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Interview

Supreme Court has differed from the Cauvery Tribunal on fundamental issues: Mohan Katarki

S. RAJENDRAN

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The Cauvery issue between the States of Karnataka and Tamil Nadu and their predecessor States has gone on for nearly two centuries. What is the *raison d'etre* for this long riparian conflict?

There is no single reason. It has been the combination of several reasons namely topography of the basin, outdated legal laws on natural flow theory and prescriptive rights, drought in upland areas in Mysore, etc. To begin with, the riparian conflicts

broadly have a typical pattern and that pertaining to the River Cauvery is no different. The water in its natural course flows by gravity from source to the mouth, where most of the rivers split into deltaic shape. It is in this delta region, taking advantage of the natural flow, the irrigation is developed historically by natural system of channels and it is here where civilisation started.

This is true for Cauvery, Krishna, Godavari, Mahanadi, Indus, Ganges-Brahmaputra, Danube, Mekong, Mississippi, Nile, and Tigris. However, the advent of hydrant technology in the middle of the century changed the situation. The upstream States started building dams to store the water and use it by gravity flow after creating a required height. This was further propelled by mechanical pump sets and hybrid crops. This invited protest from the downstream states, particularly with regard to the rivers having delta. This conflict turned into a dispute between old users who claim historical rights such as right of appropriation, prescriptive rights or natural flow rights and the new users who claim territorial rights.

These factors got more complicated in the case of the Cauvery because, the British power had its own imperial interests in Madras where it was a direct rule and in Mysore where it was an indirect rule through a Prince. The English penchant for settlement by some Agreement added to the whole resulting in 1892 and 1924 Agreements to the disadvantage of Mysore.

An out-of-court settlement by negotiation among the riparian States has been considered as a better solution. However, despite the Chief Ministers of the States of Karnataka and Tamil Nadu holding meetings on several occasions in the 1970s and 1980s under the mediation of the Central Ministers, no solution was finalised. What really came in their way?

The water disputes throw up complex technical facts and legal issues. Moreover, these disputes lie in the area of high policy making with political overtones. The U.S. Supreme Court in 1943 had rightly advised for "expert administration (by compact method) rather than judicial imputation of hard and fast food" *(Colorado .vs. Kansas 1943)* in the resolution of Inter-State water disputes.

Mohan V. Katarki

The provisions of the Inter-State River Water Disputes Act, 1956, enacted by the Indian Parliament has departed from the compulsory adjudication system and made an exception by incorporating this idea of resolution through negotiations. The Sec. 4(1) mandates the Central Government to constitute a Tribunal provided that the Central Government is of the opinion that water dispute cannot be settled by negotiations.

Therefore, sincere and bonafide talks between the States with or without the mediation of the Central Government is the first and necessary step to be taken for resolution of the water disputes. No doubt, Cauvery went through this process from mid 1960s to 1990. However, despite strong political leadership at the Centre then in 1970s, the dispute could not be resolved.

The advent of regional politics stymied the process probably. Yet another attempt was made in 1996, when Mr. H.D. Deve Gowda was the Prime Minister and Mr. M. Karunanidhi was the Chief Minister of Tamil Nadu (whose party DMK [Dravida Munnetra Kazhagam] was supporting Mr. Deve Gowda). The then Chief Justice of India, Mr. Ahamadi, had also suggested for the same. The Centre reportedly offered to pitch in some funds to develop ground water in Tamil Nadu. However, after couple of meetings in Bengaluru and Chennai, it was decided to give up the attempt, because I guess, the political pundits may have thought that it is too risky to sign a deal in choppy waters.

Karnataka and in particular the southern districts of the State have been witness to several serious violent incidents resulting in loss of human lives and properties whenever there were directions for release of Cauvery water from the Supreme Court. On this occasion, the verdict has, more or less, been gracefully accepted although some reservations do remain. Do you feel that the

issue has largely persisted thanks to political interplay with leaders and parties seeking to gain an advantage in their respective States?

We have seen unfortunate acts of violence in the past because passions rise very high on water issues. Some even predict water wars, although I don't think it is impossible to find a solution to water disputes in the 21 st century, thereby pushing nations to a war. I also don't blame politicians alone. The non-political actors too have strong views on water issues. In fact, it is their hard views that force politicians to play the political game with water.

I see a great judicial statesmanship in balancing the interests of both Karnataka and Tamil Nadu besides Puducherry and Kerala.

However, in the verdict of the Supreme Court in the judgment delivered on 16.02.2018, I see a great judicial statesmanship in balancing the interests of both Karnataka and Tamil Nadu besides Puducherry and Kerala. On reading the judgment written in a soft language as has been used by the international judicial bodies such as International Court of Justice and Sea Law Tribunal, the impression of a common man is that the judges have sympathy for both the States equally. Therefore, by and large, people in both the States have accepted the substratum of the decision.

The liability on Karnataka has been reduced from 192 TMC ft [1] annually to 177.25 TMC ft annually at the inter-State border, Biligundlu, for four reasons (para 396) [2]. These are (i) the change of legal position from prescriptive rights and natural flow theory to equitable apportionment; (ii) the non-development in Karnataka due to the restrictive agreements of 1892 and 1924 based on said outdated natural flow theory; (iii) the existence of large drought areas in 28 taluks in Cauvery basin in Karnataka; and (iv) the need for supplying drinking water to two-third of Bangalore (which is a tech hub) lying outside the Cauvery basin. Though, Tamil Nadu's share of surface water has been reduced by 14.75 TMC ft, Tamil Nadu would not suffer due to this reduction because it has been blessed with large ground water in the delta region.

The total available water in the Cauvery basin has been estimated at 740 TMC ft and there is demand for more water from all the four riparian States - Karnataka, Kerala, Tamil Nadu and Puducherry. Is it not time to bring about changes in agricultural practices including the use of modern technology (drip

irrigation etc.) for the optimum utilisation of the available water? Is there a role for the Union Government in this matter?

On merits of the case, the principle argument which I had advanced on behalf of Karnataka against the allocation of 390 TMC ft of water for irrigating 24.71 lakh acres in Tamil Nadu was that 390 TMC ft can be reduced considerably by reducing the duty on modernisation, use of improved crop varieties, etc. Mr. Shivaramakrishnan, ICS, who was former Cabinet Secretary, Government of India, records in his memoirs the unwillingness of Tamil Nadu to adopt the modern techniques on the fear of losing water to Karnataka.

I find implicit recognition of our plea to some extent as the Supreme Court has reduced the surface water requirement by 14.75 TMC ft. The drip and sprinkler methods are modern techniques in the management of water invented in Israel. This technique reduces the water requirement by 30 per cent to 40 per cent. However, the installation of infrastructure is bit costly. At present, I believe the Central Government has a scheme to subsidise installation of drip and sprinkler system. But, the Central Government may devise a scheme under planned allocation grants disbursed under Art. 282 of the Constitution for conversion of areas under canal irrigation from flow system to the drip and sprinkler.

I think the future lies in adopting these techniques on a mass scale to find more water for expansion of the irrigation facilities. I will not be surprised if the next round of water dispute (say after 15 years), would pertain to economical use of the waters in the River Cauvery particularly in the context of the Supreme Court holding that inter-State rivers are a national asset.

Does the judgment satisfy the principle of equitable sharing, given that the Court has not accepted the rationale that the 1924 agreement was an unequal one between the British Madras Presidency and the Government of the Maharaja of Mysore?

The Supreme Court did not say that the Agreements of 1892 and 1924 were not executed between two unequals namely Madras represented by British Paramountcy and Mysore represented by the Maharaja, who was a feudatory of the British. The Supreme Court has only said that when the shadow of Paramountcy disappeared

after 1947, Mysore could have denounced the Agreements. Secondly, the Agreement of 1892 and 1924 were undisputedly based on natural flow theory, because, under the said agreement read with the Rules of 1921, the right of Madras to a minimum flow of 7 feet was recognised at Upper Anicut (which is about 80 per cent of the total water of 740 TMC ft) although the actual water requirement was much less quantified as 242 TMC ft annually under the Mettur Project Report. Therefore, the Supreme Court has rightly disregarded the Agreement of 1982 and 1924 and enforced the doctrine of equitable apportionment uninhibited by the colonial Agreements.

The Tribunal had erred by fashioning its equitable apportionment based on 1892 and 1924 Agreements.

The Supreme Court specifically found that prescriptive rights mentioned in the Agreement of 1892 cannot be claimed in law and the Agreement of 1924 expired in 1974. The Tribunal had erred by fashioning its equitable apportionment based on 1892 and 1924 Agreements. This is the fundamental difference between the verdict of the Tribunal and Supreme Court.

What is the significance of the allocation for Bengaluru?

The Tribunal had taken a very unpragmatic view by excluding two-thirds of Bengaluru geographical area in the estimation of the share of Karnataka on the ground that it falls outside the Cauvery basin. If this area in Bengaluru which lies outside the basin has been historically dependent on Cauvery and there is no known source of water, the non-consideration by the Tribunal was wholly misconceived. Therefore, the Supreme Court considered this area and allocated water.

But, there is an error in allocating only 4.75 TMC ft of water because the drinking water requirement of Bangalore area falling outside the basin cannot be estimated by applying consumptive utilisation test at the rate of 20 per cent. The State Government will consider this issue and decide whether to file a Review Petition or not.

What, in your view, is the relevance/importance of this judgment in the broader context of riparian rights and laws - for states and individuals?

The judgment is a great contribution to the law governing the riparian rights. Firstly, it indirectly debunks Harmon doctrine which gave absolute rights to the upper riparian States and directly knocks out the outdated natural flow theory which benefitted only the lower riparian States. The Supreme Court in unequivocal terms has upheld the doctrine of equitable apportionment and accordingly has given relief to Karnataka by allocating more water *inter alia* to correct the injustice suffered as per the 1892 and 1924 Agreements based on prescriptive rights and natural flow theory.

Secondly, the judgment quantitatively accounts the ground water as alternate resources. Thirdly, the judgment while reiterating that the drinking water requirement has the highest priority, recognises the right of a State to demand for water in respect of the population in the entire State including areas lying in the trans basin areas. I am sure this judgment of the Supreme Court will be cited in the federal water disputes and international water disputes around the world.

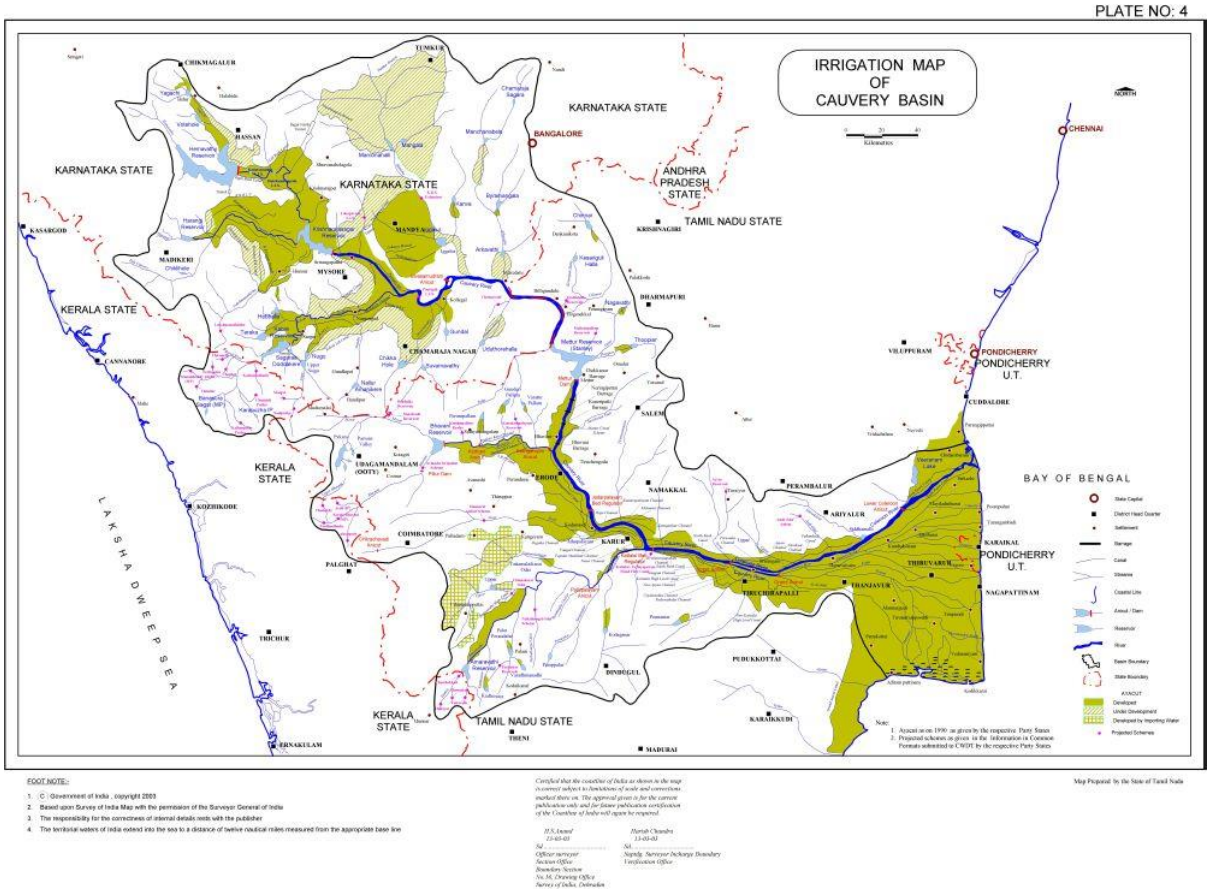
As groundwater, essentially, is an individual right, thereby applicable only to private owners of land, what is the legal or technical reasoning to include it in the computation (X.6 of the Judgment) of availability of inter-State river waters? Please, could you also clarify how this computation works when read with the formulation that "no lift schemes" will be included in the criteria "to ensure equitable share" between the two States (X.3, p. 427 of the Judgment)?

In a strict legal sense, not only the ground water even the surface water belongs to inhabitants or individuals and the State is only a trustee. The Act of 1956 indeed recognises this legal position (Sec.3). However, the constitutional position is that the States have an undoubted power to regulate and if necessary appropriate all the surface and ground water.

The surface water and ground water are interconnected physically and in the management of supplies. If you deplete groundwater, the surface water would be affected and if you deplete the surface water, the ground water would be affected. Therefore, in the allocation of surface water, ground water ought to be taken into account. This position was recognised earlier by the Krishna Water Disputes Tribunal (1973-1976). However, this Tribunal did not take note of the ground water

because there was no case made out in the factual situation of the case by the parties to the dispute.

But, in the Cauvery water dispute, it has been the mainstay of Karnataka's case that large ground water is available in the delta region of Tamil Nadu, which was estimated by the United Nations Development Programme in 1969 as 129 TMC ft. The Tribunal found at least 20 TMC ft which is equal to 30 TMC ft of surface water, but erred in failing to take into account without assigning any reasons. The Supreme Court has finally accepted at least 10 TMC ft. Therefore, no grievance can be made on this ground by Tamil Nadu.



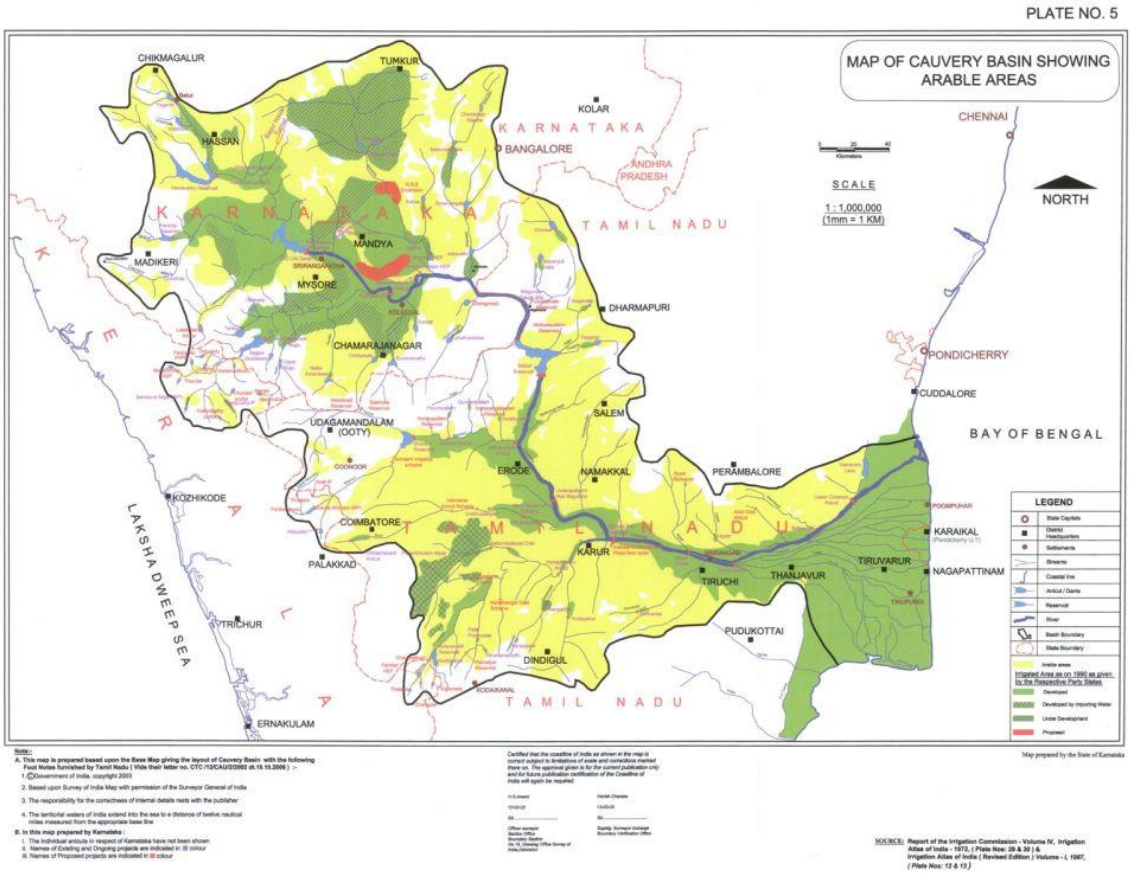
Source: Ministry of Water Resources, River Development & Ganga Rejenuvation [online]: The Report of the Cauvery Water Disputes Tribunal with the Decision, Plate 4.

Is it correct to interpret this judgment as a validation of the Tribunal's *ratio*, except with regard to the adjustment of entitlements of Tamil Nadu and Karnataka?

The Supreme Court partly modified the order of the Tribunal. With regard to the irrigated areas 24.71 lakh acres in Tamil Nadu, the findings of the Tribunal have not been disturbed. However, with regard to the water requirement, there is a reduction by 14.75 TMC ft. Out of the increased allocation of 14.75 TMC ft to Karnataka, 4.75 TMC ft has been granted for Bangalore drinking water supply and remaining 10 TMC ft for irrigation, etc. Therefore, in respect of Karnataka, the Tribunal's finding both on irrigation requirement and drinking water requirement have been modified.

The Supreme Court has not endorsed the Cauvery Management Board as recommended by the Tribunal. The Supreme Court has only directed the Central Government to frame a Scheme under Sec.6A of Act of 1956 for implementation of the modified award. Even with regard to the colonial Agreement of 1924, though the Supreme Court has upheld the finding of the Tribunal that the Agreement of 1924 is neither invalid nor it was unenforceable, but it has disagreed with the Tribunal that Agreement did not expire in 1974 after 50 years. The Tribunal's finding that Agreement only fell for reconsideration has been rejected.

The overall equitable apportionment by the Supreme Court is not based on the colonial Agreement of 1924. What was wrongly done by the Tribunal was the apportionment within the contours of the Agreement of 1924 purportedly on equitable factors. Therefore, on a fuller examination, the Supreme Court has differed from the Tribunal on fundamental issues.



[Ministry of Water Resources, River Development & Ganga Rejenuvation [online]: The Report of the Cauvery Water Disputes Tribunal with the Decision, Plate 5.]

With regard to the release at the Inter State border Biligundulu, Clause IX of the "Final Order and Decision of the Cauvery Water Disputes Tribunal" spells out that "The above monthly releases shall be broken in 10 daily intervals by the Regulatory Authority" (p 341). Do you see this as a mechanism that will reduce apprehensions in the lower-riparian State?

The concept of regulated release of waters is not in dispute. However, the manner of regulations directed by the Tribunal were questioned as unpragmatic. Although, the Supreme Court has altered the regulated releases and it has left the task to the Authority for its consideration after a period of 15 years. The total reduction of annual quantum of water by 14.75 TMC ft has brought down the June to September liability by about 10 TMC ft. We think, even now, about 15 TMC ft of water of June to September could have been shifted to the post September period. This would have

really smoothed the implementation. Hope the Authority, would consider these aspects in a distress year.

Given the history of the allegations on the refusal by Karnataka to release the Cauvery waters despite the Supreme Court's past judgments, what will give the farmers of Tamil Nadu that the upper-riparian State will implement the latest verdict?

The States are constitutionally bound by the judgment of the Supreme Court. There is no reason to presume why Karnataka will not implement the judgment. The reduction of burden by 14.75 TMC ft has smoothened the process. Hereafter, there will not be serious problems or dispute in the implementation process in the normal years. In the bad years caused by distress in the monsoon, the judgment does not spell out any guidelines.

The Tribunal award has also been vague on this. The Authority constituted under Sec.6A of the Act of 1956 would have to exercise its judgment based on ground realities and the factors such as the prevalent conditions during the south-west monsoon and north-east monsoon, storages in Mettur reseservoir, ground water availability in the delta region of Tamil Nadu and priority for drinking water and standing crops.

As per the final award, the Union Government has to constitute the Cauvery Management Board which is to be tasked with the release of water from the basin reservoirs in all the riparian States. Why is Karnataka opposed to the constitution of the Board although the Supreme Court and The Cauvery Water Disputes Tribunal have called for the constitution of the Board and have repeatedly stated that inter-State rivers are a national asset?

The Supreme Court has endorsed neither the Cauvery Management Board nor the powers and functions of the Board. However, the Supreme Court has directed the Central Government for framing of a scheme within six weeks which includes appointment of an Authority, Board or Committee as Government of India thinks necessary for implementation of the directions of the Supreme Court on the allocation of water.

With regard to the declaration that the river water form a national asset, there cannot be any dispute or objection. After all, the States in India are the creatures of Parliament under Arts .2 and 3 of the Constitution of India. If the territory of the States is the territory of India, the water flowing in the territorial limits of the States is a national asset and the Supreme Court has rightly said so.

Will the latest verdict of the Supreme Court (February 16, 2018-order) bring an end to the long drawn dispute or do you expect more legal challenges on the issue?

As a pragmatist, I think the judgment would go a long way in removing the bitterness between the States and eventually help in easing out litigative approach. The legal challenges on subsidiary issues which arise either in the implementation or in the changed circumstances may surface, but our robust constitutional system will take care of these disputes, if any.

Notes:

1. One TMC ft = 1,000 million cubic feet, where one cubic feet = 6.23 gallons. (Source for volume: *The Report of the Cauvery Water Disputes Tribunal with the Decision, Volume I.*, New Delhi, 2007. p. vii).

2. Supreme Court Judgment on the Sharing of Cauvery Waters can be accessed here [PDF 1.72 MB].

Additional Reading:

1. **Guhan, S. 1993:** *The Cauvery River Dispute - Towards Conciliation*, Frontline/Kasturi & Sons, Chennai.

2. **Ministry of Water Resources, River Development & Ganga Rejenuvation [online]:** *The Report of the Cauvery Water Disputes Tribunal with the Decision - Volumes I, II, III, IV and V*, 2007, New Delhi. [URL: http://mowr.gov.in/acts-tribunals/current-inter-state-river-water-disputes-tribunals/cauvery-water-disputes]. Last accessed February 27, 2018.

Related Articles:

1. **Rajendran, S. 2016**. " Prime Minister should intervene to amicably settle the Cauvery issue says H.K. Patil", The Hindu Centre for Politics and Public Policy, October 4.

2. **Bhattacharya, S. 2016**. " The available Cauvery waters will have to be divided on a pro rata basis: Duraimurugan", The Hindu Centre for Politics and Public Policy, September 26.

3. **Venkatesan, V. 2018**. " Solution in sight?", *Frontline*, March 16.