Chapter VII

APPRAISAL AND SUGGESTIONS

A. Appraisal

The study of the problem of inter-state water disputes in India in preceding chapters begins in the context of global crisis of water resources and thereafter, proceeds towards the thesis that though India like many countries of the world is facing water crisis which leads to her inter-state water disputes in a number of interstate rivers, but such conflicts are likely to be soluable, manageable and amenable to resolution through well constructed jurisprudence of natural resource sharing, agreements and other sort of institutional arrangements including laws, because among other extraneous variables, institutional variables exert enormous influence that shape the nature, intensity and the duration of the problem of water dispute and finally resolve the dispute in a peaceful way. Therefore, fragility of water institutions which combines water policy, water laws and water administration can linger the problem defying solution but well synthesis of them can minimize and solve the problem. So, to avert the water crisis and dispute at the national level, prior agenda should be the adoption of a water policy and thereafter, for effective implementation of the
policy, enactment and upgradation of laws as well as water administration are highly needed.

In this research project where an attempt has been made to have an insight for effective water related institutional reforms in India through the analysis of water related institutional arrangement so far adopted in three classical western federations, reveals that as a representative federal polity, U.S.A has built up nice water institutions and has also adopted a comprehensive water policy as a necessary backup for such institutional development. Two other federations i.e. Australia and Canada have also adopted National Water Policy for the development of institutional infrastructure for the settlement of water disputes. In all these water polices, the importance of written rules of equitable apportionment/equitable utilization have been recognised despite theoretical debate of discernable differences between the two as the former is apportionment oriented and presupposes a third party adjudicator, which can be a court, a tribunal or some other authority, and the later is development oriented and based on reasonable, equitable, beneficial and optimum utilization concept and does not necessarily presuppose a third party and thereby leave open legal space for two party negotiations, mediation, as well as third party adjudication. In the analysis it is also revealed that in U.S.A., the constitution itself has provided two well entrenched channels for the settlement of her inter-state water disputes. One is court adjudication, and the other is negotiation, but federal practice
shows that the negotiation so far has became the most acceptable and appropriate method for the settlement of her inter-state water dispute. Also in Australia, negotiation has increasingly been recognized as a preferred method of settlement of her inter-state water dispute. However, negotiation is not so boldly recognized in Australian constitution as it is in U.S.A. constitution. It is also to be pointed out here that except in Canada, (where constitution itself is vague regarding the subject and domestic events of water conflict are rare) in two other federations i.e., U.S.A and Australia acceptance of negotiation as preferred mode for the settlement of water disputes have brighten the possibility of the application of equitable principle as it presupposes the settlement of any water dispute non-adjudicatively. Moreover, as a necessary off shoot of compact clause, in these two federations, a number of agreements that have been entered through negotiation between the parties provide many useful mechanisms for the settlement of water disputes even at the micro level where market allocation and user based allocation of water resources prevails and which may be eventuated in macro level conflict at the inter-state level. Thus, from the survey of inter-state water disputes process in three classical federations, it may convincingly be asserted that for resolving inter-state water dispute in a federation, negotiation, conciliation, and other sort of related institutional variety should be the preferred method than judicial method.
Besides cross federal study, in this research study, where an analysis has been made to explore suitable norms and water institutions, if any, that are developed at the international level in the course of settlement of international river water disputes and which may be put into use for settlement of inter-state disputes in India, reveals that equitable utilization principles that have been adopted and codified in latest ILC draft of Non-navigational Uses of International Water Course is no-doubt the most progressive principle of water resource sharing and for this, International law can deserve the credit. But there may have been difficulty when downstream state’s existing use proposed to be curtailed by new use of upstream state for development purposes. If, according to equitable utilization principle an upstream state wants to develop her water resource then it can do it in equitable and reasonable manner without causing significant harm to the established use of downstream state which in practice seems to be too much difficult for application. If obligation not to cause significant harm to be followed then existing use cannot be disturbed. However, in International law, where treaty or agreement based on negotiation is a dominant mode of resolving International River Water Dispute, likelihood of successful application of the equitable utilization principal is greater than domestic arena by virtue of the fact that treaty and agreements provide an opportunity for flexible understanding among the parties. The whole discussion therefore, leads to the conclusion that for resolving inter-state water dispute in India or elsewhere in the world according to the principle of
equitable utilization, the first thing which is required is that the country concern should have a consensus national water policy based on such principle and in addition, the dispute affected country should also adopt negotiation or agreement through law as her dominant mode for the settlement of inter-state water dispute. Tribunals or other quasi judicial and even judicial authority may also adopt the equitable utilization principle but through negotiation application of the principle becomes much easier.

In the course of analysis where venture has been made to reach the crux of the problem through the discussion of origin and nature of few selected inter-state river water disputes in India, reveals that inter-state water disputes fall into three categories. The first, semi appropriated river basin, where there is surplus water-over and above the committed utilization and the dispute relate to the claiming of surplus water. The second, settled river basin, where the rights of parties are defined under an agreement or a judicial decree and the disputes relate to the interpretation, implementation and review of the agreement or judicial decree and the third, fully appropriated river basin, where the water is fully appropriated usually by the lower basin state having a flat terrain and disputes arise out of the irrigation demands of the basin state which has a mountainous and undulating terrain. The first two categories at present do not pose much problem. It is the third category that gives rise to serious controversies. The Cauvery river dispute belongs to this category. However, the current dimension
of water disputes in India gives a sense that mega dams and state-centric allocation of water resources and many assumptions behind such allocations are not at present conducive to sustainable development of water resources rather it gives an opportunity to politicians to catch the fish in the muddled water of inter-state rivers.

The Survey and an analysis of constitutional and statutory measures as adopted to tackle inter-state water disputes in India reveal that such measures suffer from a number of weaknesses. Two relevant constitutional provisions i.e., entry 56 list 1 and Article 262 appears to be inadequate owing to omission of references of inter-state use of water and groundwater; vague allotment of water resources to the central list; lapses to provide any directives to guide union and states in relation to water; absence of perception that water is a national resource; too much emphasis on quantitative allocation of waters and silent regarding other methods, except adjudication as a method of inter-state water disputes even treating inter-state water dispute as a special class of dispute which requires non-legal solution. Further, in the analysis it is also revealed that despite these defects the centre is not helpless in the matter of water resources as argued by many constitutional lawyers and experts in the field. As a matter of fact, there is no need to bring water in the concurrent list. By virtue of entry 56 of list 1, centre can exert enormous influence in relation to water. But, it appears that the centre over the years has not adequately utilized
the existing constitutional provisions. The analysis of the statutory provisions reflects the same picture. Belated enactment of River Boards Act in 1956 by virtue of entry 56 of list 1 of the constitution does provide only for Advisory Boards and not any River Basin Authority with power of management. 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 governments in respect of these waters nor does it lay down any policy or directives relating to the use of these waters. Besides all these statutory weaknesses, even the minimum scope to constitute an Advisory Board that has been provided under the Act still remains unutilized by the centre. Therefore, such indifferent attitude of the centre has obviously encouraged the states to raise their ugly heads of state identity which is not conducive to cross boundary planning for optimal use of the available water resources of inter-state river basin. Apart from the preventive River Boards Act another curative piece of legislation for inter-state water disputes which was enacted in the same year under article 262 of the constitution does not appear to be flawless. In addition to its questionable preference only upon adjudicatory method following constitutional mandate under article 262, the Act also suffers from few inherent defects in the enactment of the Act itself. The definition of ‘water dispute’ provided in the Act is incomplete as it does not cover disputes regarding the sharing the benefit and cost of joint project etc and also the Act does not contain water disputes related with Union Territories within its
preview. In addition, the Act does not lay down principles or
guidelines to be followed by the tribunal rather its exclusion of
Supreme Court's jurisdiction and at the same time prescription of
tribunal of three judges of the same court or a High Court appears
to be contradictory. The Act also neither prescribe any time limit to
constitute a tribunal upon the request of state government nor give
a suo moto power to Central Government to refer the dispute to the
tribunal. The defects like absence of clear time limit within which
tribunal has to give its award and the time limit within which
Central Government has to publish the award and even the award
of the tribunal at all to be published or not also make the Act more
impractical. A few more inherent defects which are being detected
in the course of the analysis of the provisions of the Act are the
silence of the Act regarding the status of interim award given by
the tribunal, absence of universal and comprehensive scheme for
implementation of all sorts of awards or decisions given by the
tribunal.

From the survey of the constitutional as well as statutory
provisions of the inter-state water disputes in India, the conclusion
as held highlights that water as a 'national resource' should at first
be specifically recognized in the Constitution itself instead of
parliamentary legislation. Principle of equitable utilization of water
should also be incorporated in the Directive Principles of State
Policy. Similarly, the methods like negotiation and conciliation
should have a place in the constitution. In addition to the need for
including other qualitative uses of water and ground water in entry 17 of list II, survey also reveals that specific reference of groundwater and impact of intra-state surface water on groundwater aquifers cutting across state boundaries as well as impact of dam construction on a single state river beyond its boundaries should be made in entry 56 of Union list.

Analysis of statutory provisions further leads to the conclusions that among the three members of the tribunal one at least should be a person possessing expertise knowledge and experience in the field of water management. The chairman of the tribunal should be appointed by the Chief Justice of India and other two members should also be appointed by a committee consisting of Chief Justice, the chairman of the tribunal and the nominee of the President of India. In addition, to make the inter-state water disputes revolving process more meaningful, matters like suo-motu power of the Central Government to constitute a tribunal, three years time limit for compulsory reference of a dispute to a tribunal by the Central Government, statutory recognition of the water dispute agreements, time limit for tribunal to complete its proceedings and quick publication of the award of the tribunal by the Central Government should be included in the statute. At the same time, giving interim decision of the tribunal a status of the award of the tribunal and merging both the Inter-state Water Disputes Act and River Boards Act as one comprehensive Act, suitable statutory amendments should also be made.
The analysis of the existing adjudicatory methods of inter-state water disputes in India in the context of functioning of the tribunals constituted so far shows that constitutional and statutory limitations have severely affected the functioning of the tribunals causing unnecessary delay to give award. It is also revealed that though tribunals in India cannot claim their ingenuity in respect of the construction of substantive principles like appropriate utilization but discarding traditional Roman, English or Common laws of water use these tribunals have skillfully grafted appropriate utilization principle in to the body of emerging laws of water uses in India. However, to keep pace with the development of international and national water law principles it has become absolutely necessary for tribunals in India to adopt equitable utilization principles while disposing inter-state water disputes in India.

In India as well as elsewhere in the world it is an established fact that water dispute is such a kind of dispute which cannot be resolved exclusively through adjudicatory method. Sometimes in combination with nonadjudicatory method and sometimes only through nonadjudicatory method water dispute may be effectively resolved. But unfortunately in India as revealed in the analysis no such opportunity adequately prevails. Neither the Constitution nor the Statutes give sufficient emphasis on this aspect despite the fact that in previous three occasions awards given by the tribunals are
largely the product of prior agreement through negotiation by the concerned states.

National water policy as well as water administration can also do a lot for effective resolution of water dispute non-judicially. The trend available in U.S.A. and Australia in this respect shows that prior adoption of equitable utilization principle through national water policy may provide a conductive environment. But unfortunately, in this respect India lag for behind. In the year of 1987 on behest of NWRC few states wilinili agreed to adopt a national water policy guidelines but still now it is marred by the lack of consensus among the states. Even the planning commission has raised the question of Constitutional justiciability of such a policy and has expressed concern that it may disturb common indigenous principles of water sharing as already adopted by various tribunals. Such argument of the planning commission though appears to be plausible but ground reality suggests that many assumptions held by the tribunals in three or four decades ago are no longer valid and awards given by such tribunals on the basis of these assumptions can no longer satisfy either the need of the people at micro level or need of the state at macro level and therefore, needs to be reviewed and updated immediately on the basis of equitable utilization principle. At the same time, due to lack of consensus on National Water policy, water administration in India have lost its purpose and remains in a state of disarray.
despite having its potentiality to be used for effective water resource management in the country.

Lastly, the survey of the non-adjudicatory method as adopted in India for resolving her interstate water disputes, reveals that for effective, quick and durable solution of the problem, negotiation seems to be most preferred method along with conciliation and at the same time, in order to make negotiation more effective as well as for streamlining the statutory and non-statutory administrative bodies, a sound National Water Policy requires to be adopted on priority basis.

B. Suggestions

In the light of above appraisal, the following suggestions are made for administrative, judicial consideration and legislative action.

If ever a subject needs planning and coordination of a national basis, it is water. When Indian Constitution was drafted, this aspect was grossly neglected. Thus there is a strong case for suggesting that recognising water as 'National Resource' suitable constitutional amendment should be made.

The Indian Constitution has not provided any policy or directive principle to guide the Union in respect of inter-state water but left everything to the discretion of Parliament. Parliament also
in long past has shown apathy in this respect. One obvious suggestion, therefore, in this regard is that the Constitution in the part of directive principles of state policy should provide norms and principles to guide the Union in respect of inter-state water disputes without depending upon the discretion of Parliament.

Constitution under article 262 even recognising the fact that inter-state water dispute is such a kind of dispute which cannot be resolved only through legal method, has prescribed only adjudicatory method for resolving the dispute excluding more relevant and effective method like negotiation, conciliation etc. Therefore, to make the negotiation a more stronger method, it is submitted that it should be directly recognised by the constitution through amendment.

In the constitutional provisions the Centre has been given a role only in relation to inter-state river and river valley excluding underground water but use of intra-state surface water may create an impact on groundwater acquifers cutting across state boundaries. Similarly, intra-state dam construction may produce impact beyond its boundary. Therefore, it is suggested that specific reference of impact of intra-state surface water on groundwater acquifers cutting across state boundaries and impact of intra-state dam construction beyond its boundaries should be mentioned in entry 56 of Union list.
Inter-state Water Disputes Act of 1956 has prescribed two methods for the settlement of dispute. The first priority has been given to negotiation. Only when negotiation fails, through the Government of India it may be resolved by Tribunal. But the Act neither provides any framework within which the dispute has to be resolved through negotiation nor lay down any policy or norms to be followed by the Tribunal for resolving such disputes. Therefore, to remove such lacuna of the Act, it is submitted that, Inter-state Water Disputes Act, 1956, through amendments should lay down certain framework, policy and norm which would be followed in these two methods separately. In this context, it is also suggested that instead of passing reference of negotiation, section 4 of the Inter-state 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 agreement 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 Resource of the Central Government and thereafter the validity and authenticity of such agreements shall not be challengeable.

Under Section 4(2) of Inter-state Water Disputes Act, 1956, 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 dispute and
on the other to constitute for the purpose ad-hoc tribunal of three judges of the Same Court or a High Court whenever necessary to solve a particular river water dispute. To remove the contradiction, what is, therefore, necessary is that instead of ad-hoc tribunal a permanent tribunal should be setup with the power of the highest court of the land and out of three members of the tribunal one at least should be a person possessing expertise knowledge and experience in the field of water law. Further, the selection of the chairman and other member may be made from amongst the retired and sitting judges of Supreme Court and High Court and 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.

In order to cut short delays, it is necessary to prescribe a time limit for the constitution of a tribunal. Once an application under section 3 of the Act is received from a state, it should be mandatory on the Union Government to constitute a tribunal within a period not exceeding one year from the date of the receipt of the application from any of the disputant states. The Act may be suitably amended for this purpose.

Under the existing provisions of the Inter-state Water Disputes Act, 1956, the Union Government cannot do anything to appoint a tribunal on its own motion, even if it is aware of the existence of a dispute in respect of an inter-state river or river
valley. Cauvery dispute is an instance of it. In 1986, the Act had been amended empowering the Union to setup a Tribunal known as “Ravi Beas Water Tribunal”, suo motu, or on the request of concerned state government. This amendment applies specially to one particular inter-state river water dispute. Therefore, an amendment is necessary of the Inter-state Water Disputes Act, 1956 for general application, empowering the Union Government to appoint Tribunal suo motu, if necessary, when it is satisfied that such a dispute exists in fact.

Despite the fact that the Tribunal is empowered under rule 5 of the Inter-State Water Disputes Rules, 1959 to arrive at a decision ex parte in the face of recalcitrant attitudes of the parties, neither the Inter-State Water Disputes Act, 1956 nor the Rules framed thereunder prescribe any time limit for Tribunal to complete its proceedings. This causes inordinate delay taken by tribunals in making their awards. Further, another main reason for pendentelit delay before a tribunal is that the requisite data for adjudication are not readily or adequately supplied by or made available from the states. One obvious suggestion, therefore in this regard is that there should be a provision in the Inter-State Water Disputes Act, 1956 that states shall be required to give necessary data for which purpose the Tribunal shall be vested with powers of a Court. In addition, the Act should also be amended to ensure that the award of a Tribunal becomes effective within five years from the date of constitution of a Tribunal. If however, for some reason, a Tribunal
feels that the five year period has to be extended the Union Government may on a reference made by the Tribunal, extend its terms.

At present in case of further 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, there is no provision in the Act to communicate the decision to the state government. Therefore, Act should be amended so that the Tribunal concern shall forward or communicate its further report to the concerned State Government.

Section 6 of the Inter-state Water Disputes Act, 1956, only speak for publication of the decision of the Tribunal and has remained silent regarding interim decision as well as time limit of the publication of decision of Tribunal by the Central Government. But experience shows that there may be a situation when providing interim decision or relief to either party of a dispute and its publication by the Central Government becomes urgent to avoid irreparable losses. Hence, there is strong case for suggesting that by amendment 'interim decision' given by the Tribunal should be included in the term 'decision' mentioned under section 6 of Inter-state Water Disputes Act, 1956 and at the same time specific time limit should also be prescribed for the immediate publication of the decision of Tribunal by the Central Government.
Once an award becomes effective after publication by the Central Government under section 6 of the Inter-state Water Disputes Act, 1956, the question of enforcement arises. Section 6, itself in this regard provides that the Union Government shall publish the decision of the Tribunal in the Official Gazette and the decision shall be binding on the parties to the dispute and shall be given effect to by them. The provision of Section 6 in this form, however, leave uncertainty about the enforcement of the said decision if any state refuses to give effect to the award fully or even partially because of the fact that Union Government does not have any means to enforcing the award. Even, mere creation of an agency and framing a separate scheme for giving effect to a particular Tribunal’s award under newly amended section 6-A of the Act will not serve the purpose without the co-operation of the states concerned. Under the circumstances, instead of specific scheme for the implementation of decision of a particular Tribunal, under section 6-A of the Inter-State Water Disputes Act, 1956 Central Government should frame universal, comprehensive scheme for the implementation of all decisions of the Tribunals in common and at the same time to make Tribunal’s award binding and effectively enforceable, it should have the same force and sanction behind it as an order or decree of the Supreme Court. The only need, therefore, is to suggest that the Act should be suitably amended for this purpose.
The Inter-state Water Disputes Act, 1956, neither has a provision for compulsory review the tribunal's award nor a provision for the number of times an award given by a tribunal can be reviewed though the tribunal is empowered to fix a period during which its award will remain valid. Therefore, to follow an uniform time frame, a period of 50 years should be fixed through amendment of the Act for the review of an award except when substantial changes in circumstances necessitate review the award earlier. Also, through amendment, the number of times an award given by a tribunal can be reviewed should be limited to only one.

In its present form Section 11 of the Inter-state Water Disputes Act, 1956 which bars the jurisdiction of the Supreme Court and other Court, is not very clear whether the bar is only applicable to disputes which are already referred to a tribunal or also extends to the disputes which are capable of being referred to a tribunal. Ambiguity also remains that whether the party can approach the Supreme Court or High Court for implementation of award after settlement of the dispute or for any matter regarding the functioning of tribunal under article 131, 136, 143, 32 and 226 of the Constitution. Therefore, to dispel the ambiguity, it is suggested that Section 11 of the Act should be amended in the form read as “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 be amended to provide the norm for differentiation between functional issues and substantial issues.

There is no need for separate adjudicatory machinery as provided under the Inter-state Water Disputes Act, 1956 and the River Boards Act, 1956. The machinery provided in the Inter-state Water Disputes Act, seems to be adequate. To give effect to this recommendation, it is therefore, suggested that Section 22 may be deleted from the River Boards Act, 1956. In consequence, Section 8 of the Inter-state Water Disputes Act should also be deleted.

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 disputes between the states “arising out of interpretation of arbitration awards relating to water disputes” as well as disputes involved in “sharing of benefit and cost of joint water projects and disputes with respect to irrigation, flood control, impact of intrastate surface waters on ground water aquifers cutting across state boundaries” within such definition. For this purpose the words “interpretation of an arbitration award relating to water disputes” may be added in Section 2(c) (ii) and the words “sharing of benefits and costs of joint river development schemes” as well as the words “irrigation, flood control, use of intra-state surface water affecting beyond the state territory” may also be inserted as Section 2(c)(iv) and (v) respectively in the definition of water dispute under the Inter-state Water Disputes Act, 1956.
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.

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 disputes” 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.

In order to make the awards more acceptable, broad based and objective one, Tribunal in course of investigation and hearing the disputes referred to it, instead of merely incorporating the views of upper echelon of bureaucracy, should also listen to local governments, panchayat, NGO’s and village communities. Besides, while distributing inter-state river water, Tribunal should give first priority to equitable utilisation principle as it is the everbest principle evolved in the jurisprudence of water resource sharing.

To settled the disputes of Inter-State River Water arising out of hapazard construction of big dams, mega project, canals, which are being constructed without any effective planning and coordination among the state for use of water resources in most economical ways, it is suggested that the Central Government at
administrative level should take immediate step to adopt a scientific river basin plan throughout the country coordinating the viewpoint of engineers, agronomists, water resources and irrigation consultants because management of water resources is grossly neglected in India and entirely left to the farmer on the field.

In addition to what have been suggested earlier, it can also be suggested that inter-state river water disputes in India should preferably be resolved through negotiation and co-operation with necessary backing from water administration and national water policy. Therefore, in this context other obvious suggestions are that at first, both Central and State Governments should strengthen and reinforce the institutions that design, implement and administer water supply and second, both Central and State Governments should adopt a consensus water policy dispelling the myth that big dams always constitute development and taking a balance view that water resource development is needed both for irrigation and drinking water because, in coming years, it is apprehended that drinking water crisis would be the bone of contention of every inter-state river water disputes in India.