The Rajasthan Soil and Water Conservation Act, 1964.

The Indian Electricity Act, 1910.

Law of these types which are not directly about water (and there are a number of them at the state level) usually have sections which concern harnessing of water or its use for other purposes such as floating timber, extracting minerals, recreation, etc. These laws presuppose that the government has a prior right to use water in these and other ways. Often such matters are dealt with the rules under the laws or through delegated powers.

IV.0.0. The Jurisprudence of Water Rights and Legal Policy

IV.1.0. The Problematic

Let us begin by smummarising the basic jurisprudential tensions that we have seen in the development of water rights over this century in India.

The first basic question is: should we characterize water right as a negative natural claim right or as a positive entitlement right. We have seen that the customary law earlier, the common law tradition as well as the Easement Act had characterized it as a negative natural right. Recently the Supreme Court in its public interest litigation has once again made it out into a natural negative right. The statutory provisions, on the other hand have tended to describe this right as a positive entitlement right.

We must reflect on what theory of state is involved in either of these characterization. To characterize it as

a negative right is to say that people must be allowed to enjoy what nature has naturally endowed for them and any external violation, including that by the state, amounts to infringement of this right. The role of the state then becomes one of protecting people from any external intervention which would spoil or lessen people's enjoyment of that to which they have a natural claim. The state itself, of course, cannot become the exploiter or violator of people's natural claim. The Ganga Pollution case, the Ratlam case and others make such an assumption. They direct the state (under the wider meaning of Article 12 which includes the industries) to stop infringing on people's fundamental rights.

As a positive right, water right can belong only within the Directive Principles of State Policy, because the fundamental rights are negative rights. The Directive Principles presuppose a different theory of state in which the role of the state is to actually provide the necessary conditions for life. Given that the state has used the modern large scale technology to dam rivers and change water use and that too at the public cost, there is in fact a legal responsibility on the state to make sure that water in supplied to the public in as efficient a way as the new technology promises. This moral responsibility is the basis of the legal responsibility which is expressed in all Municipal Corporation Acts, Water Supply Acts, Panchayat Acts and other laws concerning the relevant statutory

bodies.

Before we discuss how this conflict between positive and negative rights and different roles of the state can be resolved, let us take note of the other basic problems.

IV.2.0. Meaning of Sovereignty

The second basic question is: If right to water is a negative, natural claim right of the people, what sense would it make to claim sovereign right over all water and translate it in terms of absolute rights vested in the government, as the Indian laws do? Consider for example, right to life or freedom of expression, which are similar negative natural rights. Can sovereignty over my or your life or speech be claimed by any one?

One reason for asserting sovereign rights is to proclaim jurisdictions. It is undeniable that the state has to define and defend the country's water territories and negotiate with other countries concerning water use, if the water from one territory flows into another. Consider a parallel situation, the state has to also define (through citizenship laws) and defend the people of the country, and negotiate with other countries (through immigration laws) the flow of people from one country to another. Does this fact by itself become the ground for claiming the state's sovereignty over all people? Who is soverign, the state or the people? The question of sovereignty is a legally very vexed question. Sovereignty, evidently, also has

external dimensions, such as in international law. The issue of jurisdiction is just one aspect of it. The point here is not to discuss the meaning of sovereignty in general but only in so far as it is involved in the natural resources law. The basic question is: what can be the basis of the absolute rights over natural resources? One alleged justification in legal positivism is that since the state is the sovereign and the people have deposited powers in the sovereign to utilize the natural resources for the benefit of all, this becomes a ground for claiming absolute rights over the resources by the state. It is possible that there may be other grounds or other alleged justifications for the absolute rights vested in the state. Here we are critically examining only one of these possible grounds, namely that of sovereignty, since this seems to be the most likely assumption the Crown may have made in the colonial regime.

What the Easement and other Irrigation laws do is to simply translate sovereignty into ownership or absolute rights as if all rivers of India are owned by the government. It is like saying all people of India are owned by the state they are the property of India. Such a statement would just not make sense, morally or legally. The main reason for this is that by its very nature there are objects in the world which cannot be legally owned, or over which one cannot have obsolute rights, although one may posses them people, for example, cannot be owned by any individual or the state, nor can there be absolute rights over them.

air, space, energy, similarly can be used but not owned. Water falls in the same category. An explanation of why this is so requires a detailed investigation into the ontology of law -- the distinctions between ownership, possession, occupancy, property, and why certain kind of legal enteties allow for only a certain kind of relationship (interms of rights).[44] For the purposes of this work the intutive under-standing will suffice.

Given the ontological status of water; that is, its special legal nature, any claim to property or absolute rights over it can at best remain de facto that is an unrealizable and unimplementable legal fiction, de factor that is in reality, the only kind of rights that can become operative for anyone are usufructory rights, that is right to use of water. The real question, therefore, is who has what kind of right to use water, and what corresponding duties attach to it. Claims of sovereignty rights in terms of absolute or ownership rights hence, can at best be dictatorial claims to power over monopolizing the use of water. The question of jurisdiction or territoriality can be handled in other ways.

The confusion in the Easement Act and the Irrigation laws, which proclain the absolute rights of government in all natural water, seems to have its roots in the similarities that one may find in other natural resources laws, such as the Forest Act or the Land Acquisition Act. These laws do assert absolute rights of the state

over certain common resources. One may assume, as the irrigation laws seem to have done, that because one has assigned absolute rights in the case of land and forests, one may do so similarly in the case of water. What this similarity fails to notice is that unlike stable resources, such as land and forests, unstable and mobile resources, such as water, cannot be regulated by the same type of law.

It is to be noted further that neither the land laws nor the forest laws have proclaimed total absolute rights of the state over all natural land or forests. They do not assert that all such common natural resources belong to the government simply because the law has been enacted. On the contrary these laws lay down proper procedure for settlement of people's rights and acquisition by the state; the assumption being that all common lands and forests do not ipso facto belong to the state. How is it that in the case of water resource all natural rivers become state's property, simply because the Irrigation laws have been enacted? Imagine the oddity of the law that claims sovereign rights or property rights over all air or sunlight over Indian and vests it in the state. The rivers of India belong to the people of India not merely in jurisdictional terms, but in terms of the right to use and not to the state or the government. The Easement and the Irrigation Acts assume, as an assumption perhaps, that the people of India have vested sovereignty as property on absolute rights over natural water in the state. It is difficult to conceive

of any society of any social contract in which the people would divest itself of its own sovereign rights and vest absolute rights over its resources in someone else without attaching any conditions or corresponding duties. It would be simply absurd for a people to give away all its rights and hand over the resources to the state in absolute faith. No contractarian theory can uphold this. The people of India have evidently not done this. There is no historical evidence to this. History, on the contrary, tells us that this absolute right was usurped by a foreign colonial power, who tacitly proclaimed sovereign rights in the laws, such as concerning water and forests laws. The people did not give away their rights. The Easement Act and irrigation laws, therefore, do not reflect the will of the people. They were not even enacted by the people or their representative government. They were legislated from above by a foreign regime who applied the legal principle of 'discovery' - like the discovery of America, - whoever discovers it owns it. The rivers of India were not discovered in the nineteenth or twentieth century. Nor were they handed over to the governments through treaty. The Indian kings had no power to hand over rivers since by the traditional and customary laws they never owned it.

IV.3.0. Public purpose

If we are to reinterpret water right of the state as a usufruct right to common resource only - with a

priority claim for public use, the whole legality of water rights need to be considered differently. Primarily, the rights cannot be thought of as absolute rights against which no prescription can be obtained. Moreover, the rights at once become co-related with duties. The duties of the state in the use of water, specially where people's natural right is violated, must be specified in the statutes itself. The people of India, if they are to hand over the usufruct rights to the state on a priority basis, would do so only on an assurance that this use be made in a totally accountable and responsible way. The duties of the state, including of all its agencies would have to be congruent with the kind of rights acquired by the state. Such a reworking of the Easement Act and irrigation laws would also be necessitated by the mandate of the Constitution -- Article 39(b),(c), which states that all resources of the country can be used only for the common good. It is not sufficient to merely translate' common good' as 'public purpose'. It needs to be clearly defined who the benefiting public is and how the original users are to be included in the 'public', and how their rights are to be respected if they are not going to be a part of the 'public ,

The 'purpose' too needs to be legally justiciable. The planners cannot arbitrarily plan projects whose worth the public has no way of evaluating. Unless such radical rethinking is done on the issue of water-rights, it is

unlikely that the lawlessness of the state in planning water schemes can be checked. It is equally unlikely that the poorer sections of the society will be enpowered to claim their rights to water when the state plans to change the users or water use.

IV.4.0. Natural Right

Once it is clear that original natural rights over rivers and other natural waters belong to the people of India and not to the government or the state, there is little reason for any confusion about the nature of this right. People have a natural or fundamental right over what is essential to their life and which inherently belongs to them. The governments can have only a legal usufructory right, with the consent of the people. In operational terms this would mean that when the government acquires any usufructory right for specific public use it would have to compensate the original users or beneficieries and define the 'public' in terms of all bearers of rights. The courts have taken a right step in reasserting the fundamentalness of water rights. However, to make the state accountable and to make water use equitable for all in this nation, a number of amendments are required in the Easement Act, the Irrigation laws, Panchayat and Municipal Corporation laws, Panchayat and Municipal Corporation laws, Water Supply Acts, and other laws related to water. The grounds for these amendments and the directions they must take, have been outlined in this paper.