CHAPTER TWO

THE NATURE OF RIGHTS

2

THE NATURE OF RIGHTS

The Subject Matter

To begin with, it is important to note that the rights dealt with in this work are the rights to water itself as a resource, and not water based resources, such as fish, water plants and other food material. Water based resources give rise to numerous questions about rights too, but these need to be dealt with separately. The questions relating to water itself as a resource are those such as pertaining to water for irrigation, domestic and drinking use, industrial use, and also when the kinetic or potential energy of water is used to produce benefits such as electricity from it. It is these latter type of rights, over water as a resource, that are under consideration here.

These issues concerning rights in water must also be distinguished from other related issues which arise when water is used in particular ways. As for example, when a dam is constructed there are issues concerning rights to land being submerged, resources from such land, right to rehabilitation, compensation, etc. These are different from the rights to water over which the dam has been constructed and the benefits arising from this new uses of water. Such rights, which are the subject matter of this work are substantive in nature and do not concern procedures.

Types of Rights

There are specific questions concerning the status of any right:

a) Is it a natural (fundamental or basic) right, or is it a right granted in law?

b) Is it a customary right or is it a new right accepted or granted by the state law?

c) Is it a positive right (in which the state has to act to realize the right for the people, such as the right to health or education) or is it a negative right (in which the people have to act to realize their right, such as the right to free speech or to profession)?

d) Is it an individual right or a group right?

To deal with these different issues one has to separate the question of law --- what is the meaning or status given to a particular right in a legal system, from that of policy --- what meaning they ought to (or can be) given to attain constitutional or democratic ends. These two questions need to be further distinguished from the historical questions of how the meaning and status of a particular right has evolved in a specific law, or what meanings it has been given at different times.

Sources of Rights

A right may arise in at least four ways:

a) Granted in law by the state: this would be a legal right, such as is the case for property rights in India.

b) Arising out of contracts; such as is the case under family laws concerning marriage --- each spouse acquires certain rights in virtue of entering into a contract with the other.

c) Arising out of the constitution accepted by the people: these are fundamental or basic rights recognized in the constitution, and do not depend upon any specific statute. A nation, of course, need not have a separate text called a constitution, it can nonetheless have constitutional law such as in the form of a bill of rights. The source of such rights then would be this bill of rights. Many constitutions or constitutional law usually embody rights such as right to life, to reside, to freedom of expression, etc., as constitutional rights.

d) Arising out of human nature or that of human society or that of nature as a whole; such rights are natural rights or human rights. A constitution may recognize and embody such rights, these rights would then also be constitutional rights. But a natural or human right can exist, and can be asserted to exist in nature or in society, even if a constitution does not recognize or embody it, such as the right to life, to freedom of expression, right to information, to food, right to clean environment, etc.

The questions concerning water rights, which require a detailed documentation and study in this work, can now be more specifically stated: what type of right is water right? Is it a fundamental constitutional right or a legal right? Is it a positive right or a negative one? Are the bearers of such rights individuals or groups? What is the source of this right? Customs, state made laws, constitution or nature? If it is a natural or human right, whether or not it is reflected in the customs or constitutions, what kinds of reasons or justifications can one advance for this assertion?

Before we begin looking at the actual water laws, there are three issues in the above discussions which may require further clarification, since law persons are usually not concerned with the details of looking at rights from these perspectives, these are: right as a natural right, right as a positive or negative right and group rights as against individual rights. In what follows I shall discuss these three issues in some further detail so as to clarify the nature of rights in general and also to be able to apply the distinctions to water rights in specific.

Natural Rights

The grounds for natural rights may be sought in different ways. It may be argued to be arising out of certain historical conditions, or a specific understanding of human needs, or even certain notions of justice with reference to either human nature or the nature of society. Some may argue that reference to historical conditions, basic needs or notions of justice, make the right

supra-legal; one may argue on the contrary that whatever is being called supra-legal is in fact as much internal or basic to law, and hence a necessary part of it, as anything one may wish to call basic.

The other confusion about natural rights in that one may believe that all natural law theorists are necessarily asserting absolute rights, in the sense that the rights exist by themselves, no duties correlate to them, and that one may talk of correlation of rights and duties only of legal rights. A natural law theorist may assert absoluteness of rights, but all natural law theory does not necessarily presuppose this. A right may be argued to be natural, and one may at the same time believe that all rights are necessarily correlated to some duties, as a consequence of which one may want to show that there are some natural duties correlated to natural rights. What this means to say is that a right's being natural does not ipso-facto eliminate it from a Hohfeldian type of analysis of correlation of rights with other legal concepts, such as duties. The natural law theory presupposed in this work takes this latter view, namely that natural rights are correlated to duties and that they are open to Hohfeldian analysis. To argue that rights and duties are correlated does not mean that a natural law theory has to provide justification for both rights and duties, although it may. However, the justification of one of the correlated concept suffices. If one can give rational justification for natural rights, then by correlation it follows that some natural duty falls on some agency, and vice versa. This work, hence, does not attempt to justify both natural rights and natural duties. It limits itself to the justification of rights, the duties follow by implication.

There is another aspect of the Hohfeldian analysis that is of interest to us here. This concerns the categorization of rights into claim-rights, entitlement rights and rights by merit or desert.[1] The question about categorization of rights in this manner will arise for all kind of rights, in whatever manner they arise. What sort of right is water right, a claim, an entitlement or merited?

Let us begin with some preliminary observations about the nature and categorization of water rights. The fact that rights over water has existed in all ancient and modern legal systems, including in the traditional *dharmasastras* and Islamic laws, and also the fact that they still continue to exist as customary rights in many contemporary societies, clearly eliminates water rights as a creation of modern state made laws. They have been recognized in law by various states, even within India, in the statutes or constitutions, and have not been granted by the state. Some statutes have even attempted to curtail the customary rights, but such curtailment itself entails that these rights were not something which arose from the statutes.

Someone may wish to argue that although water rights are not something which has its origins in statutory law, they are in fact a species of contractual rights which has arisen due to some agreements between people. Such contractual rights, therefore, cannot qualify to be natural rights. For such an argument, since water rights have existed since time immemorial, one will have to invoke a historical or hypothetical contractarian theory, perhaps of the Kantian or Rawlsian variety --- a position of initial conditions in which the people, from behind their veil of ignorance (i.e., a situation in which they are not certain of the outcome of their choices nor do they have full information about the situation), have contracted with the state, society or each other, to share the water and let the state act for the benefit of all. Such an argument

does not lead one out of the natural law theory. The last condition: 'for the benefit of all', is a paramount principle in this theory. This principle, which makes possible sharing water for the benefit of all, can be grounded in some basic principle of justice (such as Rawls' two principles) because the people from their original position will not contract to share the water unjustly. The principles of what constitutes a fair or just contract will have to be agreed upon first. These principles can then argued to be, or shown to be, principles of natural justice. In any case, they cannot be legal principles in the ordinary sense of the term, for the contract will logically precede the law. There would be rights arising out of the nature of just contract, based on the nature of justice, and hence a species of natural rights --- that which is natural to a just contract.

Outside the contractarian theories there are other ways of arguing for the naturalness of water rights, and hence other senses of natural. One such argument could be built on the traditional Stoic thesis, a simple version of which could run like this: seventy percent of 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, and since they are mostly made up of water, they have a natural right to water. Alternatively, one may also build a Lockeian type of natural rights 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 Treatises 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 such a well being cannot come about otherwise. Such a sharing, he argued, necessitates that people must have a fundamental right to their shares. In his second Treatise Locke translated this necessity to share in terms of people's natural right to property. A just or 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 it. This would show that the natural right is an usufruct right and not an ownership right. This would, however, not detract people's access to the resource, for, as we have seen, the important thing is being able to use a resource, whether one owns it or not. When applied to water, Locke's reasoning yields that people have a natural right to use water.

We see therefore that whether we rely on historical data, invoke a contractarian theory or natural law theories of different types, in each case it turns out that water right can be shown to be essentially a natural right. This should not be surprising because water is something so vital to the survival of organic life on earth that it could hardly be otherwise. It would seem totally unreasonable to say that water right is something which people deserve as a desert in the social game, or that they merit it as a consequence of their moral or legal deeds, or even that they are entitled to it because they are willing to be law abiding citizens of the civil society. There would be both moral and legal condemnation if out-laws, prisoners or illegal immigrants were denied water, on the grounds that they did not deserve or merit it or that they were not members of the civil society. The most reasonable belief about water rights, therefore, would be that all people, because they are people, whatever be their moral, legal, social or civil status, have a natural claim to water. In Hohfeldian categorization, hence, the natural right would be a claim-right, and not an

entitlement, desert or merited. People have claim over water in the same way as they have claim to air to breathe.

It is only if we understand water right in this way that we can comprehend the intuitive acceptance of water rights as a natural social fact in the traditional customary laws. It is a similar type of commonsensical understanding that motivates the judges, such as in the public interest litigation cases in India, to reinterpret Article 21 of the Constitutions as not only a right to life but implied in it a right to clean environment and hence to clean water.[2]

Having noted the natural rights arguments in some detail let us now turn to a brief discussion of the third important notion which can play a significant role in water law, namely that of group rights.

Group Rights

Traditionally in India there have been both individual and group rights over water. Groups, defined in terms of ethnic communities, castes, clans or tribes have had rights over specific tanks, ponds, wells and river banks. This is significant because those who believe that social choices are to be based wholly or partially on some account of the rights of the individuals are often critical of the ideologies promoting group rights. Criticizing the bourgeois and feudal western notions of rights Marx once remarked that "none of the so called rights of man go beyond the egoistic man ... an individual withdrawn behind his private interest and whims and separated from the community."[3] Evidently, in India the situation has been somewhat complex. The feudal or pre-capitalistic conceptions of group rights in customary law 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 colonial legislation. It is, for example, presupposed in the Limitation Act of 1859, which lays limits to how long a use by a group would entitle it to claim rights, although limitation laws by themselves are not a source of rights. The presupposition is made explicit as easements in water in the amendments to the Act in 1871, (Section 27). The Northern India Canal and Drainage Act, VIII of 1873, (Section 8, Cl (h)), on the other hand, recognizes individual rights in granting that the government will grant compensation for damages done in respect of any right to water course to which a person has a right. The Bengal Irrigation Act, III of 1876, (Section 11 (g)) makes a similar provision. What we are confronted with in India, therefore, are both notions of group rights, through customary and court made laws, and individual rights, specially through the statutes. This kind of situation is, of course, not unique to India, it occurs in many traditional societies, nor is it special with reference to water resorces. A similar situation obtains in relation to forests.

The group rights discourse cannot be brushed aside as insignificant, although the liberal individualistic ideology is ubiquitous in modern law. The main reason for this is not the fact that the traditional societies still operate in terms of group distinctions which divide people along ethnic, caste or professional lines, but the fact that modern law, economics and society has found new ways of grouping people which are often decisive in the distribution of resources. To begin with, there are urban and rural distinctions, often the laws of water supply and water standards that apply to urban people do not apply to the rural people. Then, even amongst the urban people there are group

distinctions, such as people living in authorized colonies and those living in unauthorized or encroached colonies, like the slum dwellers. The rules governing distribution of water resources in these areas are different. Modern law also makes administrative grouping of people, such as panchayats (village councils) and municipal corporations (urban councils). Under the Panchayat Acts water resoruces are often vested in the village councils as a whole, these create group rights for the councils. The municipal corporation laws similarly vest group rights in the urban councils.

The important point to comprehend is that group rights need not necessarily connote ethnic or social groups, such as castes. Functional groups are formed in various ways, and law has to deal with a variety of groups, whether they be social, economic or administrative. The question of group rights versus individual rights will, therefore, always be before law. How, for example, one balances the rights of the municipal corporations or the panchayats against those of the individuals is a source of continuous problem in law. In fact division of people into nations or states is yet another type of groups formation, a political one. The whole of International Law, therefore, has a status similar to that of the customary laws which dealt with rights of separate communities. International Law can be conceived as a customary law at a much larger scale, wherein the communities under concern are comparatively bigger in size. The nature of International Law, hence, is continuous with that of customary law, they share similar features, such as flexibility, non-localization of legal authority, customs and reasoning being the source of law rather than any sovereign, mediation rather than arbitration being the common method of conflict resolution, and so on. The point here is not to explain the relationship between international laws and customary laws or go into the details of their nature, but only to point out that the question of group rights is as much relevant today in modern law as it was in the traditional laws. There are, of course, times when the question of group rights are raised in a special way in law, when for example, one wishes to deal not with economic, administrative or political groups but specifically with social groups such as of tribals or indigenous people. This is usually done when one hopes or believes that the injustice being done to such people can be best overcome by identifying them as a social group. There may be other times when one wishes to fight the injustices to specific economic groups, such as beggars or child labourers. Important as these groupings are, they must not mislead one into believing that group rights questions arise in law only in special cases. As we have seen they are ubiquitous and common in law. Water law will, hence, have to deal with not only special cases of group rights but also the commonplace ones. A detailed discussion of how this can be done will demand familiarity with the existing legal framework, at least of the society in which the basic notions are to be operationalized. But before we can turn to the examination of any existing legal framework there remains one basic notion about rights which need to be explicated in some detail, namely, their characterization as positive or negative rights. This distinction, as we shall see, is not merely a matter of legal technicalities, it involves deeper issues about the nature of a state and theory of democracy.

The Value of a Right

Even if right to water is a natural right, and not necessarily vested in the egoistic man, there still remains the question: is it a positive 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 the right holders are provided with water, such as is the case with right to health; or is it a (negative) kind of right in which the state and other people merely need to be kept away so that the right holders can enjoy unfettered access to water, such as is the case in right to life? The classification of rights as negative or positive is not a matter of mere convenience. Legally, for positive rights there is an obligation on others to do something, and for negative rights there is an obligation to refrain from doing something. This makes a major difference in who can be legally compelled to do something or not do it.

The jurisprudential basis of negative rights has traditionally been the assumption that the object for which (or over which) one has a negative right cannot be a subject matter of property. Human life, for example, cannot be owned by anyone. (Slavery ceased to be acceptable when natural rights or rights of man became better understood). It is interesting to note how the question of water rights has been historically dealt with in law. Traditionally, the basic elements : space, air, water and energy have been perceived as non-juridical objects, that is, incapable of being bound into property relations. The Roman Law did not ever classify running water as an entity capable of becoming someone's property. No *dharmasastra* or *vyavahara* text mentions property rights of anyone, including the king, in rivers or streams. (see: *Begram* v. *Khettranath*, 1869).[4] Halsbury's Laws of England explicitly mentions that water in general cannot be a subject matter of property; and moreover, that water as such must continue to be common by the law of nature. It is this sort of jurisprudential understanding that underlie the earlier legislation in India, such as in the Limitations Acts (1859-71), the Northern India Canal and Drainage Act, 1873, the Bengal Irrigation Act, 1876, and also the Specific Relief Act, I of 1877 (Sections 52-57). During the period of these Acts the unfettered negative rights of individuals was also recognized by the courts, which derived its principle from cases such as *Race* v. *Ward* (1855),[5] and the customary laws. The fact that the right was perceived as negative is evident from the court orders which concerned themselves mainly with restraining others from violating the rights; also, from the fact that the Acts provided compensation for violation or acquisition of rights which already existed.

The coming of the Easement Act in 1882 makes the first radical shift in the history of natural resources law in India, in both recognizing and not recognizing water rights as a negative natural right. Even a preliminary reading of the Easement Act will reveal its complexity and contradictions. But this very complexity tells of the intense colonial struggle in the reallocation of the powers to control water. The struggle seems to have been necessitated not only by the change in political structure but also by innovations in technologies which made possible large scale acquisition and control of water. A probe into this colonial history is a matter for another occasion, here we need to merely note the struggle within the Easement Act to define water rights. Section 2 of the Act gives full recognition to natural and negative customary rights, both for groups and individuals. The same section, at the same time, also gives absolute rights over rivers and lakes to the government. Section 4, on the other hand, defines easements, for the first time, as *iura in re aliena*, that is, a legal right that can be alienated. It states that the government's rights are not affected by easements and customary rights. Sections 15 and 18, however, conversely recognize the

principle derived from *Race* v. *Ward* and give complete recognition to natural customary rights.

The progressive development of the rights of the government, from the inane and ineffective statements of the Easement Act to the forthright and decisive assertions of the Madhya Pradesh Irrigation Act of 1931, raises a fundamental question: has the acquisition of such powers and rights by the government changed water rights into a positive right? On the face of it would seem so, if the government has taken upon itself the responsibility of harnessing or obstructing all water resources, it would also be its positive duty to ensure the availability of water to all people. The water supply Acts of various states are perhaps enacted with this supposition. The answer, however, is not that simple. No water supply Act shows any evidence of the correlated duty which binds the government and makes it accountable in providing water to people. The irrigation and water supply Acts have interpreted government's rights simply as government's absolute power so that no question of responsibility or accountability arises. The use of the term rights in such Acts, therefore, is spurious, no correlated duties are attached to them (which must necessarily be the case for all legal or natural rights).

In the absence of legally genuine rights and duties structures in water laws in India the recent public interest litigations rally round Article 21 and 14 of the Constitution which makes possible the categorization of the rights as natural negative rights, in contrast with the ambiguous statutory provisions. The question in these litigations, by and large, have not been about the state's duty to provide water, but one of not letting the state or its agencies destroy natural water resources.

In terms of hard law, the answer to the question whether water right is a positive or a negative right in Indian laws, the answer is that it is not as yet settled, it can be interpreted in either way, in so far as the existing law is concerned; the statutes wish to make it into a positive right and the courts into a negative right. The policy question as to what sort of right it ought to be demands a different 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 preferences, and the reasons for them, have been indicated in parts. A detailed jurisprudential analysis of water rights can be taken up only after we have familiarized ourselves with the existing legal framework in India and elsewhere. We must turn to this important task now.

NOTES

1. Hohfeld, W.N., *Fundamental Legal Conceptions*, (Yale. 1917).
2. See the Doon Valley and the Ganga Pollution Cases: *Rural Litigation and Entitlement Kendra* v. *State of U.P.* A.I.R. 1988 S.C. 2187

   M.C. Mehta v. *Union of India.* AIR 1986 S.C. 1115.
3. Karl Marx, 'On the Jewish Question,' in Karl Marx : *Selected Writings.*, ed :aDavid Mclallan Oxford, 1977, p. 594.
4. *Begram* v. *Khettranath* (1986) 3 Bang L.R. (O.C.J.) 18,37.

   Halsbury's : Laws of England III ed. vol. 12., p. 594.
5. *Race* v. *Ward* (1955) 4 E & B 702.