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The Supreme Court of India and Inter-State water dispute: an analysis of the judgments on Mullaperiyar Dam

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Abstract

This paper addresses the issue of the Mullaperiyar Dam dispute between Kerala and Tamil Nadu with specific reference to the two judgments delivered by the Supreme Court of India on the matter. This paper attempts to examine the arguments, facts, and the judgment of the Court on each of the primary issues raised during the course of the dispute. The first case was filed by the Mullaperiyar Environmental Protection Forum in 2001, wherein the Court adjudged the case in favour of the respondents, the State of Tamil Nadu. Consequently, due to certain developments, examined in the course of the second case, the State of Tamil Nadu filed a petition before the Supreme Court against Kerala in 2006 seeking relief for the actions on the part of the latter after the judgment in the first case. A Constitution Bench was constituted to adjudicate this case, which re-examined certain issues raised during the first case and conclusively laid down its decision in favour of Tamil Nadu.

Keywords: Constitution of India; Dam safety; Inter-States Water Disputes Act; Inter-State water sharing; Kerala and Tamil Nadu water sharing; Mullaperiyar Dam; Periyar river; Precautionary principle and risk assessment; Supreme Court of India and water disputes

1. Introduction: the dispute and the facts of the matter

The Mullaperiyar Dam located in the Idukki district of Kerala is a water reservoir constructed over the Periyar River, and is wholly owned and operated by the State of Tamil Nadu. With a gross storage capacity of 15.662 TMC (thousand million cubic feet; one cubic foot equivalent to 0.02831 cubic meters), the dam is equipped to generate power in addition to acting as a source of water for irrigation for vast tracts of land in Tamil Nadu.

The Mullaperiyar Dam has a long history, the root of which is an agreement entered into by the Maharaja of Travancore and the Secretary of State for British India in Council on the 29th of October 1886 by which 8,000 acres of land were leased to the State of India, then under British rule (one acre equivalent to 4046.86

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square meters). The land was leased for 999 years, for the purpose of the execution of the 'Periyar Project' (*Mullaperiyar Environmental Protection Forum v Union of India and others, W.P. (Civil) 386 of 2001 with T.C. (C) Nos. 56—59 and 96—99 of 2002*, para. 2 [hereinafter MEPF]). In furtherance of this agreement, the construction of a structure comprising the main dam, a 'baby' dam and other ancillary works was completed in 1895. The dam could be filled up to its full capacity of 152 feet (ft; one foot equivalent to 0.3048 meters) and would irrigate 169,408.68 acres of area, which now comprises a part of Tamil Nadu (MEPF para. 2).

After independence and, subsequently, in 1970, the States of Kerala and Tamil Nadu entered into two supplemental agreements. The primary developments through these agreements were fourfold. First, fishing rights over the dam waters were surrendered to Kerala. Second, Tamil Nadu was given permission to generate power from the dam waters. Third, an annual rent, as specified in the agreement, was agreed upon to be paid to Kerala by Tamil Nadu and an additional 42.7 acres was leased to Tamil Nadu. Fourth, the nature of the original 1886 agreement was left intact (*State of Tamil Nadu v State of Kerala and another, Original Suit 3 of 2006*, para. 17 [hereinafter TN]).

The tension between Kerala and Tamil Nadu began in 1979 and escalated with time, ending up in litigation before the Supreme Court of India. In 1979, Kerala's growing concern about the safety of the dam resulted (TN para. 3) in the Central Water Commission (CWC) conducting a safety review. The report suggested three levels of measures after the completion of which the water level could be restored to 152 ft. In the interim, it recommended that the water level should be maintained at 136 ft, and accordingly the water level was lowered (TN para. 4).

In 1998, Tamil Nadu purported that all three levels of measures were complete, which would enable elevating the water level to 152 ft, and stated that Kerala was not complying with its requests to increase the water level. This marked the commencement of the litigation. A series of writ petitions were filed in the High Courts of both Tamil Nadu and Kerala (TC(C) Nos. 56—59 and 96—99 of 2002), in support of the views of each of their Governments. The dispute escalated to the Supreme Court through principally two cases. First, a writ petition filed by the MEPF (*Mullaperiyar Environmental Protection Forum v Union of India & others: Writ Petition (Civil) No. 386 of 2001*), which took into account several other writ petitions filed before the Madras and Kerala High Courts (Transfer Case Nos. 56–59 and 96–99). Second, an original suit filed by Tamil Nadu (*State of Tamil Nadu v State of Kerala and another: Original Suit No. 3 of 2006*). The latter case was filed as a result of certain developments that effectively nullified the first judgment.

In the Writ Petition No. 386 of 2001, the Court directed the Union Minister of Water Resources to intervene. The Expert Committee, constituted as a result, in its report submitted on the 16th of March 2001, stated that elevating the water level in the reservoir to 142 ft would not amount to any harm (TN para. 10). Kerala, however, refused to accept this finding. It was then that the MEPF filed a writ petition before the Supreme Court (TN para. 17), presenting diverse pleas, including the plea that the dam was unsafe. In its verdict delivered in 2006, the Court declared it safe to raise the water level to 142 ft.

As a measure that seemed to counter the effect of this judgment, 15 days later the Government of Kerala amended the Kerala Irrigation and Water Conservation Act (2003) by the Kerala Irrigation and Water Conservation (Amendment) Act (2006) (for short, '2006 Act'). The 2006 Act included the Mullaperiyar Dam in a list of scheduled dams to be monitored by a Dam Safety Authority. The Dam Safety Authority was granted several powers, including the authority to decommission the usage of a dam. The 2006 Act fixed the water level of the Mullaperiyar Dam at 136 ft in direct contravention of the preceding judgment. In light of these events, Tamil Nadu filed a suit in the Supreme Court in 2006 (TN para. 17), challenging, *inter alia*, the constitutional validity of the 2006 Act. The judgment on this case was delivered on the 7th of May 2014, as a result of which, *inter alia*, the 2006 Act was declared *ultra vires* (TN para. 199 (i)). The

objective of this paper is to give a comprehensive commentary on the Supreme Court judgments delivered in *Mullaperiyar Environmental Protection Forum v Union of India and others, W.P. (Civil) 386 of 2001 with T.C. (C) Nos. 56—59 and 96—99 of 2002 in 2006* and in *State of Tamil Nadu v State of Kerala and another, Original Suit 3 of 2006 in 2014*. The approach taken is through a detailed review and analysis of arguments made by both the State of Kerala and Tamil Nadu from the lens of a reader and to appreciate how the Court has decided each of the issues raised.

2. The 1886 lease agreement: nature and validity

As explained above, the 1886 lease agreement is the basis for the construction of the Mullaperiyar Dam. In its writ petition filed in 2001, the MEPF pleaded that the agreements of 1886 and 1970 be declared invalid. To support this plea, the MEPF stated that the Maharaja of Travancore was forced to enter into the agreement. Section 108 of the States Reorganisation Act, 1956[1], establishes that, *inter alia*, an agreement entered into between two or more States that was subsisting before the 1st of November 1957 would continue subject to certain adaptations made by the parties by the appointed date. The MEPF argued that since no adaptions were made by this date to the 1886 agreement, it is in contravention of Section 108 and should thus be declared invalid. The Court held that Section 108 of the States Reorganisation Act applied only to political agreements, and that the agreement under consideration, which was additionally held to be non-political in nature, would fall outside the ambit of the Act.

In the 2006 case, the validity of the agreement was challenged once more. Kerala reiterated the position taken by the MEPF, and sought to prove the invalidity of the agreement. However, the Court declared the question of validity of the 1886 agreement *res judicata*, and estopped Kerala from re-agitating the issue (TN para. 74).

2.1. Validity of the 1886 lease agreement with specific regard to the supplemental agreements of 1970

In 2006, the Court considered the issue of the validity of the 1886 agreement with specific regard to the supplemental agreements of 1970. On the 18th of June 1947, two substantial developments occurred; first, the British enacted the Indian Independence Act 1947, which took effect from the 15th of August 1947; and second, the Maharaja of Travancore issued a bulletin denouncing all agreements. In addition, the Dewan of Travancore, in his notes submitted to the Maharaja, stated

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[1] Section 108(1) reads 'Continuance of agreements and arrangements relating to certain irrigation, power or multi-purpose projects.

(1) Any agreement or arrangement entered into between the Central Government and one or more existing States or between two or more existing States relating to—

(a) the administration, maintenance and operation of any project executed before the appointed day, or

(b) the distribution of benefits, such as, the right to receive and utilize water or electric power, to be derived as a result of the execution of such project, which was subsisting immediately before the appointed day shall continue in force, subject to such adaptations and modifications, if any (being of a character not affecting the general operation of the agreement or arrangement) as may be agreed upon between the Central Government and the successor State concerned or between the successor States concerned, as the case may be, by the 1st day of November 1957, or, if no agreement is reached by the said date, as may be made therein by order of the Central Government.'

that the Viceroy had accepted the Dewan's denouncement of the 1886 agreement. Furthermore, the Additional Secretary gave an assurance that all agreements would be renegotiated. On the 15th of August 1947, the India (Provisional Constitution) Order, 1947, came into effect as a result of which Section 177[2] of the Government of India Act, 1935, was deleted, and subsequently on the 24th of September 1949 Travancore and Cochin joined the Dominion of India (TN para. 42). Kerala conceded that under Section 177 of the Government of India Act, 1935, the State of Madras became a successor to the 1886 agreement. However, Kerala contended that the day the Government of India Act (1949) came into effect the 1886 agreement lapsed. Furthermore, it argued that as per Section 7(1)(b)[3] of the Act of 1947 all agreements entered into by His Majesty and the Indian States would continue if not expressly denounced by the Rulers of the Indian States. By extension, this clause would imply the lapsing of the impugned agreement in view of the developments stated above. However, according to the Court, Section 7 intended to cover only political agreements, thereby entailing the continuance of the 1886 agreement. Furthermore, the Court found the evidence presented insufficient to prove that the Maharaja had *expressly* denounced the 1886 agreement. The Court additionally emphasised that in order to fulfil the provisions of Section 7 of the Act of 1947 the Maharaja ought to have denounced the agreement after the commencement of the Act, and not before as in the instant case (TN para. 50).

The Court held that the agreements of 1970 were proof of the validity of the original agreement, and stated, 'In these supplemental agreements, the continuance of 1886 lease is stated in clear and unambiguous words' (TN para. 63). Kerala argued that the supplemental agreements were based on a wrongful assumption of law that the 1886 agreement was still in effect. The Court rejected this, relying on a verdict in the case of *State of Andhra Pradesh v State of Maharashtra & Ors [(2013) 5 SCC 68]* wherein it was laid down that when two States enter into an agreement, they do so with the aid of competent legal minds. The Court thus estopped Kerala from claiming that the 1886 agreement had lapsed, and held that it is valid and binding on Kerala (TN para. 14).

2.2. Interpretations of Articles 363 and 131 of the Constitution of India

The second aspect of the 1886 agreement is its nature. Although not expressly questioned, the Court established that the 1886 agreement is a non-political agreement in both cases. The nature of the agreement has jurisdictional significance.

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[2] Section 177 reads 'Any contract made before the commencement of Part III of this Act by, or on behalf of, the Secretary of State in Council shall, as from that date—

(a) if it was made for purposes which will after the commencement of Part III of this Act be purposes of the Government of a Province, have effect as if it had been made on behalf of that Province.'

[3] The relevant portion of Section 7(1)(b) reads 'the suzerainty of His Majesty over the Indian States lapses, and with it, all treaties and agreements in force at the date of the passing of this Act between His Majesty and the rulers of Indian States, all functions exercisable by His Majesty at that date with respect to Indian States, all obligations of His Majesty existing at that date towards Indian States or the rulers thereof, and all powers, rights, authority or jurisdiction exercisable by His Majesty at that date in or in relation to Indian States by treaty, grant, usage, sufferance or otherwise'.

The subject of the nature of the agreement arose during the course of the first case. In its judgment, one of the questions addressed was whether, as per Article 363[4] of the Constitution of India, the jurisdiction of the Court was barred (MEPF para. 3). Article 363 of the Constitution prohibits the jurisdiction of the Supreme Court in any dispute arising out of a treaty or agreement entered into or executed before the commencement of the Constitution (*State of Andhra Pradesh v State of Maharashtra & Ors (2013) 5 SCC 68*). The Court held that Article 363 pertains only to political agreements and since the 1886 agreement being a lease is non-political, it was established that the jurisdiction of the Court was not barred. In the second case, the Court resolved the issue of its jurisdiction with respect to the provisions of Article 131[5] of the Constitution. Article 131 of the Constitution is concerned with the subject of original jurisdiction of the Supreme Court; it has original jurisdiction, *inter alia*, in disputes arising between two States, insofar as the dispute involves a question of law or fact on which a legal right depends. However, the proviso to the Article establishes that such jurisdiction is barred for disputes concerning political agreements entered into before the commencement of the Constitution. With regard to this Article, the Court held that it does not cover non-political agreements.

The Constitution Bench established that Article 363 and Article 131 are not applicable to non-political agreements. The similarity in the provisions of Article 363 and Article 131 were noted (TN para. 69) by the Court, which held that political settlements executed before the commencement of the Constitution and which have or have been continued after said commencement have been taken out of the purview of judicial pronouncements, and that non-political instruments were not covered by these provisions of the Constitution. However, in both cases, the Court did not expressly define or differentiate between political and non-political agreements.

3. The Periyar River: Inter-State or Intra-State?

Interestingly, the question of whether the Periyar is an Inter-State or Intra-State river was considered only in the second case. This proved to be an important factor in the judgment on this particular issue.

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[4] Article 363(1) reads 'Bar to interference by courts in disputes arising out of certain treaties, agreements, etc.—
(1) Notwithstanding anything in this Constitution but subject to the provisions of article 143, neither the Supreme Court nor any other court shall have jurisdiction in any dispute arising out of any provision of a treaty, agreement, covenant, engagement, sanad or other similar instrument which was entered into or executed before the commencement of this Constitution by any Ruler of an Indian State and to which the Government of the Dominion of India or any of its predecessor Governments was a party and which has or has been continued in operation after such commencement, or in any dispute in respect of any right accruing under or any liability or obligation arising out of any of the provisions of this Constitution relating to any such treaty, agreement, covenant, engagement, sanad or other similar instrument.'

[5] Relevant portion of Article 131 reads 'Original jurisdiction of the Supreme Court.—Subject to the provisions of this Constitution, the Supreme Court shall, to the exclusion of any other court, have original jurisdiction in any dispute—
(a) between the Government of India and one or more States; or
(b) between the Government of India and any State or States on one side and one or more other States on the other; or
(c) between two or more States, if and in so far as the dispute involves any question (whether of law or fact) on which the existence or extent of a legal right depends:
Provided that the said jurisdiction shall not extend to a dispute arising out of any treaty, agreement, covenant, engagement, sanad or other similar instrument which, having been entered into or executed before the commencement of this Constitution, continues in operation after such commencement, or which provides that the said jurisdiction shall not extend to such a dispute.'

In the case filed by the State of Tamil Nadu in 2006, Kerala maintained that it is an Intra-State river (TN para. 202), flowing within Kerala alone. Tamil Nadu, however, claimed that the Periyar is an Inter-State river, since a portion of the catchment area lies in its territory. Tamil Nadu also submitted that in the preceding case, Kerala pleaded that the jurisdiction of the Supreme Court was not applicable with reference to Article 262[6] of the Constitution read with Section 11 of the Inter-State River Water Disputes Act[7], as the Periyar River is an Inter-State river. The Court concurred with this view and held that the Periyar is an Inter-State river. It stated three reasons for the same: first, the fact that a portion, regardless of size, of the catchment area lies in Tamil Nadu; second, the Kerala Public Works Department in a report stated that 'the rivers which have their drainage area lying in more than one State have been brought under the category of Inter-State rivers and a consolidated study has been admitted in this chapter' and further elucidates, 'Of the west flowing rivers, those which have a portion of their catchment area lying in Madras State are (iv) Periyar' (TN para. 206); third, the Court felt that the burden of proving that the Periyar is an Intra-State river was on Kerala, and that this burden was not satisfactorily discharged (TN para. 210).

4. The Mullaperiyar Dam and the issue of safety

One of the primary contentions between Kerala and Tamil Nadu has been the issue of the safety of the dam and consequent water level to be maintained. The initial stance adopted by Kerala on the matter in 1979, when it declared that the dam was unsafe and lowered the water level to 136 ft on the recommendations of the CWC team, has remained unchanged. The State has been constantly emphasising that the dam will be under the threat of collapse if the water level is raised to 142 ft.

Concerns about the safety of the dam first appeared in 1979, when Kerala wrote to Tamil Nadu, asking it to strengthen the dam. In pursuance of Kerala's request to the Union Government, a meeting was held on the 25th of November 1979, between the Chairman of the CWC and the representatives of Tamil Nadu and Kerala, after the CWC team had inspected the dam. Recognising a possible safety threat, the CWC recommended three levels of measures to be undertaken for repair; *emergency, medium*, and *long-term* measures were proposed. In the interim, it was suggested that the water level be maintained at 136 ft. Subsequently, on the 29th of April 1980 a second meeting took place, wherein it was determined that after the emergency and medium measures were completed, the water level could be raised to 145 ft (TN para. 5). Furthermore, in its report the CWC team suggested that after the completion of all the recommended measures, the water level of the dam could be elevated to 152 ft. Kerala expressed reservations about this report through a dissent note appended by its representative (MEPF para. 2).

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[6] Article 262 reads '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 (1).'

[7] Section 11 of the Inter-State River Water Disputes Act, 1956 reads 'Bar of jurisdiction of Supreme Court and other courts. 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 a Tribunal under this Act.'

In 1998, Tamil Nadu claimed that the emergency and medium measures were complete, but the State of Kerala was opposing the elevation of the water level beyond 136 ft. Consequently, a series of writ petitions were filed in both the Kerala and Madras High Courts. On the 28th of April 2000, the Supreme Court asked the Union Ministry of Water Resources to intervene and hold talks between the two State Governments. Accordingly, on the 19th of May 2000, a meeting was held; however, no solution was determined. The Union Minister of Water Resources then decided to commission an Expert Committee to look into the issue of the safety of the dam. Constituted on the 14th of June 2000, the Expert Committee consisted of one representative each of Kerala and of Tamil Nadu, under the Chairmanship of a member of the CWC (Ministry of Water Resources, 2015). On the 16th of March 2001, the Expert Committee submitted its final report in which it stated that the water level of the dam could be raised to 142 ft. However, Kerala continued to resist raising the water level and in 2001 the MEPF filed a writ petition before the Supreme Court.

In its arguments, the MEPF stated primarily five reasons for objecting to the elevation of the water level. First, it said that the original life of the dam was meant to be 50 years. However, at the time of the judgment the dam had been in use for 100 years, meaning it had served a useful life. Thus, it was contended that raising the water level could result in potentially dangerous consequences. Second, it was argued that if the dam leaks, or is damaged, large-scale harm resulting in the complete destruction of three adjoining districts would ensue. Third, it argued that the dam was constructed using now-antiquated techniques in addition to which structural stress has been witnessed ever since the dam was first filled. Fourth, the aspect of earthquake vulnerability was stressed, as the MEPF emphasised that the damage that could follow in the event a quake may cause the rupture of the dam. Fifth, the CWC's position as the highest technical body was challenged in addition to which the MEPF alleged that the views of Kerala were not taken into account during the preparation of the report. The MEPF emphasised that such a report would not have a binding effect on Kerala because of the same (MEPF para. 2).

Tamil Nadu, in response, contended that: first, the CWC is the highest technical body on the matter in addition to which the CWC team was constituted pursuant to an order of the Supreme Court. Furthermore, Tamil Nadu asserted that the CWC submitted its report after due consideration of the views of the representatives of both States. Second, it argued that it is not open to Kerala to refuse to cooperate and obstruct the undertaking of measures as suggested by the CWC (MEPF para. 3).

In the judgment, the Court observed that the Expert Committee set up by the Union Ministry of Water Resources examined various aspects of the safety of the dam, including earthquake resistance. The Court noted that the final version of the report, which lacked the signature of the Kerala representative, suggested that the then-recently strengthened dam showed no sign of excessive seepage and did not pose any security threat. Furthermore, immediately in line after the Mullaperiyar Dam is the Idukki Dam, which, despite its capacity of 70 TMC, is being filled only to 57 TMC. The Court, taking cognisance of this, observed that even if the Mullaperiyar Dam overflowed, the Idukki Dam could hold more than 11 TMC. The Court thus ordered Kerala to cooperate in strengthening the dam (MEPF para. 13).

Subsequently, within 15 days of the judgment, the Kerala State Legislature passed the Kerala Irrigation and Water Conservation (Amendment) Act (2006). As a result, Tamil Nadu filed a suit on the Supreme Court, challenging, among other things, the constitutional validity of the 2006 Act (TN para. 14).

Tamil Nadu challenged the validity of the 2006 Act contending that it was in direct contravention of the 2006 judgment delivered by the Court in the MEPF case. Kerala defended its stance, arguing that the

legislature is competent to strike down a judgment in the larger public interest (TN para. 27) and, once more, alleged inconsistencies in the report of the Expert Committee and stated that the views of the Expert Committee do not constitute an authoritative opinion. In the judgment delivered on the 7th of May 2014, the Court struck down the Act (*detailed discussion on the Constitutionality of the Act discussed in the succeeding section*) and held that it is safe for the water level to be raised to 142 ft, concluding the legal argument on the safety of the dam (TN para. 221).

5. Supreme Court Empowered Committee on dam safety and other expert committees

The 2006 case was filed before the Supreme Court by Tamil Nadu after Kerala passed the 2006 Act. During the proceedings, Kerala challenged the report of the Expert Committee constituted by the Ministry of Water Resources. In the words of the Court, 'Kerala says that both the interim report and final report submitted by the Expert Committee are riddled with inconsistencies and the views of the Committee do not constitute an authoritative opinion' (TN para. 29).

Initially heard by a three-judge bench, the 2006 case was transferred to a Constitution Bench after substantial questions of the law were encountered (TN para. 35). The Constitution Bench felt it imperative that an Empowered Committee (EC) be appointed to investigate all queries concerning the safety of the dam. Accordingly, on the 18th of February 2010 (TN para. 36) the Central Government was directed to constitute an EC under the Chairmanship of Dr A. S. Anand, former Chief Justice of India, and consisting of one member each nominated by the States of Kerala and Tamil Nadu in addition to two renowned technical experts. Kerala nominated Justice K. T. Thomas, a former judge of the Supreme Court, and Tamil Nadu nominated Justice (Dr) A. R. Lakshmanan, also a former judge of the Supreme Court, and Dr C. D. Thatte and Shri D. K. Mehta were nominated in consultation with the Chairman of the EC as the technical experts. The EC was to hear all issues raised before it by the parties and submit a report within 6 months of its constitution. The final report of the EC was submitted on the 23rd of April 2012 and the Court observed that the

> *'EC has submitted its report after a very tedious and minute consideration of facts on the safety of the Mullaperiyar Dam, which embraced the reports of tests, investigation and technical studies carried out through the three apex organisations, besides through other specialist organisations of the Government of India and specialist expert agencies and also after site appraisal*' (TN para. 38).

In its arguments during the course of the 2006 case, Kerala submitted that the danger to the dam is threefold: first, floods that may impact the dam; second, the impact of an earthquake on the dam; and third, the impact of structural degeneration on the dam. With respect to the threat posed by floods, Kerala contended that the CWC's estimation of the probable maximum flood (PMF) ought to have been higher. As regards the earthquake hazard, Kerala relied on a study conducted by Dr D. K. Paul and Dr M. L. Sharma, professors of IIT Roorkee, which indicated that both the main dam and the baby dam are likely to face damage, which may lead to the failure of both. On the aspect of structural degeneration, Kerala stated that 62% of the dam consists of lime surkhi concrete and the dam has undergone heavy leaching of lime, losing 30.48 metric tonnes per year as estimated by the Expert Committee report. Kerala also noted the reduction of the density of the materials used for the construction of the dam (TN paras 180 and 181).

The EC analysed in depth all three issues raised by Kerala. As regards the first issue, with respect to the PMF levels, the Committee was in concurrence with the findings of the CWC team and denied that the original number is an underestimation of facts, and found the hydrologic safety of the dam to be intact. With reference to the second issue, concerning the seismic safety of the dam, the Committee determined the dam to be seismically safe. With respect to the third concern regarding structural safety, the Committee found the leaching levels to be 3.66%, well within the acceptable levels of 15–20%, thus posing no danger to the strength of the structure (TN para. 191). Furthermore, the EC also analysed the seepage levels of the dam, and found them to pose no danger whatsoever, concluding that the dam is structurally safe. In addition to these observations, the Committee noted that Kerala's apprehensions were purely conjectural in nature.

Kerala challenged the findings of the EC report. It contended that the material contained in the form of 50 CDs and four DVDs is not admissible before the Court, as these data were supplied to Kerala not when the report of the EC was furnished to it, but after an order was passed by the Court requiring the EC to submit the same. Furthermore, Kerala submitted that the Coordination Committee headed by Dr C. D. Thatte took unilateral decisions prejudicial to the interests of Kerala (TN para. 196). The Coordination Committee was a sub-committee of the EC and included the representatives of Kerala and Tamil Nadu as members. On this matter, the Court declared that despite the fact that the technical data contained in the 50 CDs and four DVDs were furnished to Kerala only after an order was passed to that effect, the data contained were compiled pursuant to an order of the Court. Concluding the matter of safety, the Court concurred with the findings in the preceding case and upheld the findings of the EC.

After it ordered Kerala to allow for the elevation of the water level in the 2006 case, the Court constituted a three-member Supervisory Committee to allay the fears of the State while supervising the restoration of the water level to 142 ft. Furthermore, the Supervisory Committee was directed to periodically inspect the dam and give suggestions in cases of emergencies. As per the Court's orders, the Committee is to be under the Chairmanship of one member of the CWC and one representative each of Kerala and of Tamil Nadu.

6. Constitutionality of the Kerala Irrigation and Water Conservation (amendment) Act, 2006

As outlined previously, the Kerala legislature enacted the Kerala Irrigation and Water Conservation (Amendment) Act (2006) (The 2006 Act), effectively nullifying the 2001 Supreme Court judgment. After this legislation was enacted, Tamil Nadu filed a suit before the Supreme Court challenging the constitutional validity of the enactment and requesting a permanent injunction prohibiting Kerala from obstructing both repair measures and attempts to elevate the water level to 142 ft. Tamil Nadu challenged the 2006 Act on primarily five grounds. First, that it amounted to the usurpation of judicial power since the Kerala legislature enacted laws on the subject of the safety of the Mullaperiyar Dam, when these questions fell 'exclusively within the province of the judiciary' and were already resolved in the 2001 case (TN para. 18 (a)). Second, Tamil Nadu stressed that the 2006 Act fell beyond the legislative competence of Kerala, since the subject fell under Section 108 of the States Act, enacted under Articles 3 and 4 of the Constitution, which precede Schedule 7 in significance (TN para. 18 (b)). Third, the petitioners emphasised that the 2006 Act violated the separation of powers doctrine as enshrined in the Constitution, since it amounts to a transgression of powers conferred exclusively on the judiciary (TN para. 18(c)). Fourth, the petitioners contended that a final judgment, once rendered, continues to

operate until altered by another judgment given by a competent court. In addition, nullification of a judgment through legislation is constitutionally impermissible (TN para. 18(d)). Tamil Nadu argued that the legislature does not have the power to strike down a pronouncement of the judiciary. Tamil Nadu cited the Prithvi Cotton (1969) case where it was held that nullification of a judgment without legal basis is one of the categories of usurpation. Fifth, Tamil Nadu stressed the fact that the haste and circumstances surrounding the enactment of the 2006 Act are testament to its true purpose: to affix the water level at 136 ft. Furthermore, there were no new facts or developments that justified the enactment of the Dam Act. Citing the case of Indra Sawney (2000), the petitioners further asserted that the details of the 2006 Act are open to judicial scrutiny.

Kerala countered these arguments by furthering four propositions. First, it asserted that the State legislature had the power to legislate on the matter, as justified by entries 17[8] and 18[9] of the State List and entries 17[10],17-A[11] and 17-B[12] of the Concurrent List. Furthermore, Kerala emphasised that if the 1886 agreement survives, then in the public interest Kerala has the right to modify, through legislation, certain terms of law, as the lease was inherited under Article 295 of the Constitution, and thus does not bind the legislature of the State (TN para. 191). Second, Kerala asserted that, 'The legislature is competent to remove the basis of any judgment and, therefore, it is not permissible for Tamil Nadu to claim any right to store water at Mullaperiyar Dam beyond 136 ft' (TN para. 27). Furthermore, it advanced that the legislature has the power to regulate the safety of the Periyar River, which is located within the territorial boundaries of the State. Third, it contended that the 2003 Act was already in place at the time of the judgment in the 2001 case. Accordingly, Sections 2, 3 (applicability provisions) and Section 30[13] of the same were not considered by the Court and thus deemed the judgment *per incuriam.* Fourth, Kerala stressed that the 2006 Act was enacted in view of the *public trust doctrine* and *precautionary principle* (TN para. 140, see also, TN paras 137, 138 and 139).

The Court findings were: first, that the *public trust doctrine* and *precautionary principle*, as asserted by Kerala, hold true but endure no significance whatsoever to the case (TN para. 143). Second, in the words of the Court, Kerala 'cannot through legislation do an act in conflict with the judgment of the highest Court which has attained finality' (TN para. 140). The Court additionally emphasised that no State or legislature can be a judge in its own cause, as this would be in direct contravention of the provisions of Articles 131 and 262 of the Constitution. The Court also quashed Tamil Nadu's assertion that the legislation amounted to the usurpation of judicial power (TN para. 90). Third, the Court made an

[8] Entry 17: State List reads '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.'

[9] Entry 18: State List reads 'Land, that is to say, rights in or over land, land tenures including the relation of landlord and tenant, and the collection of rents; transfer and alienation of agricultural land; land improvement and agricultural loans; colonization.'

[10] Entry 17: Concurrent List reads 'Prevention of cruelty to animals.'

[11] Entry 17-A: Concurrent List reads 'Forests.'

[12] Entry 17-B: Concurrent List reads 'Protection of wild animals and birds.'

[13] Section 30 reads 'Distribution of Water to another State or Union Territory.— No water from a watercourse in the State shall be distributed to any other State or Union Territory, except in accordance with an agreement between the State Government and the Government of such other State or the Union Territory in terms of a resolution to that effect passed by the Legislative Assembly of the State.'

interesting observation regarding the separation of powers doctrine. It noted that though the doctrine of separation of powers is not explicitly stated, it is embodied in form and value in the Constitution, as it is merely an extension of the principle of equality enshrined in Article 14[14]. It established that a Court's decision will remain binding unless the circumstances of the judgment are fundamentally altered, such that it would necessitate legislation. Fourth, the Court ascertained that the judgment in the 2001 case was not *per incuriam*, as the 2003 Act was neither referred to nor relied upon for the same (TN para. 130). Upon these merits, the Court declared the 2006 Act unconstitutional and *ultra vires* (TN para. 199 (1)) and restrained Kerala by a decree of permanent injunction, prohibiting it from obstructing the elevation of the water level in the Mullaperiyar Dam (TN para. 221).

7. The Mullaperiyar Dam and the environmental controversy

In 1899, the land leased to Tamil Nadu under the 1886 agreement was declared as a reserve forest under the erstwhile Travancore Forest Act (MEPF para. 7). This was followed by the Kerala Forest Act, which upheld the same. In 1934, the area comprising the reserve forest and including the associated swamps and marshland was declared as the Periyar Sanctuary (MEPF para. 7). Soon after, the Sanctuary was expanded to 77 km^2 under the Wildlife Protection Act, 1972. In 1978, the sanctuary was acknowledged as the Periyar Tiger Reserve under the Project Tiger programme (MEPF para. 7). Furthermore, in 1979, upon the recommendations of the CWC team, the water level of the dam was lowered to 136 ft. Recognised as a biodiversity hotspot by the International Union for Conservation of Nature and declared the oldest sanctuary in Kerala, the Periyar Tiger Reserve holds special significance within Kerala and the country as a whole (MEPF para. 7). One of the arguments furthered by both Kerala and the MEPF has been the possible threat that may be caused to the flora and fauna as a result of the elevated water level in the dam. There are many suggestions that there could be a sustainable solution for this issue. However, since a critique of the findings was not the purpose of the paper, this section examines only what was highlighted in the two judgments.

The environmental aspect was raised in the first case. Therein, the MEPF contended that the area immediately above the then-water level of 136 ft is a vital tract of land as it forms the habitat of several wild animals, specifically larger herbivores, carnivores and amphibians. Furthermore, the land contains various habitats such as grassy areas, marshy areas, swamps and areas covered with trees. Thus, the MEPF submitted that raising the water level beyond 136 ft would adversely affect the biodiversity contained therein and would negatively impact the neighbouring flora and fauna.

Countering these arguments, Tamil Nadu urged that the act of elevating the water level would first, result in the submergence of a mere 11.2 km^2 of land, which amounts to only 1.44% of the total area, and second, as opposed to endangering the environment, it would only result in a favourable impact on the various species of flora and fauna inhabiting the area (MEPF para. 7). Tamil Nadu stressed that the higher water level would enable the wildlife to flourish.

On this matter, the Court concluded that, contrary to the MEPF's fears that the elevated water level would adversely affect the environment:

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[14] Article 14 reads 'The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.'

'The increase of water level will not affect the flora and fauna. In fact, the reports placed on record show that there would be improvement in the environment. It is on record that the fauna, particularly elephant herds and the tigers, will be happier when the water level slowly rises to touch the forest line. In nature, all birds and animals love water spread and exhibit their exuberant pleasure with heavy rains filling the reservoir resulting in a lot of greenery and ecological environment around' (MEPF para. 11).

The Court emphasised the report of the Expert Committee, which also stressed that elevating the water level would be beneficial for the wildlife.

In the second case, Kerala conceded that the environmental aspect of the case was finally concluded in the 2001 case. No further issues concerning the environment were raised.

8. The alternative: building another dam

In May 2009, the Government of Kerala constituted a Committee to look into the aspect of the safety of the dam. In its report submitted in June 2009, the Committee, *inter alia*, suggested the construction of a new dam, located downstream of the Mullaperiyar Dam, as a viable alternative. In considering the same, Kerala's Minister of Water Resources advised the Chairman of the CWC in July 2009 to constitute a team of officers to inspect the dam and examine the issues raised by the Committee constituted by the Kerala Government. Thereafter, the Secretary of Water Resources convened a meeting on the 31st of July 2009, which was attended by, among others, the Principal Secretary, Public Works Department, Tamil Nadu and the Additional Chief Secretary, Water Resources Department, Kerala. In the meeting, the representative of Kerala stated that the Government of Kerala envisions the construction of a new dam as the only feasible alternative to the problem at hand, and acknowledged Tamil Nadu's need for the water. Furthermore, he detailed that the cost of construction of the new dam would be borne by Kerala and that the terms of the 1886 agreement would be upheld with respect to the new dam as well. The representative of Tamil Nadu recognised the offer and informed the representative of Kerala that the Government of Tamil Nadu would examine the offer after the same was formally sent to them. Consequently, in his letter dated 14th of September 2009 to the Chief Minister of Kerala, the Chief Minister of Tamil Nadu communicated that the issue of the construction of a new dam as an alternative need not be raised as the existing dam will function effectively as a new dam after strengthening and repair measures are completed (TN para. 191).

In the 2006 case, one of the issues framed for consideration was the construction of a new dam as a possible solution to the issue. The EC, in its report, listed the construction of a new dam as the first alternative. The EC stated that Kerala may undertake the construction of the new dam after due clearances from appropriate authorities are obtained, and estimated the cost of construction of the new dam to be 1,000 crores. Furthermore, the EC laid down several preconditions for the construction of the new dam (TN para. 211). On the matter, the Court noted that Kerala's proposal to construct a new dam had been rejected outright by Tamil Nadu. In view of this, the Court held that in the matter of construction of a new dam, the agreement of both parties is vital and accordingly Tamil Nadu cannot be forced to accept the offer. As a result, the Court rejected the offer to construct a new dam (TN para. 213).

9. Evolving law and the Mullaperiyar conflict

The Mullaperiyar Dam conflict brought to the fore numerous issues in relation to the law. The second case was first adjudicated by a three-member bench, and consequently transferred to a Constitution Bench to address certain pertinent questions. The five-member Constitution Bench who adjudged the case consisted of Justices R. M. Lodha (Chief Justice of India), H. L. Dattu, Chandramauli Kr. Prasad, Madan B. Lokur and M. Y. Eqbal.

The first case raised predominantly four questions concerning the law. First, was the issue of constitutionality of the States Act. Entry 17[15] of the State List under the Seventh Schedule of the Constitution covers the subject matter of water. Section 108 of the States Act relates to the continuance of an agreement or arrangement made between two or more existing States that was subsisting immediately before the 1st of November 1957 with respect to the right to receive and utilise water or electric power (TN para. 14). The contention urged was that since Entry 17 of the State List under the Constitution already covers the subject matter of water, Section 108 of the States Act is outside the legislative competence of the Parliament of India. The Court, however, determined that Section 108 came under the scope of Articles 3 and 4 of the Constitution of India – which were declared unfettered by Article 246[16] and Schedule 7 of the Constitution. In the words of the Court, 'The Constitution confers supreme and exclusive power on Parliament under Articles 3 and 4 so that while creating new States by reorganisation, the Parliament may enact provisions for dividing land, water and other resources' (MEPF para. 8). The reasoning furthered by the Court was that a new State created under the States Act owes its existence to the Act itself and, moreover, it is incongruous to claim that a legislative power exercised by a State after its birth precedes in importance the legislation that gives birth to that very legislative power exercised by that State. Second, was the issue of jurisdiction of the Court with respect to Article 262 read with Section 11 of the Inter-States Water Disputes Act, 1956. The matter to be decided was whether the jurisdiction of the Court could be barred in view of the foregoing. Article 262 pertains to the matter of disputes or complaints that arise in relation to the use, distribution and control over the waters of, or in, any Inter-State river valley or river (TN para. 27). It establishes that the Parliament can by law provide for the adjudication of such disputes or complaints and can bar the jurisdiction of the Courts in the same. The Inter-State River Water

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[15] Entry 17: '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.' Further, entry 56 of List I reads '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.'

[16] Relevant portion of Article 246: 'Subject-matter of laws made by Parliament and by the Legislatures of States.—(1) Notwithstanding anything in clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule ("Union List").

(2) Notwithstanding anything in clause (3), Parliament, and, subject to clause (1), the Legislature of any State also, have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule ("Concurrent List").

(3) Subject to clauses (1) and (2), the Legislature of any State has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule ("State List").'

Disputes Act was enacted in exercise of the same power, and bars the jurisdiction of the Supreme Court in matters of water disputes. Section 2(c)[17] of the Act defines a 'water dispute' and implies, *inter alia*, that such a dispute is one that pertains to the use, control or distribution of waters or that concerns the interpretation or implementation of an agreement relating to the same. On this matter, the Court determined that the case did not fulfil the definition of 'water dispute' as it merely concerned the safety of the dam in the context of raising the water level to 142 ft (MEPF para. 9). The Court determined that its jurisdiction was not barred under Article 262 read with Section 11 of the Inter-State River Water Dispute Act. Third, was the issue of the Court's jurisdiction with reference to Article 363 of the Constitution (*State of Andhra Pradesh v State of Maharashtra & Ors (2013) 5 SCC 68*). Article 363 bars the jurisdiction of the Court in any dispute arising out of, *inter alia*, a treaty or agreement entered into before the commencement of the Constitution. Herein, the Court determined that Article 363 is applicable only to political agreements and thus cannot be held relevant to agreements that are wholly non-political in nature. Fourth, was whether the dispute was liable to be referred to arbitration; the contention furthered by Kerala was that the 1886 agreement provided for arbitration in the event of a dispute concerning the rights, liabilities or duties of either the lessor or the lessee. The Court dismissed the contention, reiterating that the dispute was regarding the safety of the dam and thus did not concern the rights, duties or liabilities of either party (MEPF para. 8).

The second case raised additional questions of the law. There arose three pertinent queries as to the interpretation of the law, because of which the case was referred to a Constitution Bench; first, was that of Articles 3 and 4 read with Article 246 of the Constitution. This issue had been dealt with in the first case as enumerated above. Kerala raised the issue of the constitutionality of the States Act once again in the second case. However, the Court found that the matter had already been considered in the previous instance and thus dismissed the contention.

Second, was concerning Article 131 read with Article 32[18] of the Constitution, in the context of *res judicata.* Under Section 177 of the Government of India Act, 1935, existing contracts made by the Secretary of State in Council for a Presidency would, from the date of commencement of the Act, have the effect as if they were made on behalf of the Province itself. Thus, with respect to the 1886 agreement

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[17] Relevant portion of Section 2(c): '"water dispute" means 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 agreement; or (iii) the levy of any water rate in contravention of the prohibition contained in Section 7.' Further, Section 7 reads 'Prohibition of levy of seigniorage, etc. (1) No State Government shall, by reason only of the fact that any works for the conservation, regulation or utilization of water resources of an inter-State river have been constructed within the limits of the State, impose, or authorize the imposition of, any seigniorage or additional rate or fee (by whatever name called) in respect of the use of such water by any other State of the inhabitants thereof. (2) Any dispute or difference between two or more State Governments with respect to the levy of any water rate in contravention of the prohibition contained in sub-section (1) shall be deemed to be a water dispute.'

[18] Relevant portion of Article 32: 'Remedies for enforcement of rights conferred by this Part.—(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.

(2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of *habeas corpus, mandamus,* prohibition, *quo warranto and certiorari*, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.

(3) Without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2).'

read in the context of the Government of India Act, 1935, the Madras Province became the lessee of the agreement – a fact that remained undisputed.

Third, was the matter of the proviso to Article 131 read with Article 363 of the Constitution and the effect of the Constitution (26th Amendment) Act from a legal standpoint. The Constitution Bench held that Articles 131 and 363 of the Constitution are confined to political agreements only and thus have no effect whatsoever on non-political agreements, as a result of which the Court's jurisdiction in respect of non-political agreements falling under the purview of Articles 131 and 363, or either Article 131 or 363, is not barred (TN para. 66). Additionally, the Court noted the similarity in the provision contained in Article 363 and the proviso to Article 131, reinforcing that non-political agreements do not fall outside the jurisdiction of the Apex Court.

10. Summary

There are various perspectives from which the entire dispute can be analysed. However, the crux lies in the 1886 lease agreement and the safety of the dam.

On the 1886 agreement, the Court was categorical that the agreement is valid and binding, and also pointed out 'that when two States enter into an agreement, they do so with the aid of competent legal minds'. In addition, the fact that the agreement was entered into during colonial times should not impact the validity of the agreement, since the Government of India has ensured that colonial agreements that can have a potentially detrimental effect have been discontinued.

On the question of constitutionality of the 2006 Act, the Court found the law in contravention of the 2001 judgment and struck it down. For Kerala, the Mullaperiyar dispute is centred on the issue of the dam safety, and the possible repercussions from raising the water level. Kerala has vociferously argued that the dam was originally built keeping in mind a lifespan of 50 years and, having been in use for over 100 years, is under threat of collapse. The Court made it clear that the safety of the dam is not as represented by Kerala; the dam is safe and not under any risk of collapse, even from an earthquake. The judgments, having taken into consideration the opinions of several expert committees constituted for the purpose, have served to temporarily allay the fears concerning the dam, leaving the question of a future plan of action unanswered.

Concerns will not die away soon. Issues will continue to be raised relating to the safety of the dam; the validity of the agreement; the environmental consequences from raising the water level; and the risk to people living nearby. Ramaswamy Iyer, capturing the essence, observes that to the people of Kerala safety is paramount and the risk is genuinely too high, and that at the same time this issue has created a sense of uncertainty and anxiety to the people of Tamil Nadu in respect of continued water flows. According to him, 'there are two vulnerabilities in this case: the life-security concerns of people in Kerala and the livelihood-security concerns of the people of Tamil Nadu. Both need to be addressed' (Iyer, 2011).

The Court, however, did not go into the sociological context of risk. It only went on to reason that despite the technological inadequacies in comparison to the state of advancement we have today, the dam has been beneficial for a multitude of reasons, predominantly in an agrarian, and thus economic, context. The nature of the dam is unique: a river that flows predominantly through one State has been dammed and the resultant benefits are accrued by a neighbouring State. Despite the multitude of opinions pertaining to the safety of the dam, there is no doubt that a precautionary approach to the

issue would be worthwhile to pursue, in view of the nature of intergenerational equity considerations that can arise in the future. However, any future plan of action involving Mullaperiyar and its waters will need to be sorted out by the people of both Kerala and Tamil Nadu within the four walls of trust, mutual respect, legal institutions, and faith in the rule of law.

The adjudication of the matter of dam safety by the Supreme Court has also been criticised as amounting to judicial overreach (Iyer, 2014), the argument being that the Court does not have the authority to appoint the experts and then determine which experts are right. During the course of the entire dispute, spanning two suits before the Supreme Court, multiple expert committees have been appointed by the Court. Kerala has constantly dissented with the findings of such committees, offering alternative expert determinations on the matter. However, in an issue as contentious as this, and when conciliation and negotiated settlement cannot be reached, the Court is the only remaining forum where a dispute covering a multitude of constitutional and technical issues can be settled. Here, the Supreme Court followed due judicial procedure in resolving issues that require expert opinions, having asked the States to attempt to resolve the matter amicably prior to the commencement of the two suits.

Interestingly, both judgments divert little or no attention to the potential environmental repercussions of raising the water level. The first judgment briefly addresses the matter, while the second judgment does not discuss such implications at all. The Supreme Court has thus conclusively ordered the continuance of the status quo, with the additional aspect of the elevated water level. Interestingly, in June 2014, the Kerala Legislative Assembly unanimously adopted a motion for a Presidential reference on the Mullaperiyar Dam dispute under Article 143 of the Constitution. It remains to be seen what the future holds for the matter.

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