abatement of Pollution) and Narmada Bachao Andolan V Union of India (2010) 2 SCALE 26 (direction to rehabilitate more than four thousand project effected families).
⁶ Ibid.
The need for good management of groundwater resources was recognised earlier by the Kerala High Court in a public interest litigation filed by local islanders seeking to protect fresh water resources on the Lakshadweep Islands. The petitioners apprehendes that the government scheme to pumpout groundwater on the Island would cause saline intrusions in the fresh water table which would, in turn imperil the potable water supply on the Islands. The Kerala High Court Commissioned an expert report which opposed the government scheme. Recognising the importance of fresh water to the Islanders and holding that the right to fresh water was an aspect of the fundamental right to life; the High Court prohibited the government from implementing the scheme until it was reviewed and modified by the Union Ministry of Environment and Forest and the Ministry of Science and Technology.7

The citizens of Karaikudi town in Tamil Nadu challenged a government scheme which would carry away waters from an ancient spring named Sambai Uthu which was the principal source of water for the town from time immemorial. In 1987, the municipality of Karaikudi unanimously opposed the scheme which was intended to benefit Triupattur. In the face of this opposition the state government suspended the scheme. Seven years later the government reviewed the project leading to a public outcry and allegations that the project was being hurried through a benefit a mineral water factory at Tirupattur, where a government minister had an interest. Though the High Court rejected the allegations against the minister in the absence of evidence, it directed the state government to review the scheme after taking into consideration the availability of groundwater and also the views of the residents of Karaikudi.8

In *Subhash Kumar V State of Bihar*9, it was observed that "Right to live as a fundamental right under Article 21 of the Constitution and it include the right of enjoyment of fresh water and clean air for full enjoyment of life. Next in *Hinch Lal Tiwari V Kamla Devi & others*10, the Supreme Court has held that the material

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resources of community like forest, ponds, lakes, hillock, mountains etc. are nature's bounty. These need to be protected for a proper and healthy environment, which enables people to enjoy a quality of life which is the essence of the guaranteed rights under Art. 21.

The Chief Justice of Supreme Court of India Justice Y.K. Sabharwal expanded Article 21 in two ways. Firstly, any law affecting personal liberty should be reasonable, fair and Just. Secondly the Court recognised several unarticulated libertie that were implied in Article 21. It is by this second method that the Supreme Court interpreted the right to life and personal liberty to include the right to the clean environment and its various components including water. A right of access to clean drinking water was held to be a fundamental right to life and anything which impairs this right and exposes the people in general to the danger of access to nondrinking water would be violative of Article 21. This view was expressed in the case of A.P. Pollution Control Board v Prof. M.V. Nayudu.\textsuperscript{11}

Further, the court lamented that a country like India which solved the problem of town planning 6000 years back in the Indus Valley Civilization today has been unable to solve the problem of water shortage till now\textsuperscript{12}. The right to get water is a part of right to life guaranteed by Article 21 of the Constitution. In this connection, it has been observed in Delhi Water Supply & Sewage Disposal Undertaking v State of Haryana,\textsuperscript{13}, that "Water is a gift of nature. Human hand can not be permitted to convert this bounty into a curse, and oppression, the primary use to which water is put being drinking, it would be mocking nature to force the people who live on the bank of a river to remain thirsty."\textsuperscript{14}

Similarly in Chameli Singh v State of Uttar Pradesh,\textsuperscript{15} the court observed that "right to live guaranteed in any civilized society implies the right to food,

\textsuperscript{11} (2001) 2 SCC 62.


\textsuperscript{13} (1996) 2 SCC 572.


\textsuperscript{15} (1996) 2 SCC 549.
water, decent environment, education, medical care and shelter. These are basic human rights known to any civilized society. All civil, political, social and cultural rights enshrined in the Universal Declaration of Human Rights and convention or under the constitution of India can not be exercised without these basic human rights. The Apex Court considered the sensitive issue raised in *Intelectuals Forum, Tirupathi V State of Andhra Pradesh*\(^{16}\) and was of the opinion, that the nature of question involved the Jurisprudential issues. In the event of conflict between the competing interests of protecting the environment and social development, the Supreme Court of India in the case of *M.C. Mehta V Kamal Nath*\(^ {17} \), has held that the issues present a classic struggle between those member of the public who would preserve the rivers, forests, parks and open lands in their pristine purity and those charged with administrative responsibility, who under the pressure of the changing needs of an increasingly complex society find it necessary to encroach to some extent upon open lands heretofore considered inviolate to change.

The resolution of this conflict in any given case in for the legislature and not for the court. If there is a law made by Parliament or the State Legislatures, the Court can serve as an instrument for determining legislative intent in the exercise of powers of judicial review under the constitution. But in the absence of any legislation, the executive acting under the doctrine of public trust cannot abdicate the natural resource and convert them into private ownership or commercial use. The aesthetic use and the pristive glory of the natural resources, the environment and the ecosystems of the country can not be permitted to be eroded for private, commercial or any other use unless the Courts find it necessary in good faith, for the public and in public interest to encroach upon the said resources.\(^ {18} \)

The doctrine of public trust applies to natural resources which includes lakes also. These are held by the State as a trustee of public and can be disposed of only in a manner that is consistent with the nature of such a trust.

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The issue was protection and conservation of tanks "Avilda" and "peruru". This is the responsibility of State. This responsibility is clearly enunciated in United Nations Conference on the Human Environment, Stockholm, 1972 to which India is a party. There can be no doubt about the fact that there is responsibility bestowed upon the Government to protect and conserve tanks in question which are an important part of environment of the area. The natural water storage resources are not only required to be protected but steps are required to be taken to restore them. This applies in relation to artificial tank.\textsuperscript{19}

In \textit{DDA V Rajendra Singh}\textsuperscript{20}, the Supreme Court declare that Yamuna river bed in Delhi as an ecologically sensitive area and hence to be protected and preserved. Any construction in Yamuna river bed will permanently destroy the ecology of River Yamuna, its ground water recharge ability and will be violative of public trust doctrine, precautionary principle which are violative of Article 21 of the Constitution. Over the last few decades the water quality in the river has deteriorated due to increased waste water discharges from 18 major storm water drains and growing encroachments in the river bed area. Also the ecosystems supporting migratory avifauna and groundwater recharge are being continuously degrade and require immediate attention for conservation.

The Supreme Court gave detailed directions in \textit{T.N. Godavarman Thirumulpad V Union of India}\textsuperscript{21}, in relation to concept of "sustainable development" relates to the protection of Kolleru lake which is one of the longest shallow fresh water lakes in Asia located between the delta of Krishna and Godawari rivers in the State of Andhra Pradesh.

\textsuperscript{19} Susetha V State of Tamil Nadu (2006) 6 SCC 543.
\textsuperscript{20} (2009) 8 SCC.
Rights to Water:

Rights to water relate:

(1) to surface water; and

(2) to subterranean water.

Surface water includes:

(i) Natural watercourses or streams.

(ii) Artificial watercourses or streams.

(iii) Water not flowing in any defined channel.

Subterranean water includes:

(i) Subterranean streams the courses of which are well known and clearly defined.

(ii) Subterranean streams the courses of which are undefined.

(iii) Percolating water the course of which is underground, undefined, and unknown.

(i) Natural Watercourses or Streams: A natural stream is one which arises at its source from natural causes, and flows in a natural channel. Every landowner has a natural right to the uninterrupted flow, without diminution, deterioration in quality, or alteration, of the water of natural surface streams which pass to his land in defined channels, and to transmit the water to the land of other persons in its accustomed course. This is known as a riparian right, and it arises from the right of access to a stream which landowners on its banks have by the law of nature.22 Riparian owners are entitled to use and consume the water of the stream for drinking and household purposes, for watering their cattle, for irrigating their land and for purposes of manufacture; subject to the conditions that:

(1) the use is reasonable;

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(2) it is required for their purposes as owners of the land; and

(3) it does not destroy or render useless, or materially diminish, or affect the application of the water by riparian owners down the stream in the exercise either of natural right or their right of easement, if any.

A right to pollute a natural stream may be acquired by grant or prescription. If the rights of a riparian proprietor are interfered with he may maintain an action even though he has suffered no actual loss.

(ii) Artificial Watercourses or Streams: An artificial stream is one that arises by the agency of man, or though arising from natural causes, flows in a channel made by man. The law governing artificial watercourses depends upon whether they are of a permanent or temporary character, and upon the circumstances under which they are created. If an artificial stream is permanent in its character, a right to an uninterrupted flow of water may be acquired by prescription or grant against both the originator of the stream, and also against any person over whose land the water flows. If it is of a temporary character, no right could be acquired by prescription.

(iii) Water not Flowing in any Defined Channel: The right to surface water standing on the soil, or not running in a defined channel, is in the owner of the soil. It is the natural right of every owner of land to collect and retain all water on the surface which does not pass in defined channel. He may also allow it to flow away in the usual course of nature upon the lower lands of his neighbour and is not bound to prevent it from so doing. He cannot do this, however, by an artificial discharge upon his neighbour's land unless he has acquired an easement which his neighbour is bound to submit to.

An owner of land on a lower level to which surface water from adjacent land on a higher level naturally flows is not entitled to deal with his lands so as to obstruct the flow of water from the higher land. This principle applies to all lands whether situate in the country or in towns.23

Subterranean Water: The law as to a subterranean stream, the course of which is well known and clearly defined, is similar to that of natural streams flowing above ground.

The principles applying to a subterranean stream, the course of which is unknown and undefined, and to percolating water in an unknown course are the same. There is no natural right to the uninterrupted flow of such streams or water. Nor can such a right be acquired by prescription, though it may be acquired by express grant. The right of an owner of land to divert or appropriate the percolating water within his own land is the same whether his motive be to improve his land or to injure his neighbour maliciously. But (1) he is not entitled to pollute water flowing also beneath another's land, and (2) he will be restrained from drawing off underground water from his neighbour's land, if, in doing so, he abstracts water which has once flowed in a defined surface channel.

Right to Water As a Basic Human Right

The right to water as a basic human right is a derivative right from several other fundamental rights entrenched in international rights instrument, such as right to life, right to an adequate standard of living, right to food and shelter, and right to physical and mental health. The concept of human right to water obligates states to ensure that populations have safe, affordable and adequate access to water through policies and strategies that create a conductive environment (be it social or economic) for such access. General Comment No. 15, which has been issued by the United Nations Economic and Social Council (ECOSOC), obligates states to realise the right to water.\(^{24}\) It states that in implementing the right to drinking water, state parties have to be non-discriminatory and maintain equality. Further states are obligated to prevent the infringement of these rights by third parties, including private companies operating water utilities. It provides that when water is distributed by the private

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sector, states parties must prevent them from compromising equal affordable, and physical access to sufficient, safe and acceptable water. This obligation includes, interalia, adopting the necessary and effective legislative and other measures to restrain, for example, third parties from denying equal access to adequate drinking water and polluting and inequitably extracting water resources.

The human right to water is increasingly widely recognised at the international and national levels. The UN General Assembly has also confirmed the existence of a human right to water. At the national level, various countries have formally recognised the right to water. Thus, the South African Constitution expressly recognises a right to have access to sufficient water.\(^{25}\) In India, the Constitution does not specifically include a fundamental right to water. Yet a number of Judicial pronouncements have made it clear that such a right exists under Indian law. It sees the unavailability of drinking water to all citizens as constituting a violation of UN human rights instruments and the right to life under the constitution. The High Court of Karnataka confirmed this but specifically indicated that the fundamental right only includes drinking water and not irrigation water.\(^{26}\)

This widespread recognition of the human right to water does not imply that there is unanimity around it. Indeed, some commentator discuss the human right to water in the conditional tense.\(^{27}\) Other argues that the right is not clearly defined at the international law level.\(^{28}\)

More importantly, the human right to water is one of the rights that are unquestionably part of any catalogue of fundamental human rights. Indeed water falls without doubt within the scope of natural rights and is clearly one of the

\(^{25}\) South Africa, Constitution, s 27 (1) (b).

\(^{26}\) *Venkatagiriappan v Karnataka Electricity Board* 1994 (4) Kar LJ 487.


rights held simply by virtue of being a human person are part of and parcel of the integrity and dignity of the human being. The Supreme Court of India affirmed in *M.C. Mehta V Kamal Nath*, 29 that water is a public trust, with the state as ‘the trustee of all natural resources which are by nature meant for public use and enjoyment.

While Judicial recognition of a fundamental right to water is unequivocal, its implementation through policies and acts is not as advanced. Recent initiatives include the Rajiv Gandhi National Drinking Water Mission that seeks to ensure that all villages in the country get drinking water supply.

**Resolution of Inter-State Disputes Over Sharing of Waters**

India has a number of Inter-State rivers and river valleys. The Constitution framers anticipated that with the accent on development of irrigation and power resources, some inter-state disputes would arise regarding sharing of river-waters. Accordingly, the Constitution Confers legislative power over such rivers to Parliament. 30 Article 262 (1) empowers Parliament to provide by law for adjudication of any dispute or complaint with respect to the use, distribution or control of the waters of any inter State river or river valley.

The Inter-State Water Disputes Act 1956, which has been enacted under Art. 262, provides for adjudication of disputes relating to the use, distribution or control of waters of inter-state rivers and river valeys among the concerned state Governments. When such a dispute arises, a State Government may request the Central Government to refer it to a tribunal for adjudication (S-3) and if the Central Government is of opinion that it cannot be settled by negotiations, it would constitute a tribunal for the purpose (S-4). Thus, S-4 while verting power in the Central Government for setting up a Tribunal has made it conditional upon the forming of the requisite opinion by the Central Government. 31


The Tribunal is to consist of a Chairman and two other members nominated by the Chief Justice of India for amongst those who are Judges of Supreme Court or the High Courts. The Tribunal may appoint two or more assessors to advise it. The Tribunal submits its report to the Central Government which on publication become binding on the parties concerned.

**The Krishna River Water Dispute**

The Krishna is the second largest river in southern India, after the Godavari river. It rises in the Mahadev range of the Western ghats near Mahabaleshwar in the Western Indian State of Maharashtra. As a result of the promulgation of the States. Re-organisation Act, 1956, the States which became riparian to the Krishna river are: Maharashtra, Karnataka and Andhra Pradesh. The dispute over the Krishna river pre-dates the emergence of these states.\(^{32}\)

The Krishna-Godavari Commission that was set up in 1961 could not provide any recommendations regarding allocation of the Krishna water among the riparian States because of the absence of reliable data on actual water use and needs of such riparian States. The negotiations led by the Central Government could not provide in acceptable solution either: As a result of a request by the riparian States, the Central Government constituted the Krishna Water Disputes Tribunal on April 10, 1969, and referred the dispute to this Tribunal in accordance with the provisions of the Inter-State Water Disputes Act, 1956. The Tribunal issued its decision on May 27th, 1976, seven years after its constitution.\(^{33}\)

The Tribunal defined the Krishna river to include the main stream of the Krishna river, all its tributaries and all other streams contributing water directly or indirectly to the Krishna river. The Tribunal determined that the 75% dependable flow of the Krishna river was 2060 thousand million cubic feet of water (TMC), and declared that this amount was available for distribution between the States of

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Maharashtra, Karnataka and Andhra Pradesh. The State of Karnataka was awarded 560 TMC, the State of Maharashtra 700 TMC, and Andhra Pradesh 800 TMC. The Tribunal declared that these States are free to make use of the underground water within their respective State territories in the Krishna river basin. In addition, the final order of the Tribunal superseded six agreements concluded between 1892 and 1946 between the predecessor States to the current riparian States.

The final order of the Tribunal gave the State of Andhra Pradesh (which is the last riparian State) the right to use in any water year (June 1 to May 31) any remaining water that may be flowing in the Krishna river, but this would not give the State of Andhra Pradesh any prescriptive right or interest over such water. The order States that failure by one State to use its share in one water year for whatever reason precludes such a State from claiming that unutilized water in any subsequent year. However, the order goes on to State that such failure should not be taken to constitute forfeiture or abandonment by such State of its share of water in any subsequent water year, nor shall it constitute an increase to the share of any other State.  

The order could be reviewed or revised by a competent authority any time after May 31, 2000. However, such review or revision shall not, as far as possible, disturb any utilization that may have been undertaken by any State within the limits of the allocation made to such State under the order. This clause, establishing a date for review of the order, and providing recognition at that date for any and all water utilization within the State allocation, in addition to the clause giving the State of Andhra Pradesh the right to use any remaining water, formed the basis for the scramble for the Krishna water by Andhra Pradesh and Karnataka, resulting in the filing of the suit in 1997 before the Supreme Court of India by both the States of Karnataka and Andhra Pradesh. The State of Karnataka sought the implementation of Scheme B formulated by the Krishna Tribunal with respect to the allocation on percentage basis in surplus as well as deficit years of flow and restrictions with regard to the use and the nature of such restrictions. The State of Andhra Pradesh in its Suit, inter alia, sought injunction

against the State of Karnataka on the allegation that the State of Karnataka has indulged in gross violations of the Award of the Krishna Tribunal, particularly by undertaking, the construction of Almatti Dam to a proposed height of 524.6 meters under the Upper Krishna Project (UKP). The State of Andhra's contention was that the construction of Almatti Dam upto 524 meters would result in the utilization of about 173, thousand Million Cubic Feet of waters, whereas the Tribunal had made no allocation for this project. The State of Karnataka lost its case with regard to the implementation of Scheme B. The Supreme Court of India held that the Scheme B could not be held to be part of the Award of the Tribunal in view of Andhra Pradesh not having agreed to the constitution of the Krishna River Valley Authority, and since the constitution of the Krishna River Valley Authority was absolutely necessary to implement Scheme B, it cannot be held that Scheme B was part of the Award of the Tribunal. But the State of Karnataka won its case with respect to its right to construct the Almatti Dam.\textsuperscript{35} The Judgment, it must be noted, has not decided the water dispute between the States. It cannot; because the Constitution itself has barred the jurisdiction of the Supreme Court of India with respect to a water dispute, once Parliament has enacted the Inter-State Water Disputes Act, 1956. All that the Supreme Court of India has done in the matter is to looked into the alleged violations of the Krishna Water Disputes Tribunal Award and interpreted it and then left it to the States to seek the constitution of a fresh Tribunal for settling their disputes. At the request of the States seeking review of the Award, as contemplated in the Award itself, the Central Government has constituted the Krishna Disputes Tribunal-II.

The Krishna Water Dispute Tribunal-II on 30 December 2010 announced its verdict for the surplus Krishna water while upholding the award given by the earlier tribunal for the mode of distribution of the 2060 thousand million cubic feet TMC water of the river.\textsuperscript{36} The tribunal also allowed Karnataka to raise the height of the Almatti dam from 519 m to 5246 m, setting aside the opposition of Andhra Pradesh and Maharashtra who had argued that raising the height of the dam would cause the villages to be inundated by backwaters.

\textsuperscript{36} The Times of India, 31 December 2010.
According to the award, the 163 TMC surplus water, which has 65% dependability, will be divided among the there riparian states of Maharashtra, Karnataka and Andhra Pradesh at the rate of 43 TMC, 65 TMC and 39 TMC, respectively. The 2060 TMC water which has 75% dependability that was the subject of the earlier award, will continue to be distributed at the existing rate of 560 TMC for Maharashtra and 700 TMC and 800 TMC for Karnataka and Andhra Pradesh, respectively. The decision is to be reviewed at any time after May 31, 2050.

The tribunal has said a Krishna water Decision Implementation Board should be set up to see to the implementation of the decisions. It would be a five member body, with the three party states each nominating one member to the board and the centre nominating two. The board is to be set up within three months from the date of the decision.

The Narmada River Water Dispute

The Narmada is the fifth longest river in India. It rises near Amarkantak in the Maikela range in the Shadol district in the State of Madhya Pradesh, passes through the borders of the State of Maharashtra with the State of Gujarat, and crosses the State of Gujarat before flowing in the Gulf of Kambata of the Arabian Sea. In 1965, the Government of India set up a committee to prepare a master plan for development of the Narmada basin which included the three riparian States, as well as the neighboring State of Rajasthan. However, the riparian States, for varying reasons, rejected in 1968 the recommendations of the committee and asked the Central Government to refer the matter to a Water Disputes Tribunal. Consequently, the Central Government constituted in 1969 the Narmada Water Disputes Tribunal. After ten years of deliberations, the Tribunal issued its award in December 1979.

The Tribunal determined the utilizable quantum of waters of the Narmada at the Sardar Sarovar Dam site, on the basis of 75% dependability, as 28 million acre feet (MAF). The Tribunal allocated this amount as follows: 1825 MAF for
Madhya Pradesh, 9 MAF for Gujarat, 05 MAF to Maharashtra and 025 MAF to Rajasthan. In addition, the Tribunal addressed a number of related issues, and the final order included decisions thereon. The issue addressed included:

(i) Proportionate sharing of water in surplus and deficit year.

(ii) Construction of the Sardar Sarovar Dam in Gujarat with a height of 13868 meters, and a 450 kilometers canal from the dam, crossing the State of Gujarat and ending in the State of Rajasthan. This was perhaps the reason why the State of Rajasthan was allocated 025 MAF although the State of Rajasthan is not a riparian to the Narmada river.

(iii) Sharing of power benefits from the proposed Sardar Sarovar dam among the States of Gujarat, Madhya Pradesh and Maharashtra.

(iv) Sharing of the capital cost, and the operation and maintenance cost, of the Sardar Sarovar headworks between the States of Gujarat, Madhya Pradesh and Maharashtra in proportion to the power benefits allocated to each.

(v) Provisions for the resettlement and rehabilitation of the people living in the submergence area in the three riparian States who are affected by the construction of the Sardar Sarovar Dam.

(vi) Payment by the State of Gujarat to the State of Madhya Pradesh and the State of Maharashtra of all costs incurred in acquiring the land to be submerged.

(vii) Concurrent construction of the Narmada Sagar Dam in the State of Madhya Pradesh.

The order included detailed provisions for the establishment of the Narmada Control Authority. The Authority would be established for the purpose of securing compliance with the implementation of the Tribunal award. Although the order stated that the decisions of the Authority shall be final and binding on the four party States, the order established a Review Committee. The Review Committee consisted of the Minister of Irrigation in the Central Government as chairman, and the Chief Minister of each of the States of Madhya Pradesh,
Gujarat, Maharashtra and Rajasthan as members. The Committee could either *suo motu*, or on the application of any party State, review any decision of the Authority. Such review should take place at a meeting in which the chairman and all members are present. As the States of Madhya Pradesh and Maharashtra had an interest in the Sardar Sarovar Dam, they were both represented in the Sardar Sarovar Construction Advisory Committee which was established to ensure efficient, economic and early execution of the dam and appurtenant works of the Sardar Sarovar projects.37

The Tribunal stated that order is subject to review after 45 years from the date of its publication in the official Gazette i.e. the year 2025.

**The Godavari River Water Dispute**

The Godavari is the largest river in southern India. It rises in the Sahyadris near Trimbakeshwar in the Nashik district of the State of Maharashtra, passes through the States of Madhya Pradesh and Andhra Pradesh before flowing in the Bay of Bengal. In addition to the States of Maharashtra, Madhya Pradesh and Andhra Pradesh, Orissa and Karnataka are also riparian States to the Godavari river. The developments regarding the Godavari river were similar to those of the Krishna river.

The Krishna-Godavari Committee that was set up in 1961 failed to provide allocation for the Godavari river among the riparian States for the same reasons relating to its failure on the Krishna river. In parallel, the Godavari Water Dispute Tribunal was set up in 1970. However, unlike the Krishna river, the riparian States reached several inter States agreements on a number of irrigation projects on the Godavari and its tributaries, while adjudication proceedings were going on. These agreements which were concluded between 1975 and 1980, and which numbered eleven in April 1980, facilitated the proceedings of the Tribunal. The decision of the Tribunal that was issued in July 1980 basically honoured and ratified these agreements, and incorporated them in its final order. In addition, the

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order gave the riparian States the right to divert any part of the share of the Godavari waters allocated to each such State from the Godavari basin to any other basin. The order also clarified that the party States could make use of the underground water within their respective territories in the Godavari basin, and such use shall not be reckoned as use of the water of the Godavari river. Similar to the Krishna order, the Godavari Tribunal stated that non-use of the share of water by one State during one year:

(i) neither entitles that State to claim the unused portion in future years.

(ii) nor is to be considered a forefeiture of that unused portion.38

The Ravi and Beas Rivers Water Dispute

The dispute over the Ravi and Beas rivers could be traced to the partitioning of India and the resulting dispute over the Indus basin between India and Pakistan. Following mediation by the World Bank, the Indus Waters Treaty was signed in 1960. The treaty allocated the western rivers, namely the Indus, the Jhelum and the Chenab to Pakistan, and the eastern rivers, namely the Ravi, the Beas and the Sutlej to India. However, the Indian State of Punjab where the three eastern rivers flow, was itself divided in 1966 into two States i.e., Punjab and Haryana. One consequential issue was how to allocate the amount of water of 7.2 MAF, that was allocated to Punjab, between the two States. The Central Government allocated 3.5 MAF to each of the two States, and 0.2 MAF to Delhi. Punjab rejected this allocation and filed a suit with the Supreme Court of India. While the suit was pending, the three States of Punjab, Haryana and Rajasthan, and the Central Government signed an agreement in December 1981 on the Ravi and Beas. The suits before the Supreme Court of India were withdrawn. However, in 1985, the State of Punjab repudiated the agreement. On July 24, 1985 the then Prime Minister of India and the President of the Akali Dal party of the State of Punjab reached a new accord called the “Punjab Settlement.”39 According to this accord the claims of Punjab and Haryana over the Ravi and Beas rivers were to be referred for adjudication to a Tribunal.


However, the Central Government could not constitute a Water Disputes Tribunal under the Inter-State Water Disputes Act 1956 as none of the parties asked for such a Tribunal, nor was any one willing to do so. The Central Government cannot, under the Act, establish such a Tribunal suo motu. This situation prompted the Central Government to amend the Inter-State Water Disputes Act to deal with this lacuna. The amendment added a new section to the Act. This Section reads:

14 (1) Notwithstanding anything contained in the foregoing provision of this Act, the Central Government may by notification in the official Gazette constitute a Tribunal under this Act, to be known as the Ravi and Beas Waters Tribunal for the verification and adjudication of the matters referred to in paragraphs 91 and 92 respectively of the Punjab Settlement.

The Tribunal was constituted in April 1986, and issued its award on January 30, 1987. The award allocated 5 MAF to Punjab and 383 to Haryana. The share of the State of Rajasthan of 86 MAF, and the share of Delhi of 0.2 MAF were left unchanged. The Tribunal directed that any excess or deficit would be shared proportionately between the States of Punjab and Haryana. But what the Tribunal observed with respect to the construction of Sutlej-Yamuna-Link Canal (SYL) has a bearing on the current dispute which is being presently heard by the Supreme Court of India on this issue. The Tribunal held that in answering the two points referred to it, it has strictly confined to the terms of the reference and paragraph 9.1 and 9.2 of the Punjab Settlement but it said that it would not be out of place to mention that paragraph 9.3 of the Punjab Settlement envisages the construction of the Sutlej-Yamuna link Canal and its completion by August 15, 1986. The Tribunal said that it has been informed that the canal is complete in the State of Haryana area and it is under construction in the Punjab area. It further stated that this canal is a lifeline for the farmers of the States of Haryana and unless it is expeditiously competed, the State of Haryana will not be in a position to utilize the full quantum of water allocated to it by the Tribunal. It is therefore necessary that all concerned should make a concerted effort to see that the construction of the canal is completed at an early date without loss of further time. The State of Punjab has not complied with this expectation of the Tribunal.
The State of Haryana had to file an Original Suit before the Supreme Court of India seeking decree against the State of Punjab for the construction of the Sutlej-Yamuna-link Canal. In 2002, the Supreme Court of India granted decree in favour of the State of Haryana and directed the State of Punjab to complete the construction of the Sutlej-Yamuna-link within one year failing which the Government of India will take over the constructions. When even the Government of India could not take over the construction, the State of Haryana moved the Supreme Court of India again to seek enforcement of the decree. The State of Punjab explained that the basis of the apportionment is no more valid because the total yield of these rivers have reduced and it will be against the interest of its own people to comply with the decree. The State of Punjab even moved the Supreme Court of India by filing on Original Suit seeking discharge from the mandatory injunction issued by the Court to construct the Sutlej-Yamuna-link. The State of Punjab also argued that in view of the change in the yield of these rivers, Central Government must constitute another Tribunal to re-determine the respective shares of the States. By judgment dated 4-6-2004, the Supreme Court of India has dismissed the case of the State of Punjab and directed the Government of India to immediately take up the construction of Sutlej-Yamuna link Canal. In order to overcome and avoid these judgments of the Supreme Court of India, the State of Punjab Legislature passed the State of Punjab Termination of Agreements Act, 2004 whereby Punjab has terminated the 1981 Agreement under which shares of the respective States were apportioned and it was also agreed that the Sutlej-Yamuna-link Canal will be constructed in a time bound manner. In this matter, the President of India has invoked his powers under Article 145 of the Constitution of India and has sought the opinion of the Supreme Court of India whether the said Act enacted by the State of Punjab Legislature is constitutionally valid.

The Cauvery River Water Dispute

The Cauvery is the fourth largest river in southern India after the Godavari, the Krishna and the Mahanadi. It rises at Talakaveri on the Brahmagiri hills of the western ghats in the district of Coorg in the State of Karnataka. It flows from the State of Karnataka through Tamil Nadu to the Bay of Bengal. One of the tributaries of the Cauvery is the Kabini river, which originates in the State of Kerala, with one of its branches irrigating parts of the Union Territory of Pondicherry. Thus, in addition to Karanataka and Tamil Nadu, both Kerala and the Union Territory of Pondicherry are also riparian to the Cauvery river.

A number of agreements were entered into with regards to the Cauvery river. The earliest of these agreements date back to 1892 and was concluded between the governments of Mysore and Madras regarding new irrigation works.

This agreement essentially required the Mysore Government not to construct any new irrigation reservoirs, as defined in the agreement, without prior consent of the Madras Government. A series of agreements thereafter dealt with the areas to be irrigated and the construction of some new reservoirs in each State.

As a result of the reorganization of the States in 1956, the States of Karnataka and the State of Tamil Nadu emerged as the two most contesting States for the waters of the Cauvery river. Negotiations between the two States and the attempts of the Central Government to resolve the dispute were unsuccessful. The State of Tamil Nadu, the lower riparian, finally requested the Central Government in 1989 to refer the dispute to a Water Disputes Tribunal. The Central Government constituted the Cauvery Water Disputes Tribunal in June, 1990.

At the request of the State of Tamil Nadu, the Tribunal issued an interim order on June 25, 1991. The order directed Karnataka to release to Tamil Nadu 205 thousand million cubic (TMC) feet of water in a 12 month period, from June to May, starting July, 1991.
The figure was based on the average flow in the Mettur reservoir in the State of Tamil Nadu. This reservoir is situated immediately after the Cauvery crosses the borders of Karnataka into Tamil Nadu. This average flow excluded the abnormally good and bad years. The State of Karnataka questioned the basis for the order and rejected it. The State of Karnataka went further and passed the Karnataka Cauvery Basin Irrigation Protection Ordinance, 1991. The objective of the Ordinance was to protect the amounts of water of the Cauvery that the State of Karnataka was using. Meanwhile the State of Tamil Nadu was pressing the Central Government to publish the interim order in the official Gazette. Under those circumstances the Central Government decided to refer the matter to the Supreme Court of India. The Court ruled that the Karnataka Ordinance was *ultra vires*, and that the interim order was a decision under the Inter-State Water Disputes Act, 1956. Consequently, the order was published by the Central Government in the official Gazette on December 10, 1991.45

At the request of the State of Karnataka, the Cauvery Water Disputes Tribunal issued a clarificatory order on April 3, 1992. The order carified that the 205 TMC included any water contributed from the catchment area of the Cauvery river within the State of Tamil Nadu. The Tribunal estimated this amount as 25 TMC. The Tribunal clarified further that in years of low flow of the Cauvery, the amounts to be released might have to be adjusted. This clarification was again welcomed by the State of Tamil Nadu and condemned by the State of Karnataka. However, good rains during 1992,1993 and 1994 eased the situation and deferred the crisis, but by 1995 the flow returned to its pre 1992 levels refueling the dispute. The State of Karnataka failed to implement the interim order claiming that the flow of the Cauvery was below normal and it could not afford to release the full amounts stipulated in the interim order. The State of Tamil Nadu moved the Supreme Court of India in 1992 for the implementation of the interim order of the Tribunal. The State of Tamil Nadu prayed that the Supreme Court of India may declare that the State of Karnataka is under a statutory and public duty bound to conform to and implement the interim order of the Tribunal dated June 25, 1991; to issue a mandatory injunction directing the State of Karnataka to act.

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in compliance with the interim order of the Tribunal and release water as directed by the Tribunal and prayed for the issuance of a decree of mandatory injunction directing the Government of India to frame a Scheme to give effect to the order of the Tribunal. This was opposed by the State of Karnataka, when it raised a preliminary objection to the very maintainability of the Suit on ground that the jurisdiction of the Supreme Court of India is expressly and completely ousted by Article 262 of the Constitution of India read with section 11 of the Inter-State Water Disputes Act 1956 and thus the Supreme Court of India cannot direct the implementation of the interim order. The further case of the State of Karnataka's was that the only manner in which an order of the Tribunal can be implemented is through a machinery provided under Section 6A of the Act which provides that the Central Government 'may' frame a Scheme for the implementation of only the final order of the Tribunal and not the interim orders of the Tribunal. In view of the important constitutional questions raised in the case, the Supreme Court of India constituted a Constitution Bench of five judges to hear the case. After several hearings spanning over five years, during one such hearing on 9th April 1997, when the Court was grappling with the vexed Constitutional questions, the Attorney General of India, appearing for the Government of India made a dramatic statement that the Government of India is agreeable to frame a Scheme under Section 6A of the Act for the implementation of the interim order of the Tribunal. The Supreme Court of India accepted this statement and hoped that this would resolve the disputes between the warring States. It took more than two years for the Government of India to frame and publish a Scheme, after a war of another kind was waged between the State of Tamil Nadu and Karnataka in the corridors of power in the form of raising several objections and cross objection to the draft Scheme. Finally on August 11, 1998, the Government of India notified the Scheme called "the Cauvery Water (Implementation of the Order of 1991 and all subsequent related orders of the Tribunal) Scheme, 1998."

The Cauvery Water Disputes Tribunal announced its final verdict on 5 February 2007. According to its verdict, Tamil Nadu gets 419 billion ft$^3$ of Cauvery waters while Karnataka gets 270 billion ft$^3$. The actual release of water by Karnataka to Tamil Nadu is to be 192 billion ft$^3$ annually. Further, Kerala will
get 30 billion ft$^3$ and Pondicherry 7 billion ft$^3$. Tamil Nadu appears to have been accepting the verdict while the government of Karnataka, unhappy with the decision, filed a revision petition before the tribunal seeking a review.

**Setting Up of An Integrated Tribunal for All Water Disputes ?**

The Water Resources Ministry is toying with the idea of setting up an integrated water disputes tribunal that will be the one-stop forum for all inter-state water wars but it was a long way off as it required an amendment of the Inter-State Water Disputes Act 1956. It could take about a year to complete the entire process of getting clearances and the amendment. There are five running tribunals in the country at present. The five tribunals are for the Ravi-Beas dispute between Haryana, Rajasthan and Punjab, Krishna dispute between Maharashtra, Karnataka and Andhra Pradesh (Krishna dispute tribunal had announced its decision on December 30, 2010), Cauvery dispute between Karnataka, Tamil Nadu, Pondicherry and Kerala; Vansdhar dispute between Andhra Pradesh and Orissa and the Mahedyi dispute between Karnataka, Maharashtra and Goa.

The move for a single tribunal means the government is in no mood to pay heed to the occasional demands for repeal of the Inter-State Water Disputes Act 1956 and to bring water disputes under the sole Jurisdiction of the Supreme Court.

**Resolution of International Water Disputes over Sharing of Waters**

The scarcity of fresh water and the problems concerning the allocation of water resources between States which share a watercourse have given rise to tensions and conflicts in many regions of the world and are likely to become a major source of disputes in the twenty-first century. In the past, navigation was the main use for international watercourses. Nowadays, however, industrialization, urbanization and population growth have resulted in the

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46. The Times of India, 31 January 2011.
decreased importance of navigation in favour of non-navigational uses.\textsuperscript{47} In this respect, river basin countries may face disputes concerning competing, often incompatible uses, including drinking, domestic uses, irrigation, fishing, electric power production or other industrial uses\textsuperscript{48}, as well as the conservation and development of water resources.

The law governing international watercourses neither establishes priorities for the uses of water resources, nor does it grant riparian States full dominion over the portion of the watercourse located in their territory. The theory currently laid down by international law is that of the limited territorial sovereignty of riparian States, with every riparian State being entitled to utilize an international watercourse within its jurisdiction if its use does not cause significant harm to neighbouring States. Therefore, the principle of equitable and reasonable utilization is deemed to be the cornerstone of the international watercourses regime, together with the obligation not to cause significant harm. This assertion has recently been reaffirmed by the International Court of Justice (ICJ) which in 1997, in \textit{Gabcikovo-Nagymaros Project} case, emphasized the importance of operating the project "in an equitable and reasonable manner", as well as in Articles 5 and 7 of the Convention on the Law of the Non-Navigational Uses of International Watercourses, adopted by the United Nations General Assembly in 1997.

In practice, the implementation of both principles involves a number of wide-ranging problems, such as the determination of the legal entitlements to water resources or the definition of what is reasonable and equitabe in each case. A dispute might also arise in cases where a State opposes works planned by another riparian State alleging they cause substantial harm to their rights and interests. To these problems can be added those derived from the necessity of protection and preservation of ecosystems, prevention, reduction and control of transboundary pollution, and the extinction of species.


\textsuperscript{48} Non-navigational uses of fresh water may be categorized into the following three clusters: agricultural uses, economic and commercial uses, and domestic and social uses \textit{Yearbook of the ILC}, 1978, Vol. II, Part One, p. 254.
The current legal regime stresses co-operation between river basin States. Indeed, since there are very few legal rules which are binding on all States, co-riparians are intended to regulate the allocation of shared water resources and environmental protection by common agreement, and to manage conflicting interests through the exchanging of information, the notification of planned measures, consultation with affected States and, if possible, joint measures. Finally, there is a need to establish effective mechanisms to be employed in case States are not able to resolve their disagreements through consultation and negotiations.

To this end, co-riparians should endeavour to conclude bilateral or regional treaties. The conclusion of agreements relies, of course, on the spirit of co-operation among States. The large number of treaties dealing with the apportionment, conservation and development of international watercourses testifies to the good-will of States in this area.

At the same time, the failure to address and resolve some of the current disputes seems to be due to the absence of agreements managing the use of water resources which provide effective dispute settlement mechanisms. Nonetheless, this absence is not an obstacle to the existence of a customary obligation on States to resolve their international disputes in a peaceful way. As shall now be explained, States can resort to whatever peaceful means they consider appropriate.

49. Allocation of water resources can be defined by bilateral or regional agreements or customs; if not, it is up to the concerned States to apportion jointly the resources taking into account all relevant factors and circumstances. The UN Convention in Article 3 (1) expressly indicates that it respects the rights and obligations arising from agreements in force. Where such agreements do not exist, paragraph 3 encourages States to enter into agreements to apply and adjust the provisions of the Convention to the characteristics and uses of a particular watercourse or part thereof. Article 6 of the UN Convention enumerates a non-exhaustive list of factors, namely the physical characteristics of each watercourse, the vital human needs and the main economic activities of their populations, the impact on the environment and the existence of practicable alternatives. All these provisions should be considered in order to reach an equitable and reasonable allocation of water resources, bearing in mind that, as affirmed by Article 10 of the UN Convention, "in the absence of agreement or custom to the contrary, no use of an international watercourse enjoys inherent priority over other uses."

Adjudicative Means

The heading of adjudicative means, also called legal means or adjudication, includes two methods involving the participation of international courts and arbitral tribunals, namely judicial settlement and arbitration. From the outset, the main advantages of adjudication over political means are to be found in the following features.

Firstly, the dispute is examined by an impartial third party taking into account all relevant facts and applicable international legal rules, unless the parties have authorized it to decide ex aequo et bono.

Secondly, adjudication results in a binding decision. The award granted by the arbitral tribunal and the judgment handed down by the court are legally binding on the parties and definitive for them as res Judicata. They shall be executed in their entirety in good faith. Therefore, adjudication can provide a definitive settlement to a particular inter State dispute.

Thirdly, adjudication grants more equality among States involved in a dispute. The fact that the differences are acknowledge by an impartial third party acting on the basis of law and that it leads to binding decisions makes adjudication more advantageous than political means for States occupying unequal starting positions.

Fourthly, adjudicative means aim to interpret and apply international legal rules. Therefore, they are well suited to disputes involving legal issues, such as difficulties in determining the applicable legal rules or their interpretation and application to the particular case. At the same time, they can help to clarify the scope of international legal standards or even to consolidate emerging ones. While such decisions do not have any binding force erga omnes, they are often relied upon by the rest of the international community to resolve their own differences, and cited by other arbitral or judicial bodies adjudicating similar cases.
Finally, it was argued previously that, ideally, negotiation is the best mode of resolving an international dispute. However, when the interests and claims of disputants are diametrically opposed, a negotiated settlement, even with the aid of mediators, may prove impossible. In such cases, the only way to achieve a solution can be through adjudication.

Like other dispute resolution techniques, adjudication has a strongly consensual basis. For a court or tribunal to have jurisdiction in a particular dispute, it is a prerequisite that all the States involved have given their consent, be it a priori or a posteriori. Consent may be given beforehand:

(i) through the conclusion of a general treaty of arbitration stipulating that all differences arising between them in future, or all differences within a certain category, shall be settled by this technique;

(ii) by including in a water resources treaty a dispute settlement provision on the basis of which, in the event of a disagreement over the interpretation or implementation of the agreement, the case may be referred to the International Court of Justice or to an arbitral tribunal set up to that end; or

(iii) by the States having formulated an optional declaration recognizing as compulsory ipso facto the ICJ's jurisdiction in all legal disputes. In such an event, the Court would have jurisdiction when two converging unilateral declarations of acceptance without any reservations are present.

Again, consent may also be given once the controversy has arisen. In such a case the parties may enter into a special agreement concluded expressly for the purpose of establishing an ad hoc tribunal or referring the question to the ICJ. Under such an agreement, the parties would express their acceptance and indicate the questions that they would be referring to the Court or the tribunal for decision.

A review of treaty practice in this field shows that States are reluctant to recognize the jurisdiction of international courts or to permit the submission of disputes to arbitration. In those treaties where adjudication is foreshadowed, an attempt to resolve the problem by diplomatic means in a prerequisite to
adjudication.\textsuperscript{51} In addition, it is fairly unusual to allow unilateral recourse by any of the parties to the dispute. As an example, Article 33 (10) of the UN Convention indicates that

"When ratifying, accepting, approving or acceding to the present Convention, or at any time after, a Party . . . may declare in a written instrument submitted to the Depositary that, in respect of any dispute not resolved in accordance with paragraph 2, it recognizes as compulsory ipso facto and without special agreement in relation to any Party accepting the same obligation:

(a) Submission of the dispute to the International Court of Justice, and/or

(b) Arbitration by an arbitral tribunal established and operating, unless the parties to the dispute otherwise agreed . . .""

To date, only five international decisions concerning non-navigational uses of international watercourses have been adjudicated.\textsuperscript{52}

\textbf{Arbitration}

Arbitration was defined by Article 37 of the 1907 Hague Convention (I) as follows:

"International arbitration has for its object the settlement of disputes between States by judges of their own choice and on the basis of respect for law."

\footnotesize{\textsuperscript{51} Some other categories of treaties do not make negotiations or resort to political means a pre-condition to adjudication. As an example, Article IX of the 1948 Genocide Convention contains an unconditional compromissory clause which provides that "Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any parties to the dispute." This provision paved the way to the lodging of two applications before the ICJ, one by the Government of Bosnia and Herzegovina against Yugoslavia in 1993 (\textit{ICJ Reports 1993}) and the other one by the Government of Croatia against the same State in 1999. Available at : www.icj-cij.org/icj.org/ncwww/docket/icry/icryframe.htm.

\textsuperscript{52} \textit{Helmand River Cases (Afghanistan v. Persia)} (1872 and 1905), \textit{Diversion of Water from the River Meuse (Netherlands v. Belgium)} (1937), \textit{Lake Lanoux Arbitration (France v. Spain)} (1957), and, finally, the case concerning the \textit{Gabčikovo-Nagymaros Project (Hungary/Slovakia)} (1977).}
Recourse to arbitration implies an engagement to submit in good faith to the award.

While arbitration and judicial settlement share a number of key features, the main difference between them is that the former provides the parties with a larger degree of freedom and flexibility. The parties retain control over the formation of the tribunal by mutual agreement. Hence, they can decide what kind of tribunal will be appointed, whether it be a single arbitrator or a collegiate body, and select the judges. The parties are also able to define the limits of the arbitral tribunal's powers, define the criteria to be applied in determining the dispute, draft its rules of procedure, determine how the proceedings are to be conducted and where arbitration is to be held. They are meant to bear the expenses equally, so they have to decide how the cost of the proceedings will be paid.

Consequently, the parties can exercise a high degree of control over the handling of their dispute. This is one of the reasons why arbitration is frequently preferred to judicial settlement. However, arbitration also has major drawbacks, namely the time and effort involved in creating an arbitral tribunal and developing its procedures, as well as the cost of financing its operation.

Few treaties provide for recourse to arbitration and, even when they do, it is generally included as a residual mechanism subject to political means being exhausted. Hence, direct recourse to arbitration is not possible in the majority of cases where a dispute arises between the States party to a watercourse treaty.

Although the possibility of unilateral recourse is not envisaged in the universal instruments, that is, the 1923 Geneva Convention and the 1997 UN Convention, a number of recent conventions provide for the submission of a dispute to an arbitral tribunal at the request of any of the parties to the dispute.

The composition of the arbitral tribunal to be created and its procedure can be spelled out either in the body of the treaty, an annex to the treaty, or an

53. Article 33 (10) of the 1997 UN Convention; Article XVI (2) of the Columbia River Basin Treaty; Article 11 (1) of the Mahakali Treaty; Article 9 (4) of the Indus Waters Treaty; and Article 16 of the Convention on the Protection of the Rhine.
additional protocol. Also, parties have the option of resorting to other methods to constitute arbitral tribunals. For instance, the PCA has developed some Optional Rules for the arbitration of disputes relating to natural resources and/or the environment (effective since 19 June 2001). These rules have not yet been employed to solve any watercourse dispute.

We can derive some lessons about the effectiveness of arbitration in disputes involving water resources by studying arbitral practice. States bring a case to arbitration with the intention of obtaining a binding decision which will put an end to a longstanding dispute. Indeed, arbitration seems a convenient way of eliminating what may be a persistent obstacle to friendly relations between neighbouring States. In the Lake Lanoux case, Spain and France had for more than forty years attempted to achieve a negotiated settlement, even through the establishment of joint institutions, to the controversy arising from the French desire to develop a hydroelectric scheme to exploit the waters of Lake Lanoux. Eventually, following the failure of negotiations the two countries entered into a compromis for the submission of the dispute to arbitration. Similarly, Afghanistan and Persia had twice requested arbitration to resolve a long-lasting dispute over the apportionment of the waters of the River Helmand, primarily for the purpose of irrigation.\textsuperscript{54}

A decision on the basis of law was required in the previously mentioned Helmand River and Lake Lanoux cases. The Helmand River case involved a dispute over the rights to land and water over Sistan, a riverside region shared by Persia and Afghanistan. Arbitration was requested on two occasions, in 1872 and in 1905, to resolve the dispute on the grounds of "ancient rights and present possession."\textsuperscript{55}

In the Lake Lanoux case, there was agreement over the law to be applied but diverging interpretations of its scope. The hydroelectric project planned by France, although intended to be located entirely in French territory, involved diversion of the waters of Lake Lanoux towards the River Ariege, thereby


\textsuperscript{55} \textit{Id} at p. 9.
affecting the course of waters which naturally drained into Spanish territory via the Carol River. While France offered to return to the Carol an amount of water equivalent to that which would have been diverted, Spain opposed any diversion.

In summary, the French project was opposed by the Spanish Government, which argued that the works affecting transboundary waters could only be executed with its consent. By contrast, France insisted on its complete freedom of action. The arbitral tribunal was called to determine the obligations of the French Government in the matter. It addressed the following question:

"Is the French Government justified in its contention that, in carrying out, without a preliminary agreement between the two Governments, works for the use of the waters of Lake Lanoux on the terms laid down in the project and in the French proposals mentioned in the preamble to this compromis, it would not commit a violation of the provisions of the Treaty of Bayonne of 26 May 1866 and of the Additional Act of the same date?"

The tribunal concluded that the French project violated neither the 1866 Treaty nor the Additional Act. In terms of resolution of the underlying dispute, the Lake Lanoux arbitration has been widely praised as an example of the capacity of judicial means to resolve a dispute in a rapid, efficient and satisfactory manner. An agreement was concluded in 1958 between both countries, which in fact endorsed the diversion of the waters of Lake Lanoux as initially projected by France, thereby settling the dispute for good. Furthermore, the decision set out a number of principles of general international law, such as the extent of the obligation of notification and consultation among riparian States in those projects affecting boundary waters.

Although arbitration produces a binding decision, there is usually no guarantee that the unsuccessful party will carry out its obligations under the award. There is the problem of how to ensure States enforce decisions, especially because after the arbitral award is delivered it is often necessary that
the disputing States re-enter negotiations, this time taking into account the legal rules that the tribunal has ascertained as applicable. However, ensuring enforcement of the award can be problematic. The second award in the *Helmand River* case, given by Arbitrator McMahon, was not accepted in its entirety by the Afghan Government, and was rejected altogether by Persia, on the basis that it was more favourably treated under the previous award.56 This outcome shows how State consent determines the resolution of a dispute, even when the outcome is legally binding on States and they would incur inter-State responsibility for non-compliance with their international obligations.

**Judicial Settlement**

Judicial settlement is conducted via the permanent international judicial organs, which pronounce decisions based on international legal rules following a process laid down for all on a permanent basis. Unlike arbitration, in judicial settlement the parties resort to a pre-existing tribunal and are only empowered to appoint an *ad hoc* judge under certain conditions. They are governed by the rules of procedure of the international tribunal. The advantages of judicial settlement are that the parties need only recognize the jurisdiction of the Court without requiring further agreement on any points, making it less expensive and time-consuming than arbitration. Furthermore, integration of a tribunal into an international organization (like the United Nations, in the case of the ICJ) can offer an additional guarantee in relation to the implementation of decisions.57 In many other respects, the characteristics of judicial settlement are very similar to those of arbitration. Among the different judicial bodies which currently exist, the only one capable of dealing with disputes relating to water resources is the ICJ.

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56. The first award was delivered by Arbitrator Goldsmith in 1872. Although it was accepted by both parties, changes occurred in the Helmand River and its tributaries causing further disputes so a new arbitration was requested.

57. Article 94 (2) of the United Nations Charter: "If any party to a case fails to perform the obligations incumbent upon it under a judgement rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgement."
As to treaty practice in this field, we observe that recourse to the ICJ has been avoided in most recent watercourse conventions. When it is foreshadowed, such clauses do not constitute *per se* an authorization to take a dispute before the ICJ. On the contrary, the jurisdictional avenue is only open by way of specific agreement rather than unilateral recourse. Therefore, such clauses have the effect of encouraging recourse to the ICJ but they do not provide for it. Furthermore, the text of such clauses reflects the general preference of States for arbitration over judicial settlement. This is exemplified by Article 33 (10) of the UN Convention and Article 24 of the Danube Convention. According to the latter, if parties to a dispute have not been able to settle it by non-adjudicative means, the dispute shall be submitted for compulsory decision to either the ICJ or arbitration in accordance with Annex V to the Convention, on the understanding that if at least one of the parties has not expressly accepted the Jurisdiction of the Court, it is considered to have accepted the arbitration. Where both procedures have been accepted by States party to a controversy, normally the jurisdiction of the ICJ would prevail, unless the parties agree otherwise.\

So far the PCIJ/ICJ (Permanent Court of International Justice/International Court of Justice) has only rendered two decisions involving non-navigational uses of international watercourses. The first decision was in 1937, in the case concerning the *Diversion of Water from the River Meuse* (*Netherlands v. Belgium*), and the other 60 years later, in the case concerning the *Gabcikovo-Nagymaros Project* (*Hungary/Slovakia*). This lengthy refrain vis-a-vis judicial settlement of issues concerning water resources is somewhat surprising, given the significantly increased level of acceptance of the jurisdiction of the Court over the last decade. Furthermore, recourse to the ICJ is provided for in other treaties.

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58. Article 24 (2) (c) of the Danube Convention reads as follows: "If the parties to the dispute have accepted both means of dispute settlement [arbitration and recourse to the International Court of Justice] . . . the dispute shall be submitted to the International Court of Justice, unless the parties agree otherwise."
dealing with sensitive issues such as human rights protection or regulating the allocation of shared natural resources, like the 1982 Convention on the Law of the Sea. To a certain extent, the situation can be seen as a legacy of the general tendency to reject binding resolution of international problems which developed during the Cold War. However, in spite of this, two former Eastern bloc countries, Hungary and Slovakia, concluded a compromis for the purpose of bringing their dispute over the Danube before the ICJ in 1993.

The role of the World Court in helping to resolve the underlying disputes has been widely criticized in both the River Meuse and Gabčíkovo-Nagymaros cases. In fact the compromis concluded by the parties asked the Court to determing the legal parameters which would then form the basis of a negotiated settlement. For example, in the River Meuse case, the Netherlands basically asked the Court to adjudge and declare that the diversion works carried out by Belgium were in violation of the treaty concluded in 1863 between both countries. The Netherlands also requested the Court to order Belgium to discontinue all the works in breach of the 1863 treaty and to restore all conditions to those consistent with the treaty. The Belgian Government rejected the Dutch claim, asking the Court to declare the submission ill founded and at the same time filing a counter-claim inviting the Court to adjudge and declare that the works performed by the Netherlands were in breach of the same treaty. Thus, both parties ascertained the same instrument as a source of rights and duties but differed in their interpretation of its scope. What they needed was a judgment which preserved the equality between them and might serve to facilitate their future negotiations.

59. A number of conventions concerning human rights protection adopted by the United Nations contain a compromissory clause accepting the jurisdiction of the ICJ for matters concerning the interpretation or application of their provisions. Examples include the 1965 Convention on the Elimination of All Forms of Racial Discrimination; the 1973 Convention on the Suppression and Punishment of the Crime of Apartheid; the 1979 Convention on the Elimination of All Forms of Discrimination against Women; and the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

60. Treaty between Belgium and the Netherlands for the Regulation of Drawings of Water from the Meuse, The Hague, 12 May 1863. This Treaty was concluded in order to "settle permanently and definitively the regime governing diversions of water from the Meuse for the feeding of navigation canals and irrigation channels."

61. Diversion of Water From the River Meuse (Belgium V. Netherlands), Judgment, 1937, PCIJ, Series A/B, No. 70, p. 28.
Similarly, the dispute over the *Gabčíkovo-Nagymaros Project* revolved around the 1977 Treaty between Hungary and Czechoslovakia. In the Special Agreement concluded to refer the dispute to the ICJ, they asked the Court to decide: (i) whether Hungary was entitled to suspend and, in 1989, abandon its part of the works set out by the 1977 Treaty; (ii) whether Slovakia was entitled to proceed to the alternative solution known as Variant C, and later put it into operation; (iii) what the legal effects of the notification of 19 May 1992 of the termination of the 1977 Treaty by Hungary were; and (iv) what were the legal consequences, including the rights and obligations of the parties, arising from the judgment.\(^{62}\) In answering these questions the Court was expected to apply the 1977 treaty and "rules and principles of general international law, as well as such other treaties as the Court may find applicable."\(^{63}\) Finally, the disputing parties had decided that immediately after the transmission of the judgment they would enter into negotiations on the modalities for its execution.\(^{64}\)

Therefore, the Court itself was not expected to resolve the disputes but to assist the parties in reaching a negotiated settlement, through the determination of the applicable legal rules and their scope. However, a definitive agreement in the *River Meuse* case was not achieved until 1995, and in the *Gabčíkovo-Nagymaros* case the dispute currently remains unresolved.

The Court has also been criticized for resolving these disputes on the basis of the law of treaties and the law of State responsibility without acknowledging the emerging rules of the law of international water-courses and environmental law, in spite of the evidence submitted by the parties.

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\(^{63}\) Ibid.

\(^{64}\) Ibid.
LANDMARK JUDICIAL PRONOUNCEMENTS

F.K. Hussain

V

Union of India\textsuperscript{65}

In this case, the High Court of Kerala had to decide as to whether the withdrawl of water with electric or mechanical pumps from existing wells could cause depletion of water sources and ultimately depriving the people of potable water as ground water resources in the island of Lakshadweep are limited. This was also requested to look at it from constitutional perspective to determine as to whether the action of the administration to augment water supply by digging wells amounts to an invasion of the fundamental right to life under Article 21.

In the case under review, the petitioners challenged the scheme of the administration to increase water supply by digging wells and by drawing water from those existing wells to meet the needs of the people. The petitioners submitted that this would upset fresh water equilibrium leading to salinity in the available water resources. It was further submitted by the petitioners that that the potential for recharge was limited, and if available ground water was withdrawn, hydraulic head would be lowered and water lens, penetrated by saline water causing diminution of potable water.

The respondents countered the petitioners and submitted that with the growing need for more water, it was not possible to content with the available resources of water supply. The respondents further submitted that scheme of projected water supply was the needof the hour.

Having heard the arguments of both sides the court directed the Central Ground Water Board to investigate into various aspects raised and submit a report. The investigating team submitted its findings and held \textit{inter alia}, that "Salt water is observed around pumping centres," and suggested other means of augmenting water supply, mainly by harvesting rain water, desalination and reserve osmosis.

\textsuperscript{65.} AIR 1990 Ker 321
After making persual of the submission the Court found all agencies in agreement that existing water resources are limited, that excessive withdrawal would upset freshwater equilibrium, leading to salinity and diminution of potable water and that new sources must be identified for augmentation. The court opined that in the dispute, the focal points was that how and how much of ground water could be extracted. The Court saw a solution for the diverse concerns in the evolution of a methodology for extraction of ground water viable technically meeting the requirement as nearly as possible. The Court directed the respondents to refer the matter to the Ministry of Science and Technology and Ministry of Environment to decide on the modalities to stop withdrawal of ground water at a cut off level, to impose restrictions and introduce a system of effective monitoring at all levels.

**Pepsico India Holding Pvt. Ltd.**

V

**State of Kerala and Others**

The petitioner, *i.e.*, Pepsico India Holding Pvt. Ltd. filed the writ petition before the High Court at Kerala praying for the issuance of writ of centiorari against the Gram Panchayat Kanjikode. The factory was set up in an industrial area after obtaining clearance from Industrial Single Window clearance Board set up under the provisions of the Kerala Industrial single window clearance Boards and Industrial Township Act, 1999. The factory also got the sanction of Gram Panchayat for the construction of building and installation of 2000 H.P. electric motor on 5-5-2000. The Panchayat later issued a notice to show cause why the licence should not be cancelled due to the allegation of over exploitation of ground water by the company and the consequent shortage of drinking water. The same did not go without challenge, but the Panchayat passes the order cancelling the licence. The petitioner went to the High Court to quash the order. The petitioner has also filed I.A.No. 3089 of 2007 seeking declaration that the

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provisions of the Kerala Panchayat Raj Act, 1994 were not applicable to the Kajikode unit of the petitioner and that the Panchayat did not have any administrative Jurisdiction over the affairs of the Kanjikode unit of the petitioner after the enactment and enforcement of the Kerala Industrial Single Window Clearance Boards and Industrial Township Area Development Act, 1999. Since, the area was declared as an industrial area the provisions of the Kerala Panchayat Raj Act ceased to have application to the industrial area in question through at the time when the factory was set up, the area was not declared as an industrial area.

The Panchayat had raised the contention that excessive use of ground water by the petitioner is creating acute water shortage in the area. Under such circumstances the Panchayat had to cancel the licence as it is empowered to ensure and maintain supply of pure drinking water to the people in the Panchayat area.

The High Court did not accept the plea of the Panchayat and held, "Panchayat, in our view, has no jurisdiction in matter of issue and renewal of licence to the petitioner's factory since the legislature in its wisdom has excluded the area in question from the preview of the Panchayat Raj Act."

Nevertheless, the court adhered the apprehension voiced by the Panchayat and directed the authorities functioning under the Kerala Ground Water (Control and Regulation) Act, 2000, to examine whether petitioner was using excessive ground water so as to deplete the water source affecting the people who were living in the Panchayat area. The Court opined that the Panchayat could taken up the matter of depletion of water resources before the authorities functioning under the ground water Act and court already found that the Panchayat had no jurisdiction under the Kerala Panchayat Raj Act in the matter of issue or concellation of licence.
Rajendra Singh and Others

V

Government of NCT of Delhi and Others

This judgement relates to a river which once flowed majestically but is now gasping for breath. If this continues, time is not far off when this gift of Gods, will die an unnatural death getting buried beneath the layer of silt.

For smooth and proper conduct of Common Wealth Games, the Delhi Development Authority (DDA) undertook the construction of a structure on the bank of the river Yamuna, in Delhi, after obtaining clearance from NEERI and Expert Appraisal Committee constituted by Ministry of Environment and Forests. This project of construction has been challenged before the High Court of Delhi. The matter in question was the impact of building activity on the Yamuna, its environment, ecology and long term damage which may cause disaster. The court had to decide the question as to whether land on which the construction was made or was proposed to be made is river bed or not? The court answered this query in positive and held "no doubt is left that the site in question is on the river-bed." Construction upon which may adversely affect the environment, the river and ecology the court had found support from the findings of the Master Plan, which asserted "Apart from the main source of water supply for Delhi, it is one of the major sources of ground water recharge....."

After hearing both sides, the court passed order that a committee of experts be constituted under the chairmanship of Dr. R.K. Pachauri, comprising of four members. The Committee had been assigned the work to undertake study of the constructions, whether proposed or completed or underway on the land in question. The committee had been asked to report with in four month as to whether these constructions in whole or in part affect or are likely to affect adversely, in any manner, the ecology of Yamuna river, its ground water rechargeability or violate in any manner, the public trust doctrine. It is obvious that the court refrained to pronounce Judgement due to lack of environment expertise at its command.

67. (2009) 8 SCC 582
State of Orissa

V

Government of India and Another 68

On 30-12-1994, a meeting was held between the Chief Ministers of the States of Orissa and Andhra Pradesh and it was decided that all the available water in River Vansadhara would be shared between the two States on a 50:50 basis annually. Subsequently, the Government of Andhra Pradesh announced a new project whereby the waters of Vansadhara River were to be diverted at Katragada to a 34 km long flood flow canal for storage in Heeramandalam Reservoir to irrigate 107 lakh acres of land by utilising 19 TMC of water. It was apprehended by the State of Orissa that the said proposed project would deprive the villagers of Orissa lying on the opposite bank in the downstream from even dry-weather flow and there was also a possibility of shifting of the river course itself. Hence, the State of Orissa protested against the new project.

The said conduct of the State of Andhra Pradesh resulted in filing of a complaint under Section 3 of the Inter-State Water Disputes Act, 1956 to the Union of India. However, no action was taken by the Government of India with regard to the request made by the Government of Orissa to restrain the Government of Andhra Pradesh from going ahead with the construction of flood flow canal or to constitute a Water Disputes Tribunal under Section 4 (1) of the 1956 Act. Ultimately, the circumstances compelled the State of Orissa to move the instant writ petition under Article 32 of the Constitution. In the said petition, the State of Orissa prayed for a direction to the Government of India to constitute an appropriate Tribunal under Section 4 of the 1956 Act and thereafter refer to it the dispute relating to the construction in question on River Vansadhara by the State of Andhra Pradesh. A prayer was also made for issuing a writ in the nature of mandamus commanding the State of Andhra Pradesh to forbear from carrying on any works in respect of the project concerned.

68. (2009) 5 SCC 492
Justice, Altamas Kabir and Justice Markandey Katju affirmed that, the prayer made by the State of Orissa does not appear to be unreasonable since the dispute between the two States does not confine itself to the construction of the side channel weir and the flood flow canal, but primarily it involves the unilateral decision taken by the State of Andhra Pradesh to divert the river waters to the State of Andhra Pradesh, which could possibly disturb the agreement between the two States to share the waters of the river equally. Such a dispute must be held to be a water dispute within the meaning of Section 2 (c) (i) of the 1956 Act.

Further, the time-frame of one year inserted into Section 4 (1) of the 1956 Act [vide Inter-State Water Disputes (Amendment) Act, 2002] for constitution of a Water Disputes Tribunal is also a reason to grant the reliefs prayed for by the State of Orissa since its complaint is pending from 13-2-2006. Accordingly, the writ petition is allowed and the Central Government is directed to constitute a Water Disputes Tribunal within a period of six months from date and to refer to it the dispute concerned. Pending constitution of the Water Disputes Tribunal and reference of the above dispute to it, the State of Andhra Pradesh will maintain status quo as of date with regard to the construction in question. Once the Tribunal is constituted the parties will be free to apply for further interim orders before the Tribunal.

Notwithstanding the powers vested by Section 9 of the 1956 Act in the Water Disputes Tribunal to be constituted by the Central Government under Section 4, which includes the power to grant the interim order, the Supreme Court under Article 32 of the Constitution has ample jurisdiction to pass interim orders preserving the status quo till a Tribunal is constituted which can then exercise its powers under Section 9.

As regards the bar under Section 11 of the 1956 Act is concerned, it will come into play once the Tribunal is constituted and the water dispute is referred to the said Tribunal. Till then, the bar of Section 11 cannot operate, as that would leave a party without any remedy till such time as the Tribunal is formed, which may be delayed.
Further, Justice Markandey Katju observed that, despite having immense reservoirs of water in the form of the Himalayas in the North and the Arabian Sea, Indian Ocean and Bay of Bengal in the West, South and East of India, there are water shortage everywhere often leading to riots, road blocks and other disturbances and disputes for getting water. In Many cities, in many colonies people get water for half an hour in a day, and sometimes not even that e.g. in Delhi, Tamil Nadu, Rajasthan, U.P., north-east, etc. In large parts of rural areas there is shortage of water for irrigation and drinking purpose. Rivers in India are drying up, groundwater is being rapidly depleted, and canals are polluted. Yamuna in Delhi looks like a black drain. Several perennial rivers like Ganga and Brahmaputra are rapidly becoming seasonal. Rivers are dying or declining, and aquifers are getting overpumped. Industries, hotels, etc. are pumping out groundwater at an alarming rate, causing sharp decline in the groundwater levels. Farmers are having a hard time finding groundwater for their crops e.g. in Punjab. In many places there are serpentine queues of exhausted housewives waiting for hours to fill their buckets of water. In this connection John Briscoe has authored a detailed World Bank Report, in which he has mentioned that despite this alarming situation there is widespread complacency on the part of the authorities in India.

Often there are disputes between states in India relating to the waters of inter-State rivers, as in the present case. To resolve these disputes Parliament has enacted the Inter-State Water Dispute Act, 1956, which was amended in 2002. This Act has provided for a mechanism for resolving such water disputes between States through Tribunals Constituted under Section 4 of the Act.

Experience has shown that while such Tribunals have played a role in resolving such disputes to a certain extent, but they have not, and cannot resolve the water shortage problem permanently. For instance, if there is a dispute between State A and State B relating to water, and if the Tribunal decides in favour of State A then the farmers and persons living in urban areas in State B often resort to agitations which may even lead to violence. Hence the real solution of the water shortage problem in the country can only lie in utilising the immense water reserves in the sea and in the snow mountains by scientific methods. Rain water must also be scientifically managed.
It is indeed sad that a country like India which solved the problem of town planning 6000 years ago in the Indus Valley Civilisation and which discovered the decimal system in Mathematics and plastic surgery in medicine in ancient times, and is largely managing Silicon Valley in USA today has been unable to solve the problem of water shortage till now. In my opinion there is no dearth of eminent scientists in the field who can solve this problem, but they have not been organised and brought together and not been requested by the Central and State Governments to solve this problem, nor given the facilities for this. I, therefore, recommend to the Central Government to immediately constitute a body of eminent scientists in the field who should be requested to do scientific research in this area on a war footing to find out scientific ways and means of solving the water shortage problem in the country. This body of scientists should be given all the financial, technical and administrative help by the Central and State Governments for this purpose. They should be requested by the Central and State Governments to do their patriotic duty to the nation in this connection, and by scientific research to find out the ways of solving the water shortage problem in the country. The help and advice of foreign scientific experts and/or Indian scientists settled abroad who are specialised in this field may also be taken, since the solution to the problem will not only help India but also foreign countries which are facing the same problem, some of which may already have progressed significantly in this area.

In particular this body of scientists should be requested to perform the following tasks:

(i) To find out an inexpensive method or methods of converting saline water into fresh water.

(ii) To find out an inexpensive and practical method of utilising the water, which is in the form of ice, in the Himalayas.

(iii) To find out a viable method of utilising rain water.

(iv) To utilise the flood water by harnessing the rivers so that the excess water in the floods, may instead of causing damage, be utilised for the people who are short of water, or be stored in reservoirs for use when there is a drought.
In the end Justice, Katju quote the couplet of the great Hindi poet, Rahim:

“रहिमन पानी रखिये, बिन पानी सब सून
पानी गये ना ऊबरे, मोती, मानुष, चून।”

"Rahiman Paani raakhiye, bin panni sab soon
Panni gaye na oobrey, moti, manush, choon."

**Mullaperiyar Environmental Protection Forum**

*V*

**Union of India and Ors.**

Mullaperiyar reservoir is surrounded by high hills on all sides with forest and is a sheltered reservoir. The orientation of the dam is such that the direction of wind in the south west monsoon would be away from the dam. It is said that for past 100 years, Tamil Nadu Government Officers have been approaching the reservoir during the flood season only from Thekkady side in a boat and have not noticed any significant wave action.

The main question to be determined in these matters is about the safety of the dam if the water level is raised beyond its present level of 136 ft.

An agreement dated 29th October, 1886 was entered into between the Maharaja of Travancore and the Secretary of State for India in Council whereunder about 8000 acres of land was leased for execution and preservation of irrigation works called ‘Periyar Project.’ In pursuance of the said agreement, a water reservoir was constructed across Periyar river during 1887-1895. It is known as Mullaperiyar Dam consisting of main dam, baby dam and other ancillary works.

According to the petitioner, there was leakage in the gallery of the dam which affected its security and, therefore, the water level was stopped at 136 feet. In view of apprehension expressed in the light of leakage, in the year 1979 the water level was allowed upto 136 ft. instead of 152 ft.

The case is important from the constitutional point of view because the jurisdiction of the Supreme Court was in question subject to the provisions of Inter State Water Dispute Act.

It was decided by the Supreme Court in this case that the matter before the Court in the impugned matter is whether the dam would be safe if the water level is increased beyond the present level. Thus this matter is not covered under the Inter State Water Dispute Act and thus is a fit case of jurisdiction for the Supreme Court.

Whether the jurisdiction of this Court is barred in view of Article 262 read with Section 11 of the Inter-State Water Disputes Act, 1956?

Article 262 provides that Parliament may by law provide for the adjudication of any dispute or complaint with respect to the use, distribution or control of the waters of, or in, any inter-State river or river valley. The jurisdiction of the Courts in respect of any dispute or complaint referred to in Article 262 (1), can be barred by Parliament by making law. The Inter-State Water Disputes Act, 1956 was enacted by Parliament in exercise of power under Article 262 of the Constitution. Section 11 of the said Act excludes the jurisdiction of Supreme Court in respect of a water dispute referred to the Tribunal. Section 2 (c) of this Act defines 'water dispute'. It, inter alia, means a dispute as to the use, distribution or control of the waters of, or as to the interpretation or implementation of agreement of such waters.

In the present case, however, the dispute is not the one contemplated by Section 2 (c) of the Act. Dispute between Tamil Nadu and Kerala is not a 'water dispute'. The right of Tamil Nadu to divert water from Peryar reservoir to Tamil Nadu for integrated purpose of irrigation or to use the water to generate power or for other uses is not in dispute. The dispute is also not about the lease granted to Tamil Nadu in the year 1886 or about supplementary agreements of 1970. It is also not in dispute that the dam always had and still stands at the height of 155 ft. and its design of full water level is 152 ft. There was also no dispute as to the water level till the year 1979.
M.C. Mehta

V

Kamal Nath & Ors.\textsuperscript{70}

The facts of the case were that a motel named Span Motels owned majorly by the family of Kamal Nath, the then Minister in the cabinet interfered with the natural flow of the River Beas and the interference thus created scandalised the lives of the villages on the other side of the river making the other bank more prone to landslides.

In this case, a petition was filed on behalf of the citizens in two villages of the area of Kulu. The petition alleged that Kamal Nath took advantage of his position in the government and got the act environmentally checked.

The court considered three principles in this particular case namely Doctrine of Public Trust, Precautionary Principle and Polluter Pays.

Applying doctrine of Public Trust, the court held that though the river channel of almost 1000 m falls within the land which has been leased out to the respondents under a valid lease agreement. But a river would still be not a property of the leasee and would fall with government. Thus the unguided act of changing the course of the river was adverse to the environment, to the ecology and also to the villagers living on other side of the river.

As per the polluter pays principle, the river was polluted changing its original course and thus the respondents in this case shall pay for the damages.

The court considering the relevant documents and technical report of the Central Pollution Control Board enumerated various activities of Span Motels considered to be illegal and constituted "callous interference with the natural flow of Beas." The court held that this resulted in degradation of environment. Span Motels "interfered with the natural flow of the river by trying to block the natural relief or spill channel of river. The lease deed granted in favour of Motel was held quashed by the court. It was held by the Hon'ble Supreme Court that Motel to pay compensation by way of costs for restitution of environment and ecology of the area."

TN Godvaraman Thirumulpad (99) V Union of India & Ors.\textsuperscript{71}

The common issue that arose for consideration was the validity of the recommendations made by the Central Empowered Committee (CEC) in its report dated 20.3.2006 which concerned implementation of the notification dated 4.10.1999 issued by the State of Andhra Pradesh under S. 26 of the Wild Life (Protection) Act 1972 (1972 Act) whose validity had been upheld by the High Court. The impugned recommendations of the CEC / notification dated 4.10.1999 contained directions for demolishing of all the tanks constructed inside Kolleru wild life sanctuary in a time bound manner as indicated therein. CEC had also issued directions prohibiting use or transportation of inputs for pisciculture in said sanctuary. Upholding the said notification /recommendations, the Supreme court held : Under the impugned notification dated 20.3.2006 the right of the local fisherman to do fishing by traditional methods is not taken away, but aquaculture in the form of any tank is prohibited. Only those who had illegally constructed bunds and who were using harmful manures have prevented from doing so by reasons of the said notification to balance the interest of development versus those of the environment. If such encroachments are not removed immediately the right of the farmer in the upstream mandals to do cultivation would be in jeopardy, consequently, it is their right to live, guaranteed under article 21 of the Constitution which is violated. Further wherever pisciculture existed in private land as on the date of notification, fishing by traditional method is permitted without causing environment hazard, till the government acquires such private land under the said 1972 Act. The right to do traditional agriculture without using pesticides and chemicals is also permitted under the notification. Lastly the encroachment activities are directed to be stopped, forthwith. The final notification, therefore, seeks to regulate, in public interest and in the interest ecology, activities, such as aquaculture, pisciculture, prawn culture and shrimp culture, basically to preserve the identity of lake which otherwise is likely to become extinct within 12 years.

\textsuperscript{71} (2006) 5 SCC 47.
Section 29 of the 1972 Act specifically prohibits commercial activity in side wildlife sanctuary. It prohibits commercial activity which diverts stops or increases the flow of water into or outside the sanctuary. With the issuance of the notification dated 4.10.1999 formation of fish tanks for aquaculture or for any other purpose is prohibited as they obstruct free flow of water both into or outside the Sanctuary.

The argument advanced on behalf of the objectors that mud bund formation is compatible within traditional fishing practice and, therefore, should be allowed to continue to exist, has no merit. When bund is formed in sanctuary or a lake it seeks to encapsulate an area which in turn obstructs free flow of water in the lake bed area. Formation of bund reduced the retention capacity of the lake. These formations, if allowed, would destroy the lake. In view of the provisions of S. 26 A read with S. 29 all commercial activities which seek to destroy ecology, stands prohibited. Compatibility of mud bunds with the traditional fishing practice in a lake is a concept different from formation of mud bund inside the Sanctuary. Notification dated 4.10.1999 does not cover the entire area of the lake. Out of 901 sq Km of Kolleru lake, an area of 308 sq km alone is notified as sanctuary. This indicates that the Govt has balanced the needs of sustainable development with the livelihood of persons surviving on the resource of this lake. Lastly, the preliminary notification was issued as far back as in 1995 under S. 18 of the Act. Therefore, the objectors were put to notice about the future course of action. Therefore, it is open to the objectors now to say that they have made huge investment which would be lost if the report CEC is implemented.
Perumatty Grama Panchayat

v

State of Kerala

The point that arises for consideration in this case in whether a Grama Panchayat can cancel the licence of a factory manufacturing non-alcoholic beverages on the ground of excessive exploitation of ground water. The brief facts of the case are the following:

The petitioner is Perumatty Grama Panchayat. The 2nd respondent Company is running a factory at Moolathara in Perumatty Grama Panchayat. Its main products are soft drinks and bottled drinking water. The said factory was established after obtaining permission from the Panchayat. It started commercial production in March, 2000 after obtaining license from the petitioner Panchayat. The main raw material used in the manufacture of beverages is water. Substantial portion of the need for water is met by exploiting ground water through bore-wells. The people in the locality raised objection against the exploitation of ground water by the Company. Therefore, the Panchayat passed Ext.P.1 resolution on 7-4-2003, deciding not to renew the licence of the factory. The translation of that resolution reads as follows:

"As the excessive exploitation of ground water by the Coca-Cola Company in Plachimada is causing acute drinking water scarcity in Perumatty Panchayat and nearby places, it is resolved in public interest, not to renew the licence of the said Company. It is also resolved to inform about this decision to the Hon'ble Chief Minister of Kerala and the Hon'ble Minister for Industries, Kerala".

This Court allowed a Panchayat to grant licence to a small drinking water unit, provided the Ground Water Department reports that the functioning of the unit will not affect the availability of drinking water in the neighbourhood. The said direction cannot be allowed in this case, in view of the huge quantity of water extracted. Accordingly, the following directions are issued:

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72. 2004 (1) KLT 731
1. The 2nd respondent shall stop drawing ground water for its use after one month from today.

2. The Panchayat and the State shall ensure that the 2nd respondent does not extract any ground water after the said time limit. This time is granted to enable the respondent to find out alternative sources of water.

3. The Panchayat shall renew the licence and shall not interfere with the functioning the Company if it is not extracting ground water; and is depending for its water needs on other sources.

4. The Panchayat shall, with the assistance of the Ground Water Department, find the quantity of water that a land owner with 34 acres of land would extract for domestic and agricultural purposes. At the time of hearing, the learned Counsel for the Panchayat raised a serious objection to the direction of the Government to conduct the study the Ground Water Department and other official agencies. The complaint of the learned Counsel was that the reports of such agencies lack credibility. People look upon those reports with suspicion. It is unfortunate that we have to make arrangements for 'guarding the guards'. I think, the media can take that role. Ground Water Department shall hold the inspection with notice to the Panchayat the 2nd respondent. It shall publish the details of the instruments used and divulge to the parties, the scientific principles based on which they work. The readings data collected shall be furnished to both sides. The media shall be permitted to watch the inspection. The 2nd respondent shall permit the accredited media persons to accompany the officials of the Ground Water Department and the Panchayat. Though their presence may be inconvenient or irritating to some, it will sub serve public interest. Transparency will lend credence to the reports. Sunlight is the best disinfectant.

5. The 2nd respondent shall be permitted only to draw that much quantity of water ascertained as per direction No. 4 above and that too, from open dug wells transparent manner, subject to inspection and monitoring by the Panchayat and Ground Water Department.

6. The arrangement for drawing water and its monitoring should be done in a transparent manner with access to the Panchayat and the media.
7. The Panchayat shall ensure that all other wells including the bore-wells of the respondent are closed down after one month. Ext.P3 order of the Panchayat and Ext.P6 order of the Government are mod to the above extent. The Writ Petition is disposed of as above. There will be no order as to costs.

Concerning the power of the panchayat to prohibit groundwater extraction by private individuals and companies it its jurisdiction. In the absence of express statutory provision, the Court held that, the panchayat has no authority to prohibit groundwater extraction by a private individual or company from its land. The Court rejected the scope of the Public Trust Doctrine as a theoretical basis to uphold the power of the panchayat and upheld the right of the landowner to extract groundwater from his land as a basic right that could be restricted only through express statutes.

**Hindustan Coca-Cola Beverages (P) Ltd.**

V

**Perumatty Grama Panchayat**\(^{73}\)

The Writ Petition had been filed by a local authority (Perumatty Grama Panchayat) challenging order passed by the Government. The above said order came to be passed on an adjudication, as directed by this Court at an earlier round of the proceedings. This had arisen, when the Panchayat refused to renew a licence, which had been earlier issued, facilitating an industrial establishment to manufacture branded items of beverages.

During the pendency of W.P. (C) No. 34292 of 2003, the Panchayat had taken further steps for cancelling the licence granted to the company and such proceedings had been subjected to an appeal, as envisaged under Section 276 of the Kerala Panchayat Raj Act. The concerned industrial unit is engaged in the business of manufacturing, storage, distribution and sale of aerated and carbonated non-alcoholic beverages, fruit beverages and Packaged Drinking Water. It is predominantly a water based industry. According to the company, they have set up units and factories in various parts of India, and one such factory is at Moolathara Village in Perumatty Grama Panchayat.

\(^{73}\) 2005 (2) KLT 554
An application for renewal of the licence, for the year 2003-04, had been duly presented with in prescribed time. But, the company was informed that the Panchayat had decided not to renew the licence consequent to a resolution of the Panchayat. Exploitation of excess ground water occasioned and there is serious shortage of drinking water. Ecological problems also were seen. Further reason pointed out was that the Panchayat was also noticing that certain organisations were agitating over the functioning of the factory.

A reply was filed by the company against the notice. They apprehended that it is a postdecisional notice and amounted to violation of the principles of natural justice. A formal hearing had been offered, and thereafter, the Panchayat had cancelled the licence granted to the company. It had been directed that the activities are to be stopped from 17.5.2003, an appeal had been filed before the Government by the Company, challenging the steps contemplated by the Panchayat, seeking guidance and interference, as briefly referred to earlier. In the meanwhile, an Original Petition also had been filed. After hearing the parties, finding that a decision after hearing the explanation was yet to be passed, the Court had, by order dated 22.4.2003, directed the parties to maintain status quo till 16.5.2003 or till the Panchayat takes a decision, whichever is earlier.

According to the Government, the circumstances called for a detailed independent investigation and consequently had issued the direction: "In the above circumstances Government hereby order that the Perumatty Grama Panchayat will constitute a team of experts from the departments of Ground Water and Public Health and the State Pollution Control Board to conduct a detailed investigation into the allegations levelled against the Company and its products. The Panchayat will take a decision based on this independent investigation as to whether the licence granted to the Company should be renewed or cancelled. The Panchayat will get the enquiry conducted by these agencies and come to a just and fair conclusion based on this enquiry within three months from the date of receipt of this order. All enquiries and
investigations should be conducted with notice to the appellant Company. Till the Panchayat takes a final decision on the cancellation of the licence issued to the Company, the stay granted by Government on 12.6.2003 against the order of cancellation of licence by the Panchayat will continue in operation. Now, coming to the present case, at the outset, it has to be held that the order of the Panchayat to close down the unit on the finding of excessive extraction of ground water is unauthorised. The panchayat can at best, say, no more extraction of ground water will be permitted and ask the Company to find out alternative sources for its water requirement. So, the Government's order to the extent it interfered with the closure of the unit has to be upheld. Even in the absence of any law governing ground water, I am of the view that the Panchayat and the State are bound to protect ground water from excessive exploitation.

A person has the right to extract water from his property, unless it is prohibited by a statute. Extraction thereof cannot be illegal. We do not find justification for upholding the finding of the learned Judge that extraction of ground water is illegal. It is definitely not something like digging out a treasure-trove. We cannot endorse the finding that the company has no legal right to extract this 'wealth'. If such restriction is to apply to a legal person, it may have to apply to a natural person as well. Abstract principles cannot be the basis for the Court to deny basic rights, unless they are curbed by valid legislation.

In view of our observations and findings, we hold that the appeal proceedings before the statutory Tribunal, filed by the Company under Section 276 of the Panchayat Raj Act, is to be closed as having become infructuous, and a formal request is to be made by the Company in that regard, on the authority of this judgment. As far as the refund of deposit of cash made, in view of the order of this Court dated 7.1.2004, on application being filed, the Registry is to place the matter before the Court, and obtain further orders. 56. The three Writ Appeals and the Writ Petition are disposed of as above.
Mrs. Susetha

V

State of Tamil Nadu and Ors. 74

The Appellant claims herself to be a member of the Okkiam Thoraipakkam Panchayat Union where a temple tank exists which admittedly was lying in disuse. It was in fact an abandoned one. The Panchayat took a decision of constructing a shopping complex for the purpose of user thereof for resettlement of those persons who were displaced due to expansion of a highway project. The State of Tamil Nadu also issued a Government Order permitting constructions of a shopping complex which was challenged by the appellant in the Writ Petition.

By an order dated 06.12.2005, the High Court, having regard to the stand taken by the Respondents herein in their counter affidavit, appointed the Director, Centre for Water Resources, Guindy, Chennai, as the Commissioner to inspect the tank land and submit a report in regard to the condition thereof. Pursuant to the said direction, an inspection was and a report was sent to the High Court and relying on the same, a Division Bench of the Madras High Court by reason of the impugned order dismissed the writ petition filed.

The Counsel appearing of the Appellant submitted that keeping in view the water shortage faced by the public in general, the High Court committed a manifest error in permitting construction of a shopping complex on a water body. It was argued that the State Government was enjoined with a duty to preserve the tank by taking all possible steps both by way of preventive measures as well as removal of unlawful encroachments and not to use the same for commercial purpose.

The respondent State of Tamil Nadu supported the impugned judgment contending that the tank in question being an artificial tank and not a natural water resource, all considerations relevant for passing an appropriate order having been taken note of by the High Court. The Gram Panchayat, urged that the Appellant herein is not its member of the Gram Panchayat and there has been no shortage of water in or around the tank. The tank in question was

admittedly a temple tank. It was not a lake. There was no inlet or outlet facilities. It was also prone to encroachments. In its report the Centre for Water Resources, upon inspection of the tank, drew the following conclusions:

(i) The catchment area available is 26,781 m². The present capacity of the tank is 1,861 m³. The annual runoff potential is 8,034 m³.

(ii) There is no specific inlet or surplus channels for the temple tank.

(iii) The water from the tank is not directly being used by the public/cattle or for any other purpose.

(iv) The water contained in the tank is unfit for human consumption.

(v) The tank area has not been maintained properly over the years and has been used as a dumping yard.

(vi) When such water bodies are not maintained property, they are likely to be encroached.

(vii) From the interaction with the Public, the team learnt that but for the recent heavy rains, the tank would have remained dry.

(viii) The tank area has no access from three sides namely South, North and Eastern sides and could be accessed only from the Old Mahabalipuram road side.

(ix) The tank does not contain any built up structures like steps to enter, etc. but contains building debris dumped into it.

(x) The area is surrounded by three other bigger sized tanks, two in the East and one in the west, which will be recharging the ground water in that area and the recharge contribution of this temple tank will be insignificant.

(xi) The Temple tank is in a dilapidated condition.

It is also not in dispute that the shops and other dwelling units abutting the said highway were subject matter of acquisition proceedings and the affected families were to be provided alternate sites, shop or dwelling units under the rehabilitation and settlement scheme. The State stated it is in public interest that the proposed shopping complex is allowed to be constructed.
Retention of water bodies is envisaged not only in view of the fact that the right to water as also quality life are envisaged under Article 21 of the Constitution of India, but also in view of the fact that the same has been recognized in Articles 47 and 48-A of the Constitution of India. Article 51-A of the Constitution of India furthermore makes a fundamental duty of very citizen to protect and improve the natural environment including forests, lakes, rivers and wild life.

Recently, in T.N. Godavaraman Thirumulpad (99) V Union of India and Ors. (2006) 5 SCC 47, this Court again highlighted the importance of preservation of natural lakes and in particular those which are protected under the Wild Life (Protection) Act, 1972. We may, however, notice that whereas natural water storage resources are not only required to be protected but also steps are required to be taken for restoring the same if it has fallen in disuse.

The Respondents categorically denied and disputed that there is any water shortage in the village. The village is situated on both sides of the National highway. It is situated near a sea and having five water tanks in or around therein. It is, therefore, difficult to accept that there had been acute water shortage in the village. The tank in question is not a natural tank. Only rain water could be collected in it. It has been a dumping ground for a long time. Although there is no material on records to show as to since when it has been fallen in disuse, indisputably the tank in question is in a dilapidated condition for a long time and has been used as a dumping yard and sewage collection pond. In our opinion, thus, it is not a case where we should direct its resurrection.

The High Court in its judgment has taken into consideration all relevant factors. It was not pointed out that essential features or other relevant principles of law were not taken into consideration by the High Court in passing the impugned judgment. We would, however, direct the State and Gram Panchayat to see that other tanks in or around the village are properly maintained and necessary steps are taken so that there is no water shortage and ecology is preserved. For the foregoing reasons, we do not find any reason to interfere with the impugned judgment. The appeal is dismissed.