

6. INDUS COMMISSION (1941-42)

While B.N. Rau was a judge of the Calcutta High Court, he was appointed as the chairman of the Indus Commission. With the coming into force, on 1st April, 1937, of the Government of India Act, 1935, the development of river waters became a purely provincial subject. Every Province could henceforth undertake such works of development on the rivers passing through its territory as it considered expedient. Till then, the Government of India (and the Secretary of State of India at London) were competent to settle all inter-provincial river problems by executive order. Section 130 of the Government of India Act, 1935, however, provided that if it appeared to the Government of any Governor's Province or to the Ruler of any Federated State that the interests of that Province or State, or of any of the inhabitants thereof, in the waters from any natural source of supply in any Governor's or Chief Commissioner's Province or Federated State had been or were likely to be, affected prejudicially by (a) any executive action or legislation taken or passed, or proposed to be taken or passed, or (b) the failure of any authority to exercise any of its powers with respect to the use, distribution or control of waters from that source, the Government or Ruler might complain to the Governor-General. If the Governor-General received such a complaint, he was (unless he was of opinion that the issues involved were not of sufficient importance to warrant such action) required to appoint a Commission. The Commission was to consist of such persons having special knowledge and experience in irrigation, engineering, administration, finance or law, as the Governor-General thought fit. The Governor-General could request that Commission to investigate in accordance with such instruction as he might give to them and to report to him on the matters to which the complaint related, or such of those matters as he might refer to the Commission. This was provided in section 131 of the Government of India Act, 1935. After considering any report made to him by the Commission, the Governor-General was empowered to give such decision and make such order, if any, in the matter of the complaint as he might deem proper.

It was, however, provided that if, before the Governor-General gave his decision, the Government of any Province or the Ruler of any State affected requested him to do so, he had to refer the matter to His Majesty in Council and His Majesty in Council might thereupon give such decision and make such order, if any, in the matter as he deemed proper. Such decision or order was to prevail over any other law made by any Province or State. As Punjab undertook investigation of several new irrigation schemes involving fresh diversions and storages, Sind got concerned about their effect on its own canals. Therefore, Sind requested the Governor-General in October, 1939 to appoint a Commission under section 131 of the Government of India Act to investigate into certain specific complaints. A Commission was accordingly appointed in September, 1941 with Justice B.N. Rau as Chairman and P.F.B. Hickey and E.H. Chave, both Chief Engineers, as members of the Commission. The first sitting of the Commission which was called the Indus Commission was held at Simla on the 22nd September, 1941. The disputants before the Commission were Sind, the Punjab, Bikaner, Bahawalpur and some other States. They all asserted their rights to an equitable distribution of the waters of the Indus and some of its tributaries. B.N. Rau and the other members of the Commission formulated the principles which governed the decision on the issues relating to distribution of river waters amongst riparian States or regions which were more or less accepted by the contending parties. These principles were evolved by the Commission after studying various cases decided earlier in America and also the Geneva Convention, 1923. They have become a model for the several Commissions appointed subsequently to decide similar disputes. The principles laid down by the Commission were :

(1) The most satisfactory settlement of disputes of this kind is by agreement, the parties adopting the same technical solution of each problem, as if they were a single community undivided by political or administrative frontiers. (Madrid Rules of 1911 and Geneva Convention, 1923, Articles 4 and 5).

(2) If once there is such an agreement, that in itself furnishes the 'law' governing the rights of the several parties until a new agreement is concluded. (Judgment of the Permanent Court of International Justice, 1937, in the Meuse Dispute between Holland and Belgium).

(3) If there is no such agreement, the rights of the several Provinces and States must be determined by applying the rule of 'equitable apportionment', each unit getting a fair share of the water of the common river (American decisions).

(4) In the general interests of the entire community inhabiting dry, arid territories, priority may usually have to be given to an earlier irrigation project over a later one : 'Priority of appropriation gives superiority of right' (*Wyoming v. Colorado*, 259 U.S. 419, 459, 470).

(5) For purposes of priority, the date of a project is not the date when survey is first commenced, but the date when the project reaches finality and there is 'a fixed and definite purpose to take it up and carry it through' (*Wyoming v. Colorado*, 259 U.S. 419, 494, 495; *Connecticut v. Massachusetts*, 282 U.S. 660, 667, 673).

(6) As between projects of different kinds for the use of water, a suitable order of precedence might be (i) use for domestic and sanitary purposes; (ii) use for navigation, and (iii) use for power and irrigation (Journal of the Society of Comparative Legislation, New Series, Volume XVI, No. 35, pages 6, 7)."

The case was presented before the Commission by eminent lawyers. The Commission submitted its Report in July, 1942 which was considered to be a classic on the subject. B. Shiva Rau writes that the work of Justice B.N. Rau as the Chairman of the Commission provided 'an illustration of the untiring industry, thoroughness and impartiality with which he tackled every problem. He familiarised himself with the aspects of the problems of irrigation and the report that his Committee submitted...on the dispute has been regarded, not only in India, but outside, as a classic on riparian rights, covering the subject with great legal knowledge and technical

accuracy'. Unfortunately, the findings of the Commission were not accepted either by the Punjab or by Sind. It was decided to refer the matter to His Majesty's Government at London. At that stage informal meetings were held by the Chief Engineers of the Punjab and Sind with a view to finding a solution by agreement and a draft agreement was prepared in 1945. But no final accord could be reached. The matter was, therefore, referred early in 1947 by the Government of India to the Secretary of State for his decision. Immediately thereafter, there was division of India and the two dominions, India and Pakistan were set up. Indus basin was divided into two parts, one part falling in India and the other in Pakistan. What happened thereafter to the dispute is now a matter of history.

7. PRIME MINISTER OF JAMMU AND KASHMIR (1945)

B.N. Rau retired from the Indian Civil Service early in 1944 and, on being persuaded by Tej Bahadur Sapru, he agreed to become the Prime Minister of Jammu and Kashmir. However, within a short period, he tendered his resignation, as he could not get on with the Maharaja of Jammu and Kashmir. Sri Karan Singh, in his autobiography, writes about the tenuous relationship that used to exist between his father (the Maharaja) and his Prime Minister :¹¹

He selected his Prime Minister with great care, but no sooner had he appointed one than he would begin cultivating some one else as a sort of counterbalance. With the exception of N. Gopaldaswami Ayyangar who was Prime Minister of the State for six years from 1934 to 1939, this happened with all the succeeding incumbents—Raja Maharaj Singh, B.N. Rau, Colonel K.N. Haksar, Pandit Ramachandra Kak and General Janak Singh—right down to the crisis of 1947.

B.N. Rau gave up the post of the Prime Minister and wrote to the Maharaja a letter explaining the reasons for his

11. Karan Singh, *Heir Apparent* (Oxford University Press 1982) p. 12.