Chapter V

Constitutional and Legislative Scheme for Settling Inter-state River Water Disputes in India

The focus of this chapter and the subsequent two chapters is to trace the appropriate method of dispute settlement in case of inter state river water dispute in India, and to evaluate such methods in the light of river water dispute settlement mechanisms so far adopted in other federations.

Dispute or Conflict is an essential form of social relationship and cannot be excluded from social life. It is also an inevitable rule that behind each dispute there must have a controversial subject matter. Natural resources such as land, mineral wealth and water are the classical example of such subject matter. Natural resource conflict over water is an age old phenomenon in human society and history. Legend has it that the Buddha intervened in a terrible water war between two communities in ancient India, the Sakiyas and Koliyas over the sharing of the river Rohini, brought both sides together and ended the long drawn discord.¹ Modern period also is not free from such conflict. Like many instances of water resource conflicts at global level, recently a bitter dispute between Tamil

Nadu and Karnataka over the sharing of the Cauvery River Water in India, exposes the fact that natural resource conflict over water is almost a universal and regular event both at global as well as municipal level particularly where the form of Government is federal because, States, as right bearing unit in a federation are competitive in attitude and always conscious to maintain state right leading to inter state conflict.

Water disputes may have both a collective as well as an individual dimension. These may arise amongst the beneficiaries or between the beneficiaries or between Government and Government where the form of Government is federal. Now all rivers are Government property. Therefore, in almost all Cases of river water disputes Government becomes one of the parties and in a federal form of Government in case of cross frontier river, state Government becomes the parties. If any affected individual or corporation of a state want to assert their claim against another state or individual or corporation of another states, such assertion or claims could be taken care by the respective state.

It is true that conflict cannot be excluded from social life but that dose not mean that conflict is a perpetual affairs. Practically speaking, co-operation crossed by conflict marks society whereever it is revealed. Co-operation and conflict are two basic processes of

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social life. In a society, admixture form of conflict and peace prevails. Therefore, though no system or society can completely eliminate conflict, but it can keep it at a lowest possible level adopting various methods of conflict resolution.

To minimise the conflict, different legal system have developed different methods. When such methods are analysed, they fall into two broad category: one involves agreement between the states based on co-operative approach and the other category provides adjudicatory settlement based on contentious approach. First category comprises the methods like negotiation, mediation, conciliation and second category comprises the methods like judicial and quasi judicial method including arbitration.

All these methods have been adopted and practised in India to resolve her inter-state water disputes. But all these methods are not necessarily the product of the constitution or statute. Few of them had developed and emerged in India long before the adoption of the present constitution and subsequently got recognition either by the Constitution or by the statutes and few of them still not recognised but deserve recognition.

So, to get at the total picture of the origin, development and nature of such methods of settlement of water dispute in India, at the outset, analysis should be made with constitutional scheme and statutory arrangement relating to such dispute settlement method because any discussion related to federal problem demands prior
examination of the constitutional and legislative framework that have been adopted on the basis of constitutional provisions to tackle and remove such a problem. The constitutional and legislative scheme concerning with the problem of water dispute in post constitutional period of India may be analysed in three parts as given below:

A. The laws in force immediately before the commencement of the constitution;
B. Constitutional Provisions;
C. The laws enacted under the authority of the constitution or post-constitutional legislation.

A. The laws in force immediately before the commencement of the constitution

Under the Government of India Act, 1915-1919 the structure of the Government was unitary. Hence, the question of distribution of legislative powers relating to water resources and dispute between the central and the Provincial legislatures did not arise. However, item No. 7 of part II of the schedule to rules 3 of the devolution rules made under scheme 45-A of the GOI Act, 1915-1919 which became the forerunner of Entry 19 of List II (Provincial list) and Entry 17 of list II (State list) of seventh schedule respectively of GOI Act, 1935 and the Constitution of India 1950 included ‘Water’ except interprovincial concern in the provincial subject. At that time matters of dispute between different
political unit in the country were resolved either by mutual
agreements or by the orders of the secretary of state who decided
each case on its own merit.\(^3\)

The federal structure in India got evolved only under the
Government of India Act, 1935. This Act for the first time,
provided for settlement of water dispute under sections 130, 131
and 132, read with scheme VII, list II and Entry 19 of the
provincial legislative list.\(^4\)

Under Section 130 of the Government of India Act, 1935, a province or a princely state, whose interests were
prejudicially affected in the water supplies from a natural source
due to the action of the other province or princely state, could
complain to the Governor General. The next section i.e., section
131 provided that except for complaints of trivial nature, the
Governor-General was required to refer any such complaints to a
commission for investigation and report. After considering the
report, he was to give such decision as he deemed proper.
However, before he gave the decision any province or the princely
state affected could require him to refer the matter to his majesty in
council who could give such decision as he deemed proper.
Moreover, section 133 of the Government of India Act, 1935
barred the jurisdiction of federal courts in regard to such dispute.

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Apart from these provisions in the main body of the Government of India Act, 1935, there was an entry 19 of List II (provincial legislative list) which provided that the water, that is to say, water supplies irrigation and canals, drainage and embankment, water storage and water power are the subjects falling within the sole legislative competence of the provinces.

From the scheme of the Government of India Act, 1935 pertaining to interprovincial water dispute and power of the provincial and central legislature, few important feature may be drawn:

a. The words 'natural source of supply' as used in section 130 of the Government of India Act, 1935 has a very wide meaning. It includes flowing waters as well as waters collected in natural tanks. The definitions can even be extended to ground water as the words refer to the source only and not to the methods of extraction or the usage. But the word 'natural' excluded man made systems like canals from the Act.

b. The Government of India Act, 1935 itself provided a machinery for adjudication of water dispute. Similarly, the Act itself barred the jurisdiction of courts in regard to such dispute without banking upon any other statutes.

c. There was no entry in the federal list of the 1935 Act relating to water supply, irrigation etc. No longer was the
Central Government directly concerned with the development irrigation except when a province or a princely state raised a dispute over the development of a project in another province or state and the dispute could not be settled by mutual negotiations leading to agreement. In otherwords, the Central Government’s legal competence in respect of irrigation and water course to be confined to interstate dispute.\(^5\)

### B. Constitutional provisions

At the time of the drafting of the new constitution of India the pertinent provisions regarding water dispute were contained in draft Articles 239-242 of the draft constitution including draft Article 242 (a) which was subsequently proposed by Dr B.R Ambedkar as an amendment of Article 242 on 9th September, 1949. Article 239 to 242 of the draft constitution of India appeared under the heading “Interference with Water Supplies”.

For the settlement of interstate water dispute, the draft Constitution of India through draft Articles of 239 to 242 initially contained identical provisions of the 1935 Act based on presidential action on the assumption that dispute regarding water may be very rare.\(^6\) But subsequently Dr. Ambedkar moved an amendment proposing the necessity for a permanent body to deal

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\(^{5}\) Ibid.

\(^{6}\) M.V.V. Ramana, Inter-State River Water Disputes in India, Orient Longman, Madras, 1992, P-55
with the disputes because it was expected that there would be an increase in the number of interstate water dispute consequent on full exploitation of interstate river for increasing the irrigation and power potential in independent India. The new draft Article proposed by Ambedkar also left the parliament to make laws for the settlement of dispute without providing any dispute settlement machinery by the constitution itself. Here it is to be worth noting that this draft Article 242(a) proposed by Ambedkar as reproduced below is the forerunner of Article 262 of the Indian Constitution adopted in 1950.

After examining the historical development of sections 130 to 134 of the Government of India Act, 1935 and Article 262 of the present Indian Constitution, it is appropriate now to analyse the core provisions of the Indian Constitution pertaining to water dispute.

Part XI of the Constitution deals with “Relations between the Union and the States” and Chapter II of this part relates to

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7 C.A.D. 1187
8 242 (a) "Adjudication of disputes relating to waters of Inter-State river or River Valleys. (1) Parliament may by law provide for the adjudication of any dispute or complaint with respect to the use, distribution or control of the Waters of, or in, any inter-state river or river valley.

(2) Notwithstanding anything contained in this Constitution, parliament may, by law, provide that neither the Supreme Court nor any other Court shall exercise jurisdiction in respect of any such dispute or complaint as is referred to in clause (1) of this Article" CAD Vol-IX. 1187.
“Administrative Relations”. Article 262 contained in part XI, Chapter II, reads as follows.

Disputes relating to waters

262 Adjudication of disputes relating to waters of inter-state rivers or river valleys

1. parliament may by law provide for the adjudication of any dispute or complaint with respect to the use, distribution or control of the waters of, or in, any inter-state river or river valley.

2. Notwithstanding anything in this Constitution, parliament may by law provide that neither the Supreme Court nor any other Court shall exercise jurisdiction in respect of any such dispute or complaint as is referred to in clause (I)  

These provisions clearly reveal that the text of Article 262 is the reproduction of the final version of the draft Article 242(a) with a minor verbal deletion, and with the addition of the heading “Disputes relating to Waters”.

9 The Constitution of India. The Government of India, Publication Division, Delhi, 1951. Article 262.
The other relevant provisions of the constitution are Entry 56 of list-I (Union List) and Entry 17, of List-II (State List) of the Seventh Schedule.

Entry 56, list I runs thus

“Regulation and development of inter-state rivers and river valleys to the extent to which such regulation and development under the control of the Union is declared by parliament by law to be expedient in the public interest”.

Entry 17, List-II reads as

“Water, that is to say, water supplies, irrigation and canals, drainage and embankments, water storage and water power subject to the provisions of entry 56 of List I”.

The Constitutional core provisions pertaining to the water dispute and its settlement procedure reveal a number of important features which are as follows:

a. Constitutional core provisions have relevance with water dispute in two different ways. Whereas, Article 262 unfolds the powers of the parliament pertaining to “adjudication of dispute relating to waters of inter-state rivers or river valleys”, the two legislative entries, have relevance for determining the dimensions and scope of

\[10\] Id. Seventh Schedule. Entry 17, List II. Entry 56, List I.
the respective jurisdictional competency of the Union or
the states in respect of water in general and regulation
and development of inter-state river and river valley in
particular.

b. The constitution itself does not provide for a machinery
for adjudication of water disputes. It leaves it to
parliament by law, to make such provisions as it think fit
for adjudication of such dispute and complaint. The
constitution further empowers parliament to decide and
provide by law whether jurisdiction of the Court is to be
barred.

c. Article 262 does not put any fetters upon the power of the
parliament regarding the parties. Parties to such dispute
can be states, union territories or any legal persons
including corporation or even individuals whose interest
are affected in the process of use, distribution and control
of the waters of the concerned inter-state rivers or river
valleys. However, the subject matter of dispute
mentioned in Article 262, i.e., distribution and control of
the water of inter-state river and river valleys suggests
that parties should be state only. If any individual or
corporations wants to be party, then they should come
through respective states. Also from the interpretation of
the Article 262, it can be said that the parties need not be
the concerned riparian state only. Constitution under
Article 262 has given broad powers to the parliament to determine and delimit the jurisdiction of the law made under that Article.

d. Article 262 though liberal in respect of parties but specific in respect of subject matter of dispute. By virtue of interpretation of Article 262, it may be said that the entire regulation and control of the intra-state river and river valleys will not be included for the purpose of such dispute and hence the disputes should be limited only to the "use, distribution and control of the water", of the concerned inter-state rivers or river valleys.

e. Under the constitutional core provisions, i.e., under seventh schedule, the state’s legislative power over water is made subject to parliament’s power under entry 56 of list I. It is because that unlike entry 56, list I, the expression ‘Water’ in entry 17, list II is not qualified by the prefix ‘inter-state’. Therefore, though the state legislature have full powers to legislate on all matters mentioned in Entry 17, list II, including their regulation and development even if the source of water is an inter-state river or river valleys within the territory of a state. However, parliament, may, by making the requisite declaration in public interest in terms of entry 56 of list I, enact a law for the regulation and development of such inter-state rivers, and river valleys under the control of
the union. The parliamentary law would, to the extent of its operation, have the effect of ousting the power of the state legislature under Entry 17 of List II.

f. Constitution under Article 262 has considered the inter-state river water dispute as a special class of dispute which is a non legal one. Therefore, it should be resolved not by the supreme court under Article 131 but by some sort of adjudicatory body like Tribunal. Also, Constitution under Article 262 has only prescribed adjudicatory method for resolving dispute excluding other non adjudicatory method.

C. The laws enacted under the Authority of the Constitution or Post Constitutional Legislation

By virtue of powers vested in it under Entry 56 of list I of Seventh Schedule, read with Article 262 of the Constitution, the parliament enacted the River Boards Act, 1956 (No. 49 of 1956), which, in terms of section 4 authorised the Union Government to establish, on the advise of a State Government or otherwise, River Boards for advising the interested Governments regarding regulation and development of inter-state rivers or river valleys within their areas of operation and, particularly advising them in
relation to the co-ordination of their activities with a view to resolving conflicts among them and to achieve maximum results in respect of the measures undertaken by them in the concerned inter-state river or river valley, for the purpose of, inter alia, conservation, control and optimum utilisation of the concerned inter-state river.\textsuperscript{11}

According to the River Boards Act, 1956, “where any dispute or difference arises between two or more Government interested with respect to any advice tendered by the Board under that Act as any measure undertaken by any Government interested in pursuance of any advice tendered by the Board or other matters covered by that Act, touching or arising out of it, any of the Governments may, in such form and in such manner as may be prescribed, refer the matter to arbitration”.\textsuperscript{12} The “arbitration” is not to be appointed by the parties to the dispute but by Chief Justice of India from among the sitting or retired judges of the Supreme Court or High Courts. Further, the Act expressly bars the application of the Arbitration Act, 1940, to the “arbitration”.

Again by virtue of the power under Article 262 of the Constitution, parliament enacted the Inter-State Water Disputes Act 1956 (Act 33 of 1956).\textsuperscript{13} The Act is entitled as “an Act to provide


\textsuperscript{12} Id. S. 22

\textsuperscript{13} The Inter-State Water Disputes Act, 1956, The Government of India, Publication Division, New Delhi, 1956.
for the adjudication of disputes relating to water of inter-state rivers or river valleys”. The salient sections of the Act are as follows:

Section 2(c) of the Act defines a “water dispute” to mean any dispute or difference between two or more state governments with respect to

i. the use, distribution or control of the waters of, or in any inter-state river or river valley; or

ii. the interpretation of the terms of any agreement relating to the use, distribution or control of such waters or the implementation of such an agreement; or

iii. the levy of any water rate in contravention of the prohibition contained in section 7.

Section 3 describes complaints by State Government regarding water dispute. It says “if it appears to the Government of any state that a water dispute with the Government of another state has arisen or is likely to arise by reason of the fact that the interest of the state, or of any of the inhabitants thereof, in the water of an inter-state river or river valley have been or are likely to be affected prejudicially by—

a. any executive action or legislation taken or passed or proposed to be taken or passed by the other state, or
b. the failure of the other state or any authority therein to exercise any of their powers with respect to the use, distribution or control of such waters; or

c. the failure of the other state to implement the terms of any agreement relating to the use, distribution or control of such waters;

the state Government may in such form and manner as may be prescribed, request the Central Government to refer the water dispute to a Tribunal for adjudication.”

Regarding the Constitution of Tribunal Section 4 of the Act prescribes as follows:

“(1). When any request under section 3 is received from any state Government in respect of water dispute and the Central Government is of opinion that the water dispute cannot be settled by negotiations, the Central Government shall, by notification in the official gazette, Constitute a Water Disputes Tribunal for the adjudication of the Water Dispute.

(2). The Tribunal shall consist of a chairman and two other members nominated in this behalf by the Chief Justice of India from among persons who at the time of such nomination are Judges of the Supreme Court or of a High Court.

\[14\] Substituted by Act 35 of 1968. Section 2, for the Previous Sub-section.
(3). The Tribunal may appoint two or more persons assessors to advise it in the proceedings before it."

Section 5 deling with the actual adjudication of water dispute between states, reads as under:

1. When a Tribunal has been constituted under section 4, the Central Government shall subject to the prohibition contained in section 8, refer the water dispute and any matter appearing to be connected with or relevant to, the water dispute to the Tribunal for adjudication.

2. The Tribunal shall investigate the matters referred to it and forward to the Central Government a report selling out the facts as found by it and giving its decision on the matters referred to it.

3. If, upon consideration of the decision of the Tribunal, the Central Government or any State Government is of opinion that any thing therein contained required explanation or that guidance is needed upon any point not originally referred to the Tribunal, the Central Government or the State Government, as the case may be, may within three months from the date of the decision, again refer the matter to the Tribunal for further consideration; and on such reference the Tribunal may forward to the Central Government a further report giving such explanation or guidance as it deem fit and in such a case, the
decision of the Tribunal shall be deemed to be modified accordingly

4. If the members of the Tribunal differ in opinion on any point, the point shall be decided according to the opinion of the majority.

Section 5A, speaks about the filling of vacancies which is a permanent one. If the chairman or other members for any reason quits the post then, Chief Justice of Supreme Court can fill the post by person nominated by him.16

Section 6 of the Act Provides the provisions for publication of the Tribunal’s decision in the following languages:

“The Central Government shall publish the decision of the Tribunal in the official Gazette and the decision shall be final and binding on the parties to the dispute and shall be given effect to by them”.

The Inter-State Water Disputes (Amendment) Act of 1980, inserted a new section that is section 6-A which empowers the Central Government to make schemes for implementing the decisions of the Tribunal by establishing any authority (whether described as such or as a committee or other body). According to amendment, the Central Government framing the scheme may also provide the composition, jurisdiction, powers and functions of the

15 Inserted by section 3, ibid.
16 Inserted by section 4, ibid
authority, the term of office and other conditions of service, the manners of filling vacancies among the members of such authority as well as the procedure to be followed by the authority. 17

Section 8 and 11 deal with bar of reference to certain disputes to Tribunal, Supreme Court and other Court. Section 8 reads “Notwithstanding anything contained in section 3 or section 5, no reference shall be made to a Tribunal of any dispute that may arise regarding any matter which may be referred to arbitration under the River Boards Act, 1956”. Section 11 of the Act also puts restriction upon the jurisdiction a Supreme Court and other Courts on the basis of the express powers conferred on parliament under Article 262 (2) of the Constitution. Section 11 says “Notwithstanding anything contained in any other law, neither the Supreme Court nor any other Court shall have or exercise jurisdiction in respect of any water dispute which may be referred to Tribunal under this Act”.

Section 9 of the Act dealing with the powers of the Tribunal prescribes as follows:

“1. The Tribunal has the same powers as are vested in a civil court under the code of civil procedure 1908 in respect of the following matters, namely

17 Inserted by Act 45 of 1980.
a. Summoning and enforcing the attendance of any person and examining him on oath;

b. requiring the discovery and production of documents and material object;

c. issuing Commissions for the examination of witnesses or for local investigation;

d. any other matter which may be prescribed.

2. The Tribunal may require any State Government to carry out or permit to be carried out, such surveys, and investigation as may be considered necessary for the adjudication of any water dispute pending before it.

3. A decision of the Tribunal may contain directions as to the Government by which the expenses of the Tribunal and any cost incurred by the State Government in appearing before the Tribunal are to be paid, and may fix the amount of any expenses or cost to be so paid, and so far as it relates to expenses or cost, may be enforced as if it were an order made by the Supreme Court.

4. Subject to any rules that may be made under this Act the Tribunal may by order regulate its practices and procedure.”

Section 12 of the Act deals with the tenure of the Tribunal. It reads as under:
“The Central Government shall dissolve the Tribunal after it has forwarded its report and as soon as the Central Government is satisfied that no further reference to the Tribunal in the matter would be necessary.”

Section 13 of the Act empowers the Central Government to make rules relating to the presentation of complaint by the State Government before the Tribunal, the procedure to be followed by Tribunal under this Act etc.

Finally, section 14 which was inserted in the Act of 1956 in 1986 by an amendment empowers the Central Government to constitute a Tribunal to be known as Ravi and Beas Water Tribunal for the verification and adjudication of the matters referred to in paragraphs 9.1 and 9.2, respectively, of the Punjub settlement and clause 3 of Section 14 of the Act also empowers the suo motu power of reference to the Central Government before the Tribunal to be constituted according to aforesaid Punjub settlement.

In the light of the above analysis, it may be pertinent to point out here that the laws governing the rights of the states in respect of the waters of inter-state rivers under the constitution is almost identical with the law under the provisions of the Government of India Act 1935. Article 262 of the constitution recognises the principle that no State can be permitted to use the waters of inter-state river so as to cause prejudice of the interest of another
contending state or of a state in the river valley or of the inhabitants thereof\textsuperscript{18}.

The only difference is that under the Government of India Act, 1935, \textit{his majesty} was the final authority to decide the then inter-provincial water dispute and now, under the new constitution it is a statutory Tribunal appointed in terms or the statutory provisions of an Act of parliament, enacted for this purpose, which finally adjudicates these dispute. In addition to that, formerly, under the Government of India Act, 1935 only the affected provinces could complain or bring the dispute before the Governor General whereas now under the Inter-State water Disputes Act, 1956, as demonstrated by the amendment of the said Act in 1986, even the Union Government can refer such a dispute to a Tribunal created for this purpose as happened in case of the Eradi (Ravi Beas) Tribunal, in 1986, when the Union Government referred the dispute, involving the sharing or waters of Ravi and Beas river, to the said Tribunal.

It may also be appropriate here to point out that section 3 of the Inter-state Water Disputes Act, 1956, reproduces substantially in its sub-clause (a) and (b), from provisions of section 132 of the Government of India Act, 1935.

Such comparison apart, a critical analysis of Constitutional and statutory provisions relating to water dispute in India will also

show a number of weaknesses of such provisions. Constitution of India has provided two types of provisions related with inter-state river water dispute. Entry 56 List- I is a kind of provision which empowers the Central Government to enact preventive legislation that is, for regulation and development of inter-state river basins which would minimise friction among the states. On the other hand, Article 262 is a kind of another constitutional provision which empowers the parliament to enact curative legislation for providing a machinery for settlement of dispute. However, it is strange enough that Article 262 is put in the chapter which deals administrative relations. But in both these two types of constitutional core provisions relating to inter-state water dispute, have a number of weaknesses. First, in these two provisions, the centre has been given a role only in relation to inter-state rivers and river valleys but use of intra-state surface water might produce environmental or social consequences in another state. Secondly, there is no specific reference to the ground water in these provisions though the word 'water' may doubtless be taken to include ground water. Thirdly, constitution through these provisions did not clearly allot water resources to the central list to give teeth to the Central Government. Fourthly, Constitution has not provided any policy or directive principles to guide the Union in respect of the inter-state river but left everything to the discretion of parliament. Fifthly, the constitutional provisions donot show any direct evidence of a perception of water as a natural resource much less of water as a part of the larger environment or the ecological system, though
there are perhaps some glimmering of this in the reference to river valleys in Entry 56 in the Union list. Sixthly, constitutional core provisions put too much emphasis on old fashioned problem like apportionment and conflicting uses of water. Seventhly, constitution is totally silent regarding other method except adjudication under Article 262. It has excluded negotiation or arbitration agreement as a method of inter-state water dispute. Lastly, the constitutional provisions do not specifically envisage 'inter-basin transfer.' Despite such weaknesses it would be inappropriate to argue that centre is helpless in this respect. Amidst various weaknesses, the minimum opportunity which the constitution gives the centre has not been used adequately by it. A critical review of the constitutional provisions will make it clear that Entry 17 in the state list is not an unqualified entry. Water is indeed in the state list but it is subject to the provision of Entry 56 of List I. Therefore, the present situation is more a case of non-use of a given powers by Union than one want of the same. So, the legislative power of the State Government under Entry 17 of the state list remains unfettered only because parliament has not made much use of the powers vested in it by Entry 56 of the Union list. Therefore, the argument that water is a state subject is no longer a valid argument. Water is both state subject and potentially as much a central subject, particularly as most of our important rivers are

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The plain reading of constitutional provision also makes it clear that though water is not in the concurrent list but with out constitutional amendment to bring it to the concurrent list, by virtue of existing Entry 56 of list I alone, the centre can exert enormous influence in relation to water. But the centre, in fact, has not utilised the existing legal provisions adequately. The centre's passive attitude in this respect is very well reflected on her half hearted effort for legislative enactment. It was only in 1956 that under the provision of Entry 56 of list I of the seventh schedule, referred above, parliament enacted the River Boards Act.

Even this statute is not free from defects. The River Boards Act, 1956 provides only for advisory boards and not for River Basin Authority with power of management and in fact, no river board even of an advisory kind have been setup under this Act. Also the Act does neither give any authority to the centre to develop or regulate the waters of inter-state river nor to control in any way the activities of state government in respect of these water nor does it lay down any policy or directive principles relating to the use of these waters. All that the River Boards Act does is to give authority to the Government of India to set up for any inter-state river, a river board to advise (not binding) the states on any matter relating to the regulation and development of the water of

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21 Supra Note 19 at P-733
the river. The River Boards Act, 1956 was the first law to be passed by the Union in the post constitutional period for the constitution river boards for distribution of water resources between the state out of storage common to both. But as a matter of fact it remains totally on paper and no board has been constituted so far, though the ministry of Irrigation and Power were very much keen on the establishment of river boards for certain inter-state rivers. The Damodar Valley Corporation antedates the constitution and was setup by separate enactment and in fact it functions not as a River Valley Authority. The Betwa River Board and Brahmaputra River Board were setup by two separate parliamentary enactments, but they too have suffered the same fate. There are some organisations setup under government resolutions like the Bansager Control Board which are meant to supervise specific projects; the Narmada Control Authority is a body setup under the orders of the Narmada Water Dispute Tribunal with limited functions relating to cost allocations and rehabilitation of project affected persons, later enlarged to cover the monitoring of environmental aspects, but is certainly not in the nature of a Narmada Basin Authority; and the Ganga Flood Control Commision is limited to the preparation of master plans for flood control. The Krishna Waters Dispute Tribunal envisaged the

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23 Supra Note 11, ss-4 and 22
24 The River Boards were proposed for Narmada, Mahi, Godavari, Ravi, Beas, Sutlej, Krishna, Cauvery, Yumuna etc. Reports of Ministry of Irrigation and Power, 1962-63, P-11
25 The Damodar Valley Corporation Act, 1948 was passed by the Constitutional Assembly of India on March 4, 1948 under section 103 of the Government of India Act, 1935.
26 Iqbal Ahmed Siddiqui 'History of Water laws in India' in Chhatrapati Sing (ed). Water Law in India, Indian Law Institute, (1992), P-733.
establishment of a Krishna River Authority, but this never come about. However, recently Cauvery River Authority has been established to implement the interim award of Cauvery Water Dispute Tribunal. But like other authority mentioned earlier, it is also not constituted under The River Boards Act, 1956, but constituted under section 6-A of the Inter-State Water Disputes Act, 1956 to fulfil specific object. It is also to be noted here, as expected earlier, this authority too is bound to encounter resistance.27

The absence of a single real river basin authority as envisaged under the River Boards Act leads towards the inference that the Central Government has not performed the duty of its own given by the Act. Almost this indifferent attitude of the Centre has obviously encouraged the states to raise their ugly heads of state identity which is not conducive to planning across the boundaries for the optimal use of the available water resources of basin.

Due to such paralysed state of River Boards Act, 1956, the method of distribution of inter-state river water hitherto followed, has not adopted any uniform principle. Sometimes it has been achieved through inter-state agreement and sometimes through adjudication by a Tribunal constituted under Inter-state Water Disputes Act, 1956. But it does not mean that alternative method of distribution of inter-state river water through Tribunal constituted

27 Supra Note 19. P-733.
under the Inter-state Water Disputes Act is without defect. Contemporary with the River Boards Act, 1956, the Inter-State Water Disputes Act 1956 was another first law to be passed by the Union in the post constitutional era to deal with inter-state river water disputes under Article 262 of the constitution. Though there has been no criticism of the structure of Article 262 of the constitution but there are few inherent defects in the enactment of Inter-state Water Disputes Act, as revealed during the application of the Act in various cases of Inter-state Water Dispute in India. The Act does not lay down any principle or guidelines to be followed by the Tribunal. It is also very difficult to understand the logic of adopting on the one hand, the exclusive clause of the constitution to debar the Supreme Court from exercising jurisdiction over such disputes and on the other, to constitute for the purpose an adhoc Tribunal of three judges of the same court or a High Court. The Act is thus contradictory in concept. The Tribunal system tries to assimilate the legal and other specialised qualifications. But here it is to be seen that all members are lawman. Assessors are there but not in the adjudicating body. Also Chief Justice exclusively enjoys the power of appointment of such members. There does not seem to be any valid reason for limiting the appointment of the members to sitting Supreme Court or High Court judges. Also in terms of the present enactment a reference to a tribunal need to be made only when a request is made by a State

28 Supra Note 22 at P-908
Government to the Central Government to refer a water dispute to a Tribunal. Therefore, a duty is cast on the Central Government by the Act to consider whether the water dispute can or cannot be settled by negotiation. It is only when the Central Government is of the opinion that it cannot be so settled then the Central Government is required to constitute a tribunal to decide the dispute and make a reference to it. But here, there is a difficulty. Is the opinion of the Central Government contemplated by section 4(1) of the Act to be arrived at subjectively or in objective manner? The matter has not so far been pronounced upon in any decision of the Supreme Court or any of the High Court. The Union Government appears to have shown a marked reluctance to exercise this power to appoint a tribunal under the Act and this has caused considerable dissatisfaction in the concerned states.

The administrative Reform Commission had recommended that a time limit say three years be prescribed for settlement by mediation of the Central Government on these inter-state water disputes and that on the expiry of the time limit the dispute should stand referred compulsorily to a tribunal for adjudication. Sarkaria Commission also has recommended a time limit to

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29 Supra Note 13 Section 4
30 M.C. Setalvad in this respect has pointed out the trend of the Supreme Court's decision in the Barium Chemicals Ltd. and another Vs. The Company Law Board and others (1966) case and suggests that if the Union Government fails to apply its mind to a request made to it by the State Government under section 3, or arbitrarily form a view that the dispute can be settled by negotiation, it can be compelled in appropriate proceeding to apply its mind to the request made to it. M.C. Setalvad, Union and State Relations under the Indian Constitution, Tagore Law Lectures, University of Calcutta, 1970, P-94.
constitute a tribunal with a period not exceeding one year from the date of receipt of the application from any of the disputant state.\textsuperscript{32} So, this defect obviously is one of the major defects of the Act.

Under the provisions of the Act, the Union Government cannot do anything to appoint a tribunal of its own motion whatever may be the urgency of constituting it. However, by the amendment of the Act in 1986 the Union Government may suo motu refer the matter specified in paragraphs 9.1 and 9.2 of the Punjab settlement to a tribunal called Ravi and Beas waters Tribunal constituted for the purpose. But it should be kept in mind that such an amendment by section 14 of the Act has a limited application that is, in case of a dispute specifically mentioned in the said amendment.

It has been noticed that there is quite often a long delay in the publication of the decision of the Tribunal. Such delay cause a great deal of inconvenience and hardship to the parties. The present provisions of the Inter-state Water Disputes Act are very vague and unsatisfactory in this respect. The Statutes empowers both the Central Government and the State Government to make a reference within three months of the date of the decision of the Tribunal for its further consideration under section 5(3). It is not clear whether the decision is to be published soon after it has been delivered by the Tribunal; or after the lapse of three months; or in a case when

\textsuperscript{12} Supra Note 19, P-491.
reference is made after it is answered by the Tribunal. Additionally, another defect related with this section is that the State Government concerned can also make a reference to the Tribunal but there is no provision in the Statute for communicating the decision of the Tribunal to it; the Statute only requires that the decision shall be communicated to the Central Government. The only possible means for a state Government to know about the decision is either through the publication or through the courtesy of the Central Government. Further, section 6 says that “the decision shall be final and binding on the parties to the dispute and shall be given effect to by them”. The provisions of Section 6, in this form, leave uncertainty about the enforcement of the said decision. Hence, the existing position regarding the publication and implementation of Tribunal’s decision is ambiguous and unsatisfactory. The Act, has never told by adding the words ….. “and it may be enforced as if it were an order or decree made by the Supreme Court”, at the end of section 6. However, to give teeth to the Act regarding implementation of Tribunal’s decision Act was amended and section 6-A was inserted in the year of 1980 empowering the Central Government to make scheme to implement decisions of the Tribunal. But the record of success of the section is still discouraging. Neither the parties concerned nor the Central Government has shown any interest to utilise the section positively. Since 1980, in a number of occasions parties concerned have rejected Tribunal’s award. In the case of Ravi Beas Water
Tribunal; Punjab Government rejected the award. Similarly, in case of Cauvery dispute, Tribunal’s interim order was sought to be nullified by the Karnataka Government. Central Government also was a mere spectator without framing any scheme under the Act and at last under the compulsion of Supreme Court, the Central Government framed a scheme for implementation of the Cauvery Water Dispute Tribunal’s interim award under section 6-A of the Act. Such a development proves the inadequacy of the amended section. It proves that when the Central Government remains apathetic and takes time and the concerned State Government’s show non-cooperation the Act has nothing to do. It is also adhoc solution applicable only to interim order. It is also to be seen that neither the Act nor the rules formulated there under prescribe any time limit for the Tribunal to complete its proceedings. Sarkaria Commission highlighted the defect along with the comment that the Act has no provision to compel the states to give necessary data to the Tribunal.

Section 6 of the Inter-state Water Disputes Act, 1956 empowers the Tribunal to give ‘final’ decision only. But there may be a situation when providing interim decision or relief to either party of a dispute becomes urgent to avoid irreparable losses. Cauvery Water Dispute Tribunal faced the similar situation. Supreme Court has also given its verdict in favour of legality of

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33 Karnataka reacted sharply to the Tribunal’s order by the promulgation of the Karnataka Cauvery Basin Irrigation Protection Ordinance, 1991.
passing such interim relief by the Tribunal. But the Act is still silent in this respect\textsuperscript{34} and that is why controversy still remains that whether Tribunal has any inherent power to grant interim relief or not.

In its present form section 11 of the Inter-State Water Disputes Act, 1956 empowers the parliament to exclude the jurisdiction of the Supreme Court and other Courts “in respect of any water dispute which may be referred to a Tribunal under this Act”. This drafting of the section is not very clear whether the jurisdiction of Supreme Court is barred in respect of dispute which are capable of being referred to a Tribunal or only such disputes are excluded from the purview of the Supreme Court as have been referred to a Tribunal. The word ‘may’ in a statute often does not indicate the legislative intention clearly. Section 11 may be interpreted to mean that only such disputes are beyond the purview of the courts as have been referred to a Tribunal. It is also conceivable that a state against whom the decision of the Tribunal goes may fail or neglect to give effect to the same. Such a situation may also raises the question whether in such an event, the aggrieved state can invoke article 131 of the constitution, conferring on the Supreme Court exclusive original jurisdiction regarding any dispute between two or more states pertaining to a

\textsuperscript{34} Government (central) has not taken any initiative for amendment of the Act in the light of advisory opinion given by Supreme Court in presidential reference under Article 143(I) of the Constitution that interim report would be considered as ‘report’ and Tribunal is competent to grant it.
legal right. the substantive rights between the states as to the disputes relating to waters of an inter-state river would already have been adjudicated upon by the Tribunal at the time of giving its decision in the matter. What might be left after such adjudication would be the dispute relating to implementation of the decision of the Tribunal. When the Tribunal gives the decision in favour of a state, that state acquires a legal right to have it implemented. It may, accordingly, be urged that whenever any dispute relating to such right arises, the aggrieved state may invoke the original jurisdiction of the Supreme court under Article 131 for enforcement of the right acquired by it in respect of implementation of the decision of the Tribunal. It is felt that section 11 does not stand in the way of invoking the provisions of Article 131 in the matter, because that section does not wholly bar the jurisdiction of the courts, but bars such jurisdiction only in respect of any water dispute referred to a Tribunal.35 Such an interpretation is not ruled out because the object of the Inter-State Water Disputes Act is to create an adjudicatory machinery and that machinery comes into operation only when a Tribunal has been created. Therefore, so long such ambiguity remain in the wording of the section, jurisdiction of the judiciary may not be deemed to be excluded. In another aspect, section 11 is not very clear. Though section 11 providing exclusionary clause has excluded adjudication

by Supreme Court regarding inter-state river water dispute but by virtue of Article 131, 136, 143, 32 and 226 of the Constitution of India, Supreme Court can intervene to regulate the functioning of the Tribunal. It has been argued that these articles of the constitution have provided the Supreme Court only to intervene the functioning of the Tribunal and substantive issues relating to river water dispute can not be controlled by these articles. But controversy may arise as to what issues constitute substantive and what are the issues that constitute only functional matter. The section itself has not provided any norm. The Act is also silent relating to measure that will be adopted if the Tribunal acts malafide and abuse or overstep the jurisdiction.

The Act has no provision to provide any time limit for reviewing the award of the Tribunal. It may be unjust to bind down a state to an award for ever. Though Tribunal has power to prescribe a time frame during which its award is to remain applicable but there is no bindingness on the part of the Tribunal to do that thing and to follow an uniform time frame for all cases. So for the sake of uniformity regarding time frame and to ensure bindingness some sort of statutory backing is required.

The statutory adjudicatory machinery as envisaged under the Inter-State Water Disputes Act, 1956 is tribunal oriented. But the statutory machinery should not preclude voluntary arbitration between the states, rather some sort of link is necessary between the two. In fact under the present Act there is no bar to
voluntary arbitration however, to facilitate such arrangement more effectively express recognition of it in the statute is necessary. So, Tribunal under Inter-State Water Disputes Act, 1956 without an appellate authority for the arbitration award can entertain a dispute for interpretation if it is referred by the parties of the arbitration agreement. In order to do such thing, the words “interpretation of an arbitration” may be added in section 2(c) (ii) of the Inter-state Water Disputes Act.

In the light of historical development of water dispute in India, it appears that the definition of ‘Water Dispute’ provided under section 2 of the Inter-State Water Disputes Act is ‘incomplete’. Dispute about sharing the benefit and costs of joint project, dispute relating to hydroelectric power, irrigation, flood control which are resultant product and purposes of “use, distribution or control of water” are not covered by the definition. But history of the disputes of river water in India shows that the categorical mentioning of such things in the definition of ‘Water Dispute’ is highly needed.

A careful scrutiny of the provisions of the Inter-State Water Disputes Act, 1956 reveals that the inter-state water disputes only amongst the states come within the purview of the Inter-State Water Disputes Act, 1956. Union territories seem to be not in the purview of the Act. It is no doubt a defect of the Act
A microfine comparative analysis of the adjudicative mechanisms provided under two water dispute statutes would reveal that difference between them is only technical not substantial. The use of the word ‘arbitration’ under section 22 of the River Boards Act, 1956 seems that the Act has provided arbitration method to settle the dispute. But under the Act ‘arbitrator’ is not to be appointed by the parties to the dispute but by the Chief Justice of India from among the sitting or retired judges of the Supreme Court or High Courts. Further the Act expressly bars the application of the Arbitration Act, 1940, to the “arbitration”. The “arbitration” thus virtually under the River Boards Act means adjudication by tribunal. Therefore, it may be said that nature of the adjudicatory bodies under the two enactments is the same with few technical differences such as whereas the tribunal under the Inter-state Water Disputes Act is of three members, the River Boards Act have the provision of one arbitrator for settling water dispute between the states. Another difference between the two statutes is that whereas under the Inter-State Water Disputes Act a dispute has to be referred to a tribunal by the Central Government, in case of the River Boards Act, it could be referred by a State Government. The existence of such duplicate machinery in both the statutes seems to be unnecessary. Lastly, at present, both the statutes relating to inter-state water dispute are not comprehensive to cover all aspect of interstate water dispute.
In the light of foregoing analysis of the legal framework of the inter-state river water dispute settlement mechanisms provided under the constitution, the following conclusions may be drawn:

1. If ever a subject needed planning and co-ordination of a national basis, it is water. When constitution was drafted, this aspect was grossly neglected. Therefore, recognising water as a ‘National Resource’ suitable constitutional amendment should be made.

2. The constitution in the part of ‘Directive principles of state policy’ should provide basic norm and principles to guide Union in respect of inter-state water dispute without depending upon the discretion of parliament.

3. The methods of dispute settlements like negotiation and agreement also should be directly recognised by the constitution.

4. Apart from mentioning specific, conflicting and quantative uses of water such as water supplies, water storage etc. entry 17 of list II should also include other qualitative uses of water, i.e., use of water without polluting it etc.

5. Constitution has put too much emphasis on river water dispute excluding underground water. So specific reference of groundwater should be made in the
constitution as well as impact of inter-state surface waters on groundwaters aquifers cutting across state boundaries and impact of dam construction on a single state river beyond its boundaries should be mentioned in entry 56 of union list 1.

Further, analysis of the statutory provisions leads to the following conclusions:

i. The Inter-State Water Disputes Act, 1956 should laydown certain policy or norms to be followed by the Tribunal.

ii. Out of three members of the Tribunal constituted under the Inter-State Water Disputes Act, 1956 one at least should be a person possessing expertise knowledge and experience in the field of water law and water management. Further, the selection of the chairman and other member may be made from amongst the retired Judges of Supreme Court and High Courts.

iii. Chairman should be appointed by the Chief Justice of India and other two members should be appointed by a committee consisting of the Chief Justice, the Chairman of the Tribunal and the nominee of the President of India.
iv. Central Government should be given a suomotu power to refer a dispute to the Tribunal and for this purpose the Inter-State Water Disputes Act, 1956 should be amended in such a way that the provisions as contained in section 14 thereof may have a general application to meet every eventualities in future and an amendment is not needed every time for specific case.

v. In India, whenever necessary a Tribunal is formed to solve a particular river water dispute. Instead of this, a permanent Tribunal should be setup with the power of the highest court of the land. It should be equipped with technical personnel to assist the Tribunal in technical matter.

vi. A time limit should be imposed say one year on the Central Government under section 4(I) of the Inter-State Water Disputes Act, 1956 for compulsory referring an inter-state water dispute to a Tribunal after it receives a complaint from any party.

vii. In addition to constitutional backing to give legislative sanction to the agreement arrived at between states through negotiation, section 4 of the Inter-State River Water Disputes Act, 1956 should be amended in such a way as to prescribe therein that the states concerned
shall make their utmost endeavour to settle an inter-
state water dispute through an agreement and that such
agreements will be ratified within specific period of
time. Further, there should be a provision in the said
Act that on being ratified such agreements will be
deposited with the Ministry of Water Resources of the
Central Government and thereafter the validity and
authenticity of such agreements shall not be
challengeable, or alternatively, the agreements arrived
at between states through negotiation need to be
given legislative sanction by making it an Act passed
by parliament.

viii. Despite the fact that the Tribunal is empowered under
rule 5 of the Inter-State Water Dispute Rules, 1959 to
arrive at a decision exparte in the face of recalcitrant
attitude of the parties, neither the Act nor the rules
framed thereunder prescribe any time limit for
Tribunal to complete it proceedings. Therefore, to
strengthen and foil the stalling tactics, there should be
a time limit before which Tribunal has to give its
decision.

ix. Some specific time limit should also be prescribed for
the immediate publication of the decision of the
Tribunal by the Central Government.
x. In case of reference by the State Government as a party within three months of the decision or award of the Tribunal under section 5(3) of the Inter-State Water Disputes Act, 1956, Tribunal concern should also forward or communicate its further report to that State Government.

xi. The 'interim decision' given by the Tribunal should be included in the term 'decision' mentioned under section six of the Inter-State Water Disputes Act, 1956.

xii. Instead of adhoc, specific modus operandi for the implementation of interim award or decision applicable to a particular dispute framed under section 6-A of the Inter-State Water Disputes Act, 1956, Central Government should frame a universal, comprehensive scheme for the implementation of all sorts of awards or decisions. Alternatively, the decision of the Tribunal should be implemented as if it were an order of the Supreme Court provided under section 9(3) of the Act, in case of the distribution of costs and expenses of the Tribunal.

xiii. As a norm, Tribunal should follow the equal division of the cost as practised in USA whenever it will
determine the question of awarding cost under section 9(3) of the Inter-State Water Disputes Act, 1956.

xiv. The jurisdiction of the Supreme Court to adjudicate on inter-State Water Disputes should be expressly barred irrespective of the fact whether a dispute has been referred to a water tribunal or not. Hence, section 11 of the Inter-State Water Disputes Act, 1956, should in the amended form, read as follows:

“Notwithstanding anything contained in any other law, neither the Supreme Court nor any other court shall have or exercise jurisdiction in respect of any inter-state water dispute.” The Act should also provide the norm to differentiate functional issues from substantial issues of the water dispute and also should provide adequate measures against the abuse of power and jurisdiction by the Tribunal.

A period of 50 years should be fixed for the review of an award except when substantial changes in circumstances necessitate reviewing the award earlier. Also the number of times an award given by a Tribunal can be reviewed should be limited to only one.

xvi. There is no necessity to provide separate adjudicatory machinery under the two water dispute statutes i,e.,
The Inter-State Water Disputes Act, 1956 and The River Boards Act, 1956. The machinery provided in the Inter-State Water Disputes Act can deal with the dispute arising in the River Boards Act, 1956. Therefore section 22 should be deleted from the River Boards Act, 1956. In consequence of it, section 8 of the Inter-State Water Dispute Act should also be deleted.

xvii. The definition of “Water Dispute” contained in section 2(c) of the Inter-State Water Disputes Act, 1956, should be widened so as to include the dispute between the states “arising out of interpretation of arbitration award” as well as disputes involved in sharing of benefit and cost of joint water project and dispute with respect to irrigation, flood control, impact of intrastate surface waters on groundwater aquifers cutting across state boundaries within such definition. For this purpose the words “interpretation of an arbitration award” should be added in section 2(c)(ii) and the words “sharing of benefit from and cost or liability of joint river development schemes” as well the words like “irrigation, flood control use of intrastate surface water affecting beyond the state territory” should be added as section 2(c) (iv) and (v)
respectively in the definition of water dispute under the Inter-State Water Disputes Act, 1956.

xviii. The words “State Government includes the Union Territory Government” should be mentioned in a suitable place in the Inter-State Water Disputes Act, 1956 so that the dispute by or with the Union Territories also could come within the purview of the Act.

Lastly, it may be concluded that covering all aspects mentioned above the Inter-State Water Disputes Act, 1956 should be renamed as “Inter-State Water Law” with slight modification of its purposes as “An Act to provide for the settlement of disputes relating to waters of inter-state rivers and river valleys” deleting the existing words “adjudication of dispute” used in the purpose of the Act, because, after amendment the Act will embrace Article 262 as well as Entry 56 of List I of the constitution. It is expected that a suitable amendment made on the basis of above conclusions would provide an integrative single legal framework to settle inter-state water dispute. Instead of two different statutes based on two different constitutional provisions it may provide as single statute to fulfill the purposes laid down under the constitution relating to interstate water dispute.