when a dam is constructed there are issues concerning rights in submerged land, resources from these land, rehabilitation of oustees, compensation, etc. These are different from the rights in water which the dam has obstructed and the benefits arising from this damed water. Such rights are substantive in nature. They do not concern procedures or remedies.

Before we get into the hard law aspect of what are the water rights in Indian law, there is one basic task that remains: getting clear about what is meant by 'rights'. Let us turn, therefore to briefly explicate the meaning of 'rights', before we get back to the Indian situation.

1.3.0. The Nature of Water Rights

There are specific questions concerning the nature of water rights:

(a) is it a natural (customery) right or a legal (positive) right (right granted by law) ?

(b) is it a individual right or a group right?

(c) is it a positive right or a negative right?

To deal with these three issues one needs to separate the question of law: what is the meaning given to the notion of rights in the Indian law presently, from that of legal policy: what meaning they ought to be given (or can be given) to attain the constitutional and democratic ends. These two questions need to be further distinguished from the historical question of how the notion of water rights has evolved in Indian law -- what meaning its nature has

been given at different times. Since the question of hard law -- concerning water rights in Indian law, and that of legal policy, are matters for detailed analysis later, these introductory remarks are intended to capture only the general sense of 'rights' in relation to water rights. It may also be interesting to bring in a few historical observations about how the notion has legally evolved over time in India.

I.3.1. Nature of Natural Rights

A right may arise in at least three ways: (i) granted by law; this would be a 'legal' right, such as is the case under the forest laws in India, where people are given usufruct rights by the state over forest produce; (ii) arising out of contracts, such as is the case under family laws, specially concerning marriage; each spouse acquires certain rights in virtue of entering into a contract with the other; (iii) as a natural right, that is a right arising out of either the very nature of human nature or that of society. Such rights may be argued to be arising out of the historical conditions, basic needs or notions of justice with reference to eighter human nature or that of society. Some may argue that references to history, basic needs or justice make the right 'supra-legal', but this need not necessarily be so, one may argue, on the contrary, that what is being called 'supra-legal' is in fact as much internal or basic to law and hence a part of it as anything

one may wish to call basic.

The fact that a right may be natural does not mean that it is not open to the Hohfeldian analysis of correlation of rights with other legal concepts, such as duties. Jurists sometimes make the mistake of assuming that only legal rights are amendable to the Honfeldian rights - duty analysis. This type of correlation would be true of any sort of right, in whatever way it may arise. Of natural rights, for example, one may ask, are there natural duties correlated with them. If it turns out that there in fact are then it does not make the right any less 'natural'; the justification for the naturalness of the right has been independent of whether or not there are correlated natural duties. Natural rights theorists do not argue that there are natural rights because there are natural duties, (although they may). It is also important to note that it may be argued (and it often has been) that natural rights are fundamental in the sense that they have their independent status, that they are true in law whether or not there be corresponding duties on others, that is to say, that such rights are not open to a Hohfeldian type of analysis.

The falsity of the view that natural rights are not available for Hohfeldian analysis is not our central concern here. This question is posterior to the question of the nature of water rights itself. Our first task is to state what such a right is, or can be. The realization that

natural rights are available for Hohfeldian analysis is nonetheless important, because in this scheme all rights are correlated with duties. Hence the establishment of water right will also entail the establishment of the corresponding duty of the agency that fulfils the duty, namely the state and its agencies. However, there is another aspect of the Hohfeldian scheme which is of interest to us here, this concerns the categorization of rights into claim-rights, entitlement rights, rights by merit or desert.[1] The question about this type of categorization would arise for all rights, in whatever way they arise. Having made these clarifications the basic question can now be put: what is the nature of water right and how do we categorize it?

The fact that right over water has existed in all ancient laws, including our own dharmasastras and the Islamic laws, and also the fact that they still continue to exist as customary laws in the modern period, clearly eliminates water rights as being purely legal rights, that is rights granted by the state or law. They have been recognized in law, by the various states, even within India, and not granted. The later statuates have curtailed the rights, but that is another matter.

The other case that can be made for this right is that it is a contractual right. But since this right has existed since ancient times, one will have to invoke a Kantian or a Rawls type of contractarian theory -- a

hypothetical position of initial conditions in which, from behind their veil of ignorance, the people have contracted with the state, society, or each other, to share the water and to let the state or the society use water for the benefit of all. This last condition of the 'benefit for all' will become paramount in this case. Such a sharing can occur only by applying some basic principles of justice -- of the Rawlsian type, for people from their original position will not want to share water (or let the state use the water) unjustly. In such a situation the basis of water rights will have to be grounded in notions (or principles) of justice which apply to the original contract. In any case it will not be a 'legal right' in the ordinary sense of the term, for the contract would logically preceed the law. It would be a right arising out of the nature of justice, or that of a just contract, and hence a spiece of natural right -- that which is natural to a just contract.

Outside the contractarian theories there are other ways of arguing about the 'naturalness' of water rights, and hence other senses of 'natural'. One such theory could be the traditional Stoic thesis, a crude argument for which could be: seventy per cent of the human body consists of water, hence biologically it is in the very nature of human survival that water is necessary for them. Since people have a natural right to survive they have a natural right to water. Alternatively, one may also build up a Lockeian type of natural right theory, with a different sense of

'nature'. The case that Locke built for land can easily be applied to water. In his first treatise of the Two Treatise on Government Locke argued that although God created the world, he, being desirous of people's well being, wants people to share the land equitably, since their well being cannot come about without such a sharing. Now such a sharing necessitates that people have a fundamental right to this sharing. In his second Treatise Locke translated this necessity to share in terms of peoples fundamental (natural) right to property. Proper contract Locke argued should respect God's will, and therefore it should respect the right to property. One may argue against Locke that people's well being lies in the ability to use land and reap the benefits and not necessarily in owning land. This would show that the natural right is a proprietary or usufruct right and not an ownership right. The question, however, concerns the nature of right and does not depend upon whether it is an ownership right. Even the natural right to use the resource is as significant as the right to ownership. When applied to water, the reason which Locke gives yields the result that people have a natural right to use water, if not own it.

We see therefore that whether one invokes a contractarian theory, natural law theories or even relies on mere historical data, water right essentially turns out to be a natural right.

The fact that water is something so vital for the survival of life on earth, as we know it, it would seem

unreasonable to say that people deserve it as a desert in the social game, or that they merit it because of their deeds, or even that they are entitled to it because they are willing to be law abiding citizens. Even out-laws and the most damned sinners ought not to be denied water. There would be both a moral and a legal condemnation if this occured. The most reasonable belief concerning water therefore, would be that people, because they have a right to life and life cannot survive without water, have, ipso-facto, a natural claim to water. In Hohfeldian categorization, therefore, this natural right will be a claim-right and not an entitlement, desert or merited. People have a claim over water in the same way as they have a claim over air, space or sunlight. It is only if we understand water right in this way that we can understand why in the customary laws, including riparian laws, the right over water has been accepted as a natural social fact. It is the same type of understanding that motivates the judges, in public interest litigation cases, to reinterpret Article 21, the right to life, the right to environment and hence right to access to clean water, as a fundamental right.[2]

I.3.2. Group Rights vs. Individual Rights

Traditionally in India there were both individual and group rights over water. In fact, often the group rights of communities, castes or whole villages over tanks, ponds, wells, streams or river banks, were more common. This is significant because those who believe that social

choices are to be based wholly or partly on some account of the rights of the human individuals are critical of such liberal ideology. Criticizing the bourgoisie notion of rights Marx once remarked that "none of the so-called rights of man go beyond egoistic man ... an individual withdrawn behind his private interests and whims and separated from the community."[3] Evidently, in India, the situation has been some-what complex. The pre-capitalistic customary conceptions of group rights have competed with a parallel set of post-capitalistic individual rights, vested in the 'egoistic man' through various statutory provisions, from the very beginning of the colonial legislations. It is, for example, presupposed in the Limitation Act of 1859, made explicit as easements in water rights in its amendment in 1871. (Sec.27) although limitation laws are not by themselves a source of rights. The Northern Indian Canal and Drainage Act, VIII of 1873 (Section8 Cl (h)), similarly implicity recognizes individual rights in granting that the government will grant compensation for damage done in respect of any right to water course to which a person has a right under the Indian Limitation Act, 1871. The Bengal Irrigation Act, III of 1876. Section 11. (g) makes similar provisions. What we are confronted with in India, therefore, are both the notions of group rights through customary and case law and individual rights through the statuates. This sort of situation is not unique to India, it occurs in many traditional societies, nor is it unique with

reference to water, a similar situation obtains in relation to forests. The rights discourse, nonetheless, together with the liberal ideology that is ubiquitous in the statuates, cannot be brushed aside as insignificant. The question, whether in the present conditions it is more important to assert group on individual rights, is a matter of legal policy, which we shall discuss subsequently.

I.3.3. Positive vs. Negative Rights

Even if right to water is a natural right - not necessarily vested in the egoistic man, the question still remains, is it a positive right or a negative right? That is, is it a (positive) kind of right in which the state and other people (on whom the corresponding duty falls) can be compelled to ensure that an individual is provided with water, such as is the case in right to health, or is it a (negative) kind of right in which the state and other people merely need to keep away so that the individual can enjoy unfettered access to water, such as is the case in right to life? The classification of rights as positive and negative is not a matter of mere technical convenience. Legally, in positive rights there is an obligation on others to do something, and in negative rights there is an obligation to refrain from doing something. This makes a major difference in who can be compelled to do something or not to do it. The jurisprudential basis of negative rights has traditionally been the assumption that that over which (or for which) one has a negative right cannot

be a subject matter of property. Natural human life, for example, cannot be owned by anyone. It is interesting to observe how the question of water rights has been historically dealt within law. Traditionally, the basic elements : space, air, water and energy, have been perceived as non-legal objects, that is incapable of becoming property. The Roman Law did not ever classify running water as capable of becoming someone's property. No Dharmasastra or Vyavahar text mentions property rights of anyone, including the king, in rivers. (see : Begram. v.Khettranath, 1869) Halsbury's Laws of England explicitly mentions that water in general cannot be the subject matter of property; and moreover, that water as such must continue to be common by the law of nature.[4] It is this sort of jurisprudential assumption that underlie the earlier legislations in India, such as in the Limitation Acts, 1859-71, the Northern India Canal and Drainage Act, 1873, Bengal Irrigation Act, 1876 and also the Specific Reliefs Act I of 1877 (sec.52-57). During the period of these Acts, the unfettered negative rights of the individuals was also recognized by the courts, which derived the principle from Race. v. Ward (1855)[5] and the customary laws. The fact that the right was perceived as negative is evident from the type of effort the courts were making in refraining others from violating someone's rights. Under the Acts too compensations were to be paid for violation or acquisition of rights which already existed. The courts or the government were not

trying to locate the duty bound agencies who would make people realize their rights.

The coming of the Easement Act in 1882, makes the first radical shift, in the history of Indian law, in both recognizing and not recognizing water right as a negative natural right. In terms of ascertaining what exact status the Act gives to water right, the question is complex and not easy to answer. But this very complexity itself reveals the underlying struggle to reallocate powers over water, in terms of redefining the rights over it. This struggle seems to have been necessitated by changes in the political structures as well as due to the Industrial Revolution which made possible new technologies for water harvesting. Whether this was so is a task for a different type of historical research. Section 2 (6) of the Easement Act, however, gives full recognition to natural and negative customary rights, both for groups and individuals. Section 4 of the same Act, on the other hand, defines easements for the first time as '<u>iura in re aliena</u>', a legal right that can be alienated. Section 2 of the Act, also for the first time, gives absolute rights over rivers and lakes to the government. It states that the government's rights are not affected by easements and customary rights. The principle derived from <u>Race</u> v. <u>Ward</u>, which is explicitly recognized and accepted by C1 (8) of the Act, is circumvented by C1 (a) (2) of the same Act, which places absolute rights in water in the government. The progressive development of the rights

of the government, from the Easement Act of 1882 to the Madhya Pradesh Irrigation Act of 1931, raises a fundamental question: has the acquisition of such powers by the government changed water rights into a positive right? On the face of it it would seem so, if the government has taken up the task of harnessing or obstructing all water resources, it would also be its positive duty to ensure availability of water to the people. The Water Supply Acts of various states are enacted with such a supposition. The answer, however, is not so simple, because in the recent times much of the public interest litigation concerning water issues rallies around reinterpretation of Articles 21 and 14 which involve characterization of right to life (including water) as a negative natural right, in contrast with the earlier statutory provisions. The questions in these litigations are not one of the state providing water to people, but the state not destroying the natural water resources. In terms of hard law then, the answer to the question whether water right is a negative or positive right, the answer is that it is not as yet settled in law, both interpretations are possible. The policy question: what it ought to be, demands a separate analysis. Here it is important to note that what we demand of the state and of the people depends much upon how we conceptualize the nature of water rights, whether negative or positive, natural or legal and group or individual.

The issues concerning the State's role and

people's claims can be dealt with greater clarity only after we have probed the questions concerning the status rights and the people's rights in more detail. Let us, therefore, now turn to first document the existing law from these two perspectives, before entering into the policy questions. In each case the legal framework can be discussed in terms of four types of rights, depending upon the sources from which they arise: customs, legislations, courts and learned opinions on interpretations (incohate rights). These distinctions are for convenience of understanding. In actual practice there is a great deal of overlapping between what may follow from statuates and what from customs or court decisions.

II.0.0. The Rights of the People

II.1.0. Customary Rights

In India, even before the coming of the Limitation Act and the Easement Act, various species of servitudes and easements were known, both in the Hindu and the Muhamadan Law.[6] The earlier English Law as applied to India, distinguished between servitudes of, two types: easements and '*profits a pendre*', In *profits a pendre* the rights were to be exercised along with certain duties. Those in which there were only rights but no duty to be performed were called easements. It also meant that no special profits were to be gained by the exercise of such rights, it was only a matter of gaining certain conveniences. Economic benefits were to be made only through *profits*