UNDERSTANDING RIGHTS IN AN ECONOMY: THE CASE OF WATER

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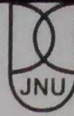

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DECLARATION

I declare that the dissertation entitled "**Understanding Rights in an Economy: The Case of Water**" submitted by me in partial fulfillment of the requirements for the award of the degree of Master of Philosophy of Jawaharlal Nehru University is my own work. This dissertation has not been submitted for the award of any other degree in this University or any other University.

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We recommend that this dissertation be placed before the examiners for evaluation.

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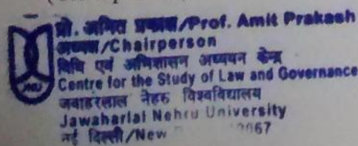

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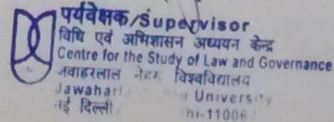

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In Memory of the Late Robert Michael Rodricks

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CONTENTS

Page No.

Acknowledgments iv

Introduction 1

Chapter I 5

- **A. Introduction**
- **B. Concerns of Vocabulary**
- **C. Defining a Right**
- **D. Defining an Idea: Human Rights**
- **E. Conclusion**

Chapter II 23

- **A. Introduction**
- **B. Water Rights: Preliminaries**
- **C. Traditional Property Based Approaches to Water Rights**
- **D. A Human Right to Water: Some Illustrations**
- **E. Conclusion**

Chapter III 42

- **A. Introduction**
- **B. Rights and Mainstream Economic Theory**
- **C. Some Philosophical Considerations**
- **D. Is There Scope For An Integration?**

Conclusion 57

Bibliography 63

INTRODUCTION

Law has a language unto itself (Goodrich 1990). Therefore, in any discussion involving a subject of "legal interest" a schema of classification is key (Zellmer 2007). Why? A schema of classification, in the context of legal discussions, it is argued, is important for "organizing" and making sense "of new information" (Zellmer 2007, 682). If so, where can we find such a schema for our focus - water rights? The answer that we shall rely upon is in the work of Taposik Banerjee. In his paper *Right to Water: Some Theoretical Issues* he puts forward a simple classification of rights vested in water. He says:

> "Rights of the users to use water can be classified into two broad groups. One group consists of the human rights or fundamental rights. The second group is property rights over different water sources that are either tradable or non-tradable. (Banerjee 2010, 2)"

Given these two broad groups of water rights, our schema of classification, it is important for us to be able to able to understand their underpinnings. Our discussion starts by looking at a simple proposition: access to water is a right or, to clarify, X has a right to *w*. It appears fairly straightforward. But, it is not. With the broad aim of understanding, from a right to water, we shall work through the various understandings of a right and how they are conceived. If we take it that there has to be a theoretical basis for making a claim for a right, our first chapter will attempt to discuss what theoretical possibilities lie before us by dealing with the dominant deliberations around rights.

We will begin by highlighting some of the semantic issues that crop up when dealing with a right, in particular, and law, in general. Moving forward from our semantic caveat, we will attempt to define a right by engaging with the plural ways in which a right can be conceived of. An important part of understanding a right lies in examining the nature and its functions. We will illustrate two dominant understandings of the function of a right, namely, the will (choice) theory of the function of a right and the well-being understanding of the function of a right.

Motivated by our examination of the underpinnings of a right we attempt to examine the idea of a human right. We will do so by asking a few questions of the concept of a human right. These questions are: 1. Is a human right a right 'to' or is it a

right 'from'? 2. Is there a moral grounding for human rights? 3. Do human rights correspond to duties? 4. On whom does the duty of a human right lie? This will enable us to observe a more complete picture of the concerns behind the two ideas before presenting an understanding of how they inform legal considerations (Cooter 2011), more generally, and the various forms of water rights, in particular.

Water has always been important to mankind. Is it surprising then to find societies and cultures have tried to frame rules regarding how it is used and distributed? Owing to the fact that any supply of water is part of a complex natural process – the hydrological cycle, water, unlike land, has always posed a challenge to lawmakers. Water law has had its origins in different contexts where a wide array of factors such as "geography, climate and extreme variability of water resources as well as the uses to which water is put" (Hodgson 2006, 4) exist alongside "varying economic, social and cultural conceptions" of water (Hodgson 2006, 4). Water rights as derived from water law emerge from this broad assortment of factors. Therefore, they have come to mean many different things. It is worthwhile to remember that: "because of the dynamic complexities of the qualitative and quantitative aspects of the hydrologic cycle, human intervention in that cycle and the many historical, social, ecological, economic and political circumstances that influence the use of water resources, water law and the rules governing water rights tend to be rather complex (FAO, 2001)" (Hodgson 2006).

One of the ways in which water was made legible in the language of the law was through framing rules about water that have, at least historically, been been linked to land rights (Hodgson 2006, 1). In particular, they have had strong links to rights concerning the ownership property in land where there was direct access to a source of water (Hodgson 2006, 1). With the right to use water being linked to the land rights, if person (A) had to sell the use of water (W_U) to person (B), the only legal mechanism available to person (A) was to sell the land to person (B). We will build from '*The Property Rights Paradigm*' by Armen A. Alchian and Harold Demsetz that "the structure of rights have important consequences for the allocation of resources" (Alchian and Demsetz 1973, 19). We believe it is. Hence, we examine the basic structure of the traditional

property based understanding of water rights alongside human rights based understanding of water rights.

So, when we speak of a water right (W_R), what are we referring to? Is there *a* water right (W_R) (in the singular) or is there a set of different types of water rights (W_{Ra}, W_{Rb}, W_{Rc}, etc.)? And, if there are multiple water rights, what are they and how do they differ from one another? Our second chapter is an attempt at answering these questions.

The correspondence between a right and a duty, that is, the Hohfeldian axiom we put forward in the first chapter gave us a glimpse into the analytical structure of a right. This assertion that a right is only a right if it as a duty that matches it helps, as we have seen, open up the conversation on rights. It is not so much for a right holder to hold a right, the substance of a discussion on rights lies in understanding the nature of the obligations that the duty bearer has to fulfil.

In drawing on our theoretical discussion of the function of rights, we have established that, as per Raz, understanding rights through the lens of well being serves well as the entry point for a discussion on human rights. An important aspect of our theoretical beginnings highlights the fact that in thinking about rights it is an imperative that we acknowledge that a state, which is subject to political assessment due through the idea of human rights, base its considerations on how to implement a human rights regime on a set of diverse factors.

Mainstream or neoclassical economics with its analytical edifice has served as a means for governments to think about issues of policy and evaluate the scope for their implementation. Its popularity, in terms of making considerations based on the benefits and costs with the ultimate goal of addressing concerns of social welfare. The aim of this chapter is to show that a direct while a direct integration of human rights concerns seems an appropriate, the analytical structure of mainstream economics and the values that go along with it have implications for broader socio-political and economic considerations.

In our last chapter, we begin by asking questions of mainstream economic theory, in general, and its evaluative tool welfare economics, in particular. We draw on the example of the Cochabamba conflict in our attempt to do so. In the next section, we

draw on Reddy's philosophical analysis of economics and human right to examine the reasons why they seem incompatible with each other. Despite his criticisms, we look at ways in which there could be a meaningful conversation between economics and could be fostered. In our last section, we conclude.

Chapter One

INTRODUCTION

Consider the following assertion: access to water is a right or, to clarify, X has a right to water. It appears fairly straightforward. This chapter attempts to demonstrate the contrary. With the broad aim of understanding, from a theoretical point of view, a right to water, we shall work through the various understandings of a right and how they are conceived. If we take it that there has to be a theoretical basis for making a claim for a right, this chapter will attempt to discuss what theoretical possibilities lie before us by dealing with the dominant deliberations around rights.

We will begin by highlighting some of the semantic issues that crop up when dealing with a right, in particular, and law, in general. Moving forward from our semantic caveat, we will attempt to define a right by engaging with the plural ways in which a right can be conceived of. An important part of understanding a right lies in examining the nature and its functions. We will illustrate two dominant understandings of the function of a right, namely, the will (choice) theory of the function of a right and the well-being understanding of the function of a right.

Motivated by our examination of the underpinnings of a right we attempt to examine the idea of a human right. We will do so by asking a few questions of the concept of a human right. These questions are: 1. Is a human right a right 'to' or is it a right 'from'? 2. Is there a moral grounding for human rights? 3. Do human rights correspond to duties? 4. On whom does the duty of a human right lie? And, in our final section, we conclude the chapter.

Concerns of vocabulary –

Rights are a fundamental element of law. But, a discussion of rights is not exclusively conducted by the discipline of law. Rights feature in the discussions of entire gamut of the humanities and social sciences, from philosophy to political science and from economics to sociology. Our discussion will reach into these other disciplines occasionally.

To begin, I ask - What is a legal right? This begs an additional set of questions - What does a right comprise of? How is it assembled? What does it mean to say, X has a right to *w*? And, if X does have a right to *w*, how can we say this claim is true?

There is no single idea of a right. In fact, the word itself has two uses. One use is moral and the other is political (Donnelly 2003). Donnelly distinguishes between the two uses:

- The moral use signifies something being right (or wrong). It implies, for example, the right thing to do (Donnelly 2003). Essentially, it states a specific form of morality.
- The political use signifies an entitlement or claim. It implies someone has a right (Donnelly 2003).

Both uses connect 'right' with obligations. They way each one does so is different. The moral use implies a yardstick of conduct. The rights-claim, on the other hand, focuses on the right-holder and his ability to enjoy the right. Put in context, this highlights the obligation of the duty bearer (from Dworkin 1977, 188) in (Donnelly 2003, 7).

When we speak of rights, we are basically talking about justice. Hart (1955) showed that there are differences in the way justice is referred to from one country to the next (H. Hart 1955, 177). It tends to "hover uncertainly between law and morals" (H. Hart 1955, 177). Where law "is occupied by the concepts of justice, fairness, rights, and obligation" (H. Hart 1955, 177).

While a legal right can be justified by "moral explanation" (Fuller 1969, 5), do morally founded rights 'exist' if they do not have any legal 'support'? Human rights belong to this latter realm. So, if we assert that there does indeed exist a human right to water even if it does not exist in any law, it can, at the very least, be grounded on moral values. But, for it to exist in the legal system, we could say that it needs to be regulated. Essentially, we are saying that there may not be a strong connection between law and morals. Going forward we shall examine this point.

Defining a right -

A right as a relation: Hohfeldian analysis –

Primarily, there are two theories that explain the nature and function of a right. One describes it in terms of will and the other in terms of interest. 'Will' here conveys 'choice.' This means that the right-holder has control over the right. The implication of this is that the right-holder can choose if he wants to claim the right and, correspondingly, when he would want to do so. If a right reflects an 'interest,' it posits a link between benefit of the right-holder as the basis of the duty-holders obligation.

Both ways of theorising rights define them in terms of duties. That is, there exists a correlation between a right and a duty. Essentially, rights and duties can be thought of as two sides of the same coin. Understanding the difference between a right and a duty is fundamental to understanding the legal grounding of a right to water.

Hohfeld opined that one has a legal right under any one of four legal conditions. So, I have a legal right if –

1. I have the 'legal permission' to behave in a certain way, that is, I have a 'legal liberty';

2. Some other person is 'legally bound' to behave in a certain way with me, that is, I have a 'legal claim-right';

3. I have been granted 'power by the law to change someone else's legal condition', that is to say, I have 'legal power';

4. Some other person does 'not have the legal power to change my legal condition', that is, I posses a 'legal immunity'.

At the base of this all is the idea that there exists a correlation between a right and a duty. Consider the following, given that X is a right-holder and Y is the duty-bearer:

X has a claim (claim-right) that Y *beta* if and only if Y has a duty to X *beta*

According to Hohfeld's schema, a right can be further broken down into a set of 'elements': claim (demand right); privilege (or liberty); power; and immunity. Each of these elements can be thought of as a right in itself. Hohfeld organized these 'elements' in 'jural opposites' and 'jural correlatives' (Hohfeld 1917).

- Opposites –
  - If X has a claim then X lacks a no-claim.
  - If X has a privilege then X lacks a duty.
  - If X has a power then X lacks a disability.
  - If X has an immunity then X lacks a liability.
- Opposites –
  - If X has a claim then some person Y has a duty.
  - If X has a privilege then some person Y has a no-claim.
  - If X has a power then some person Y has a liability.
  - If X has an immunity then some person Y some person has a disability.

This representation can be explained as follows: X's right against Y does not have any meaning unless Y has a analogous duty that he honours X's right. If Y has no duty, it means that Y has a privilege, in other words, a liberty he can do whatever he chooses to do, and further X does not have any right to stop Y from doing so.

Insofar as Hohfeld's analysis describes the correspondence between a right (that is a claim, etc.) and an obligation, it is relevant for our discussion on a right to water. And therefore, we shall keep revisiting this framework throughout the remainder of this work.

Can a right exist without a remedy?

There exists a popular legal maxim, originally in Latin, that states that there is a remedy that goes along with every right. In terms of Hohfeld's system this means that if X has a right, he should be able to rely on Y to fulfil the right (that is to perform his duty). That means that the means to get a right is combined with a remedy. So, if a right is to be legally valid, it can be so only if it can be enforced in a reliable manner.

In practice, this maxim can be best realised by a legislator and an executer. In his capacity, the legislator looks to the law so as to be able to apply the correct remedy, depending upon what the right is. After this, it is the job of the executer to administer the remedy that corresponds to the right infringed upon. This process of enforcing the right must, according to the rule of law, be provided by the courts.

What if a right follows from the 'will' theory?

There can be no right that cannot be exercised or enforced. This means that there can be no right whose use cannot be waived, if the right-holder was to choose to do so. At its most general, this is the position that will-theorists of rights take. Obviously, there are a variety of ways in which this is interpreted.

Hart founded this strand of theorising. He took the notion of holding a right in a manner that was very literal. X and Y share a relation with each other. This relation is one in which if X chooses to exercise his right then it follows that Y, owing to his position, is forced to oblige (H. Hart 1955, 181).

What can we infer from this mode of theorising about rights? One inference is regarding the concern of will-theorists. Their concern is primarily the domain over which the liberty of an individual applies. Rights are essentially a way of granting control to and power over those who bear the duty towards his right (Wenar 2005). Essentially, the central thesis of will-theorising is that having a right makes the will of the right holder get an exclusive status (Wellman 2000). That is to say that a right is nothing but a protection that is granted to the freedom of the right-holders will, given the particular domain defined by the right (Cruft 2004, 367). This has implications for the notion of duty. Cruft (2004) pointed this out with the observation that "relational

duties can only be genuinely owed to people who hold powers to waive or enforce these duties" (Cruft 2004, 367) meaning that “only if accompanied by powers of waiver-or-enforcement would one’s power, immunity or liability *protect one’s choices*” (emphasis in original) (Cruft 2004, 367). To this, Penner adds that a right that can be waived if so chosen only because it stands in the interest of the right-holder that they should remain so, and vice versa (Penner 1997, 302).

Hart stressed on the point that there could be rights that correspond to Hohfeldian no-duties but if the duty-holder benefitted from the performance of his duties would not imply a sufficiency for having a right (H. Hart 1955, 179). This can be illustrated by saying: X may ‘have’ a right *r*. This would mean that X can claim that it is fulfilled by Y. X would, under this theory, possess the ability to waive his right, if he chose to do so. The implication of this is that if X chooses to waive the right *r*, he would simultaneously free the duty bearer the burden of responsibility required to secure *r* (H. Hart 1955, 179). In the event that a third party Z has an interest, this means that Z is a beneficiary (that is a no right-holder), which is promoted by virtue of X having a right over Y, Hart argues that:

> “while the person who stands to benefit by the performance of a duty is discovered by considering what will happen if the duty is not performed, the person who has a right (to whom performance is owed or due) is discovered by examining the transaction or antecedent situation or relations of the parties out of which the ‘duty’ arises” (H. Hart 1955, 181).

Essentially, a right based on will explicates the relationship between a private individuals and a right. Suppose that the right in question is a property right (H. Hart 1955, 181). If we imagine a situation in which a landowner Y has come to an agreement with X to deliver a supply of water at an agreed upon rate of exchange then the will-theory clarify both individuals relation to each other as mediated by the right.

What does this mean for a right to water? Does it imply that we can ‘hold’ a right in water? It does, if X is in a position of power defined by the his ability to choose the specific terms of the arrangement such as where he would like to take delivery of water and whether, for example, he has the right to turn the tap on or off when he so chooses. To state it simply: Whether X claims his right to water, or, as the case may be, chooses not to do so is determined by his will. This means that Y has a

duty to fulfil the delivery of water. If Y does not do so then X is entitled to seek a remedy.

This way of viewing rights is not without problems. Let us consider an illustration hinged on the following question - What if X and Y do not have a relationship that has an equal basis? Consider the case in which X has too little purchasing power. According to the will theory, X and Y will not be able to enter into the aforementioned relationship, that is to say that an individual cannot even become X. In the specific case of water, we can imagine that Y delivers the water for free or at a rate that is heavily subsidised. Under such limited conditions, X can be a right holder and make a demand on Y to fulfil the obligation he would have to supply the water.

If we consider an example in which X is an individual who is both poor and does not have access to a water supply that is safe, will this persons exercise of their agreed upon will-based right still be a matter of choice? Will the person still "actively be in charge of the relationship" (Donnelly 2003, 8) to Y? It seems highly doubtful that that will be the outcome. And, given that rights ought to "work not simply by being voluntarily respected by duty-bearers but, most important, by being exercised by right-holders" (Donnelly 2003, 210), even in this adverse situation, X will be compelled to put demand their rights from Y. A possible solution to this problem would be to seek court action. However, court action is a costly means of getting justice especially for someone who is in an adverse position.

In the event that Y is the State, we get a more realistic scenario in which to consider water supply. How is it that the situation would change? An individual could perhaps be bound to the State by a 'social contract' or, for that matter, could be a citizen of the welfare state but, these relationships are not legal relationships, in the sense we have discussed so far. The question to be asked, at this point, is – how can we hold the State responsible in its role of Y? Is the answer, following Hart, to develop "small-scale sovereigns" (H. L. Hart 1982, 183)? The answer in this case would be no. Simply because as a citizen of a democratic country we would be need to engage in the process of voting. This is a process that is both slow and no specific of the outcome that would emerge after the process of voting is concluded.

If the right to water needs to be a right in the sense that will-theorists imagine it, that is, one where X has sufficient power and control to be able to make the choices that he would choose to make, it can only be one of exception. It would require us to rephrase the nature of the right-duty relationship.

Essentially, rights cannot be in the will of the right-holder if there is no way in which they can be secured. What we are centrally arguing is that "the duties which correlate with rights are only contingently related to the capacity of anyone else to demand or waive the performance of the duty. Thus my right to life may, but need not, entail that I may release you from your standing duty not to kill me" (Campbell 1985, 11).

What if a right follows from the theory of interest?

We can get a better understanding of the function of rights if we base our understanding in the interest theory. Following from Campbell, amongst others, let us consider a situation in which X can have a right that finds its base in the recognition that the reason for being able to have this right, and consequently imposing a duty on the duty-holder, is that his interest is recognised (Campbell 1985). Such a right can exist whether or not it is obliged and even in the absence of the knowledge of who is being addressed by this right. Rights in this conception take "the point of view of person(s) who benefit(s) from that relationship" (Finnis 1980, 205). This implies that the way we talk about 'what is just' is through the point of view of the person X. That is, we take the point of view of the X's interest in the right given that Y has not been fulfilled his duty towards X. Raz offers a definition. He states:

> "X has a right if and only if X can have rights, and, other things being equal, an aspect of X's well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty" (Raz, On the Nature of Rights 1984, 195).

For Raz an individual is only capable of having a right under the condition that his well being is of my importance in terms of valuation (Raz 1986, 167). A right is asserted without a specification of the substance of it only in rare exceptions (Raz 1986, 167). It usually follows that the assertion of a right also includes the substance of the right being specified. It is important to note that these specifications draw on arguments that may be legal, moral or political but the essential nature of the

specification is semantic (Raz 1986, 167). For example – A right 'to' *r* would be different from a right 'in' *r*.

If we think about this inversely, then we can say that if X has a right it must be true that some aspect of his well-being is being respected (Raz 1984, 200). What does this enable us to say about rights? We can now assert that a right is essentially the grounding for a duty. This assertion implies that instead of a duty corresponding to a right, as per the Hohfeldian axiom, it is the right that is the basis for explaining the duty.

A right, Raz says:

> "can impose a duty to do certain things but not others. The right to life may impose a duty not to kill or endanger life of another without imposing a duty to take whatever action is necessary to keep him alive. Which duties a right gives rise to depends partly on the basis of that right, on the considerations justifying its existence. It also depends on the absence of conflicting considerations. If conflicting considerations show that the basis of the would-be right is not enough to justify subjecting anyone to any duty, then the right does not exist" (Raz 1986, 183).

We can assert that there may be no legal duty on the part of Y to save X's life, but, that would not necessarily invalidate the moral arguments being employed. Considered differently, we might ask – to what extent ought the state go, in terms of positive actions, in order to address the concerns around the life and subsistence of its citizens? Our question highlights an important issue concerning human rights that is of considerations that are conflicting. An interesting question to ask would be regarding the manner in which considerations are prioritised. But, amongst the criteria that go into taking this decision are "content, urgency, utility, moral values, political credit, and bases" essentially what Raz calls "interests of ultimate value" (Raz 1986, 178).

In concluding this sub-section I would like to highlight that, as far as theoretical bases for discussing a right to water are concerned, Raz's definition and understanding of a right are important. Why? They highlight a key aspect of thinking about rights, that is, through the lens of interests that constitute an individuals well being and how that is the sufficient basis of an obligation on the duty-bearer. Stated in our representational form:

X has a right to *water* because his well-being is of ultimate value and on this facet of X's well-being/interest rests a sufficient reason for holding the *state* to be under a duty.

Defining an Idea: Human Rights –

Building up from our discussion of the basic theoretical structure of a right, we shall now attempt to examine the following statement: X has a human right to *r*. Human rights are granted on the basis of being human. Their foundation rests on values and interests that are universal in nature. Human rights are thought to have special characteristics (Donnelly 2003, 10). The two basic characteristics they possess are universality and inalienability (Donnelly 2003, 10).

Universality and inalienability are powerful characteristics. This is because they have political ramifications. Often, human rights are used as a standard to probe the legitimacy of the political powers that be. Moreover, human rights have moral implications. Indeed the very foundation the edifice of human rights rests on is extremely powerful – each member of humankind is endowed with certain rights. In a narrow sense, human rights constitute a form of political norms. Their substance basically deals with the addressing the following – how ought governments to treat their people?

Are human rights a right 'to' or are they a right 'from'?

We can think of human rights in two ways: Negative and Positive. It is necessary to point out, at this juncture, that these classifications conform to the conventional ways of thinking about a human right. The negative way of thinking about human rights is the more traditional of the two theories. The negative right can be depicted as follows: X has a right to *r*. Y cannot interfere with X's enjoyment of *r*. If, for example, X is entitled to a freedom from political oppression, the state must not subject X to torture. To fulfil the obligations that go along with this right, a state must simply refrain from performing certain actions.

Negative right address the domain of liberty. As an aim, they seek to protect citizens from the actions of a state that are excessive. Popularly, these rights are referred to as 'first generation rights.' Positive human rights are often known as

‘second generation rights.’ They are concerned with the social, economic and cultural rights of people.

They mean that X lay a claim on G_r (the governments) resources. This may take various forms. It could manifest in a demand being made to increase public expenditure so as to provide better access to education, healthcare facilities, housing, roads, public transport, etc. The human right, in its popular usage, has come to be a way of describing a minimum standard of living that must be available to the citizens of a state.

The United Nations Declaration of Human Rights, 1948 (UN General Assembly 1948) and the International Covenant on Economic Social and Cultural Rights (hereafter referred to as ICSECR) both acknowledge that the form a human right can take is could be as either “positive right or as a negative right” (UN General Assembly 1966).

In general, if X has a right, it implies that Y has a duty. The case is not so simple with human rights. Why? This is due to the fact that there have been very different ways in thinking about human rights. There is an older tradition that comes from Locke, Mill, etc. And, there is a newer tradition. The human rights that we speak of today are different from older understandings what was entitled to a human being by virtue of his ‘humanness.’ Human rights are a product of the twentieth century, in particular we are referring to the human rights that have an international character and are proclaimed to be universal (Weston 2007).

Is there a moral grounding for human rights?

Piechowiak is one who argues in the affirmative. He points to the fact that any confusion that could possibly arise comes from a lack of understanding the differences between human rights and human rights law (Piechowiak 1999).

He is of the view that rights are derived from “inherent dignity” and are primarily “inalienable” (Piechowiak 1999). He argues that:

> “Objections to the universality and the existence of human rights as rights, often stem from overlooking the distinction between human rights law and human rights themselves (the rights which are protected by human rights law). Ignoring the fact that the human rights concept came

into existence partially to challenge the positivistic approach to law, human rights are sometimes rejected only because they do not accord with those characteristics of rights which were elaborated based on statutory law" (Piechowiak 1999, 5).

The human rights that we have now are a product of purposeful action. They have come out of deliberations between sovereign states. That is to say that there has been purposeful discussion that lies behind the system of international law. Suppose, for the purpose of illustration, we imagine that human rights are moral rights, we would have to reconcile ourselves to the fact that "human rights have become legal rights as well" (Banerjee 2010).

Natural law theories of rights would tell us that we do not need an international organization like the United Nations for human rights to exist. Human rights would exist regardless. Nickel argues, in this regard, "that human rights are not coming from any specific political philosophy or ideological position" (Nickel, Making sense of human rights, 2nd ed 2007, 7). They were a, successful as the case turns out, attempt to install "an international law" (Nickel, Making sense of human rights, 2nd ed 2007, 7) and flesh out a "fixed worldwide meaning for the idea of human rights" (Nickel, Making sense of human rights, 2nd ed 2007, 8).

Nickel argues that the best way to see human rights is not as a norm or set of norms shared by diverse groups of human beings, as that would not be realistic, but to see them primarily as "the obligations of governments" (Nickel 2006) by effectively setting "demanding minimum standards" (Nickel 2007, 10).

Piechowiak, in this respect, has argued that:

"modelling the legal system on the basis of a respect for human rights, helps to protect positive law from degenerating into 'legal lawlessness'. The State and the law exist for the individual living in a society… The contemporary State based on a respect for human rights is usually characterised as a democratic State governed by the rule of law, realizing an appropriate social policy" (Piechowiak 1999, 9).

Do human rights correlate to duties?

Human rights would need to correspond to duties in order for them to be rights in the Hohfeldian sense. Only if they conform to the Hohfeldian axiom can they be

considered to be a right. So, if X has a human right addressed to some entity Y, the human right would hold only if the right gave Y a duty to make good on X's right.

This is not simple in the case of human rights. Consider the following illustration:

X has a human right to *r*, when *r* is a negative right. Then Y has a duty to not interfere with X's enjoyment of the right. If we replace *r* by liberty and Y by the state, for example, we find that the duty is one that gets defined with riders. And, the substance of these riders could be determined by the state. An example of one such rider is in the event that X has committed a crime. The respect for liberty would be subject to law on criminal procedure.

If we replace *r* by a positive right and Y by the state, the duty lies on the state to perform certain actions to enable X to enjoy *r*. Consider the case of providing food. The duty bearer does have an obligation but, once again, depending on how it is defined, the obligation could be very abstract. Given constraints on the resources available, the obligation that the state currently has could turn out to be nothing more than a 'goal' that it needs to achieve in the future.

Following Nickel, we could put human rights in terms of needs (Nickel 2007, 139). He acknowledges that if, for example, a right to education has to be implemented judges do not have the power to actually implement. They cannot raise money to fund schools nor can they create them. But, inspite of this, they have an important role to play (Nickel 2007, 142; 144).

This, of course, brings us back to the relevance of Raz and his definition. Hence, in conclusion, we note that Raz's definition is a powerful way of making understanding the human right as it is steeped in the considerations of X's well-being.

To whom should the duty of a human right be addressed?

As we have already mentioned, following Nickel, human rights are "characteristically addressed to governments" (Nickel 2006)**.** International law as well places legal obligations on the state. So, must we infer that the state is the best place to for X place seek fulfilment of his duties? The answer, once again, is not simple.

Imagine a state, as one conventionally understands it. Within such a state it is not inconceivable to imagine that the government chooses to delegate the responsibility of fulfilling a right to an agency or institution that can best meet the obligation. But, will this agency or institution be able to fulfil this obligation in the long run? It depends. This is an area in which considerations of the costs of choosing a particular action become relevant. This is where economics come in. Essentially, at the level of macroeconomic policy is where a state will have to start making rights a priority so that there are means, in monetary terms, to realise them. This is particularly true of positive rights as they require some action on the part of the duty-bearer.

A secondary addressee could be international agencies such as the World Bank and the United Nations. Primarily due to the capacity in which they interact with states.

Bearing in mind, what Piechowiak has identified as traits fundamental to human rights as: "complex of relations which is constituted of real relations between individuals who have the duty to act (or refrain from acting) towards each other, and the relations of every human being to certain goods (things, circumstances) securing his or her well-being" (Piechowiak 1999, 10). This would imply that there is also a duty that is vested in each citizen to his fellow citizens. Indeed, we must note that an important part of the conception of rights involves the recognition that "everyone has duties to the community" (UN General Assembly 1948) and that everyones rights and freedoms can be subject to limits prescribed by the law "for the purpose of securing due recognition and respect for the rights and freedoms of others" (UN General Assembly 1948).

Conclusion –

To conclude, let us go back to the very beginning of this section. We began by laying down, what seemed like at the time, a fairly innocuous statement: X has a right to *w*. The basic intention of this, framed in the larger context of discussing a right to water, was to, at least in its theoretical context, understand the three parts of that statement namely, the right-holder X, the idea of what holding a right means and the relation between the right-holder, the right and *w*, that is subject of the right being

held. We took that there is a theoretical basis for making a claim for a right, this chapter attempted to discuss what theoretical scope can be developed for an understanding of a right to water by engaging with some of the deliberations around rights.

We began by highlighting some of the semantic issues that crop up when dealing with a right, in particular, and law, in general. Moving forward from our semantic caveat, we attempted to define a right by engaging with the plural ways in which a right can be conceived of. An important part of understanding a right lies in examining the nature and its functions. To understand the nature of a right, we presented a right in the elemental form introduced by Hohfeld. Our basic inference is that for a right to truly be a right, it must possess a correspondence with a duty. To put it another way, if Y has a duty to X with respect to some *w* (that which the right is being granted in/to) it is only then that we can say that X truly has a right.

Our innocuous statement is not as innocuous anymore. At the very least, having a right, in the abstract, requires that there is a corresponding duty. This means that for X to be a right-holder there has to be a Y who is the duty-bearer. Y's duty can be best understood by saying that Y has an obligation to X to fulfil *w*. This can be further complicated by looking at the concept of *legal remedy*. The question being asked is – If a right must correspond to a duty, then does it follow that, in the absence of the obligations of a duty being fulfilled, a right must also have a remedy? We find that the answer is yes. If X has a right to *w* and Y bears the duty of fulfilling X's right to *w*, in the event that Y fails to do so, X can seek a legal remedy. The appeal to a legal remedy is much a part of the practice of law. In fact, it is quite an oft quoted legal maxim.

Understanding a right also has another equally important component, the aspect of its function. There are two dominant ways of understanding the functions of a right - the will (choice) theory of the function of a right and the well-being understanding of the function of a right.

If we follow the will theory, we find some interesting answers but, they pose complications for thinking about a right to water. Will theorists imagine a right being built-in with a choice about whether one is wants to exercise the right or not. This

implicitly requires that X has some degree of power or control over the relationship between himself and Y. If we are to be realistic about this conception of rights, we observe that in real world interactions X may not have power or control over the relationship between say a water supply company and themselves. Nor do they have any direct, individual control over a relationship if Y is the state. At least, not in a sense that is costless or low cost, and timely. Further, given that the rights-claim in will theory is being made on the basis of the exercise of a choice, it is naive to conclude that people in advanced circumstances of deprivation are exercising their choice or any control/power regarding their rights.

Essentially, rights are problematic when thought of as being in the will of the right-holder if there is no way in which they can be secured. Following Donnelly, our central argument is that “the duties which correlate with rights are only contingently related to the capacity of anyone else to demand or waive the performance of the duty. Thus my right to life may, but need not, entail that I may release you from your standing duty not to kill me” (Campbell 1985, 11). At best we could say that if the right to water needs to be a right in the sense that will-theorists imagine it, that is, one where X has sufficient power and control to be able to make the choices that he would choose to make, it can only be one of exception. It would require us to rephrase the nature of the right-duty relationship.

Having deemed the will theory of rights inadequate in light of the context of our discussion on the right to water, we move into the other dominant theoretical understanding of a right – the interest theory of rights. According to the interest theory of rights, a claim for a right must correspond to a duty, as demonstrated by Hohfeld, by the reason why the duty bearer is obliged to make good on his obligation is because the right is being claimed by the individual in the interest of his well being. That is to say, a reason for a duty to be fulfilled lies in the benefit of the indivudal claiming the right.

If Y is the state we can ask – to what extent ought the state go, in terms of positive actions, in order to address the concerns around the life and subsistence of its citizens? Scholars believe that this is based on the criteria relevant to the sovereign nation. And, that the criteria that go into taking this decision are "content, urgency,

utility, moral values, political credit, and bases" essentially what Raz calls "interests of ultimate value" (Raz 1986, 178).

In drawing on Raz's definition and understanding we can understand that they are important. Why? They highlight a key aspect of thinking about rights, that is, through the lens of interests that constitute an individuals well being and how that is the sufficient basis of an obligation on the duty-bearer. Stated in our representational form:

X has a right to *water* because his well-being is of ultimate value and on this facet of X's well-being/interest rests a sufficient reason for holding the *state* to be under a duty.

Motivated by our examination of the underpinnings of a right we attempt to examine the idea of a human right. We asked a few questions of the concept of a human right. These questions are: 1. Is a human right a right 'to' or is it a right 'from'? 2. Is there a moral grounding for human rights? 3. Do human rights correspond to duties? 4. On whom does the duty of a human right lie?

Following our theoretical discussion of the concept of a right we determined that the interest theory of the function of a right gives us an interesting way of framing the right itself, that is, as a existing because it is in the interest/well-being of the right holder. At its simplest, this is a good way to understand the concept of a human right. A human right articulates concerns that are universal in nature. This is their special characteristic. That is they concern the well-being/interest of all individuals. When we consider this alongside the other special characteristic of a human right - inalienability, we find that their meat and bones, as it were, have a definite political character to it. In the modalities of articulation of a human right one thing is clear – they are constitutive of an evaluative aspect in which the state becomes the object of assessment and its practices become the approach towards crafting an assessment.

A significant realm of interest in the subject matter of human rights is the nature of the endowment they grant. Rephrased, we observe that human rights may call on their duty bearers to do one of two things – 1. Engage in positive action or 2. Not impede the functioning of the right holder. The can be either a right 'to' something or a right 'from' something. When looked at concurrently, we conclude

that human rights can be thought of as the minimum standard, that is, the floor on which all individuals ought to be standing.

When examining their moral grounding, we must not forget the historical experience they have been grounded on. In a sense they are best thought of as the by-product of deliberate action. One may argue, as some scholars have, that there are moral arguments that are amenable to human rights thinking. While this is true, we have highlighted the other side of this coin – intent.

Given that human rights are not uncomplicated, we find that, in the abstract, they do correspond to duties and therefore, they are in line with the Hohfeldian axiom but the nature of the obligations in real world considerations, due to the positive and negative aspects of the human right, are incredibly complex and have the tendency to be extremely abstract. Human rights are representations of need, following Nickel and, in a broader sense come from respecting the well being of an individual, following Raz's definition, hence, their complexity.

A necessary question that follows from this is – To whom do the obligations of a human right get addressed? We find that obligations of human rights are diffused through a variety of levels. They lie on the state, its domestic agencies, global institutions like the World Bank and the United Nations, and, ultimately, the citizens of the states themselves. Essentially, duties in the light of human rights are circular in nature as the obligations get dispersed through a variety of levels.

Chapter Two

INTRODUCTION

Water is fundamental to human activity. Therefore, it is not surprising to find that most societies and cultures have tried to frame rules regarding how it is used and distributed. Owing to the fact that any supply of water is part of a complex natural process – the hydrological cycle, water, unlike land, has always posed a challenge to lawmakers.

In fact, water rights have historically been linked to land rights (Hodgson 2006, 1). In particular, they have had strong links to rights concerning the ownership property in land where there was direct access to a source of water (Hodgson 2006, 1). With the right to use water being linked to the land rights, if person (A) had to sell the use of water (W_U) to person (B), the only legal mechanism available to person (A) was to sell the land to person (B). The premise that we will build this chapter on follows from '*The Property Rights Paradigm*' by Armen A. Alchian and Harold Demsetz that "the structure of rights have important consequences for the allocation of resources" (Alchian and Demsetz 1973, 19)

So, when we speak of a water right (W_R), what are we referring to? Is there *a* water right (W_R) (in the singular) or is there a set of different types of water rights (W_{Ra}, W_{Rb}, W_{Rc}, etc.)? And, if there are multiple water rights, what are they and how do they differ from one another? The aim of this chapter is to provide answers to these questions. We will do so by examining how water rights have been articulated and interpreted in the two dominant legal traditions – the civil law tradition and the common law tradition. We will also examine how each tradition classified water based on the sources that they came from and the variation between the many forms that water rights have depending upon the source of water they were designed to address. Further, we will examine more recent articulations of water rights namely the human right to water, its origin and the form in which it is articulated in international law. Our objective is to examine the structure of different rights to water, based on their conceptions, at the domestic and the international level.

Water Rights: Preliminaries –

It is not easy to precisely state a definition of a water right. The reason why this question is difficult to answer is because the world over, water law has had its origins in different contexts where a wide array of factors such as "geography, climate and extreme variability of water resources as well as the uses to which water is put" (Hodgson 2006, 4) exist alongside "varying economic, social and cultural conceptions" of water (Hodgson 2006, 4). Water rights as derived from water law emerge from this broad assortment of factors. Therefore, they have come to mean many different things. It is worthwhile to remember that: "because of the dynamic complexities of the qualitative and quantitative aspects of the hydrologic cycle, human intervention in that cycle and the many historical, social, ecological, economic and political circumstances that influence the use of water resources, water law and the rules governing water rights tend to be rather complex (FAO, 2001)" (Hodgson 2006).

Water rights can be defined as a "legal right to abstract and use a quantity of water from a natural source such as a river, stream or aquifer" (Hodgson 2006, 4). That is to say, a person (A) may have the legal right (W_R) to abstract quantity an amount (X) of water or a person (B) may have the legal right (W_R) to use quantity an amount (Y) of water from a specific water resource (M). In its most elemental form this describes a property relation. Following Muzner, amongst others, we shall attempt to demonstrate "the sophisticated understanding of property is as a *relation* (emphasis in original). Therefore, property is a relation, usually legal in nature, between persons or other entities with respect to things.

What does a water right regulate? The jurisdictional domain of a water right is a function of the specific legal rules in force which itself depends upon the understanding of the interrelation between activities. This may stipulate that having a water right is essential to:

> "to divert, restrict or alter the flow of water within a water course; to alter the bed, banks or characteristics of a water course, including the construction (and use) of structures on its banks and adjacent lands including those related to the use and management of water within that water course; to extract gravel and other minerals

> from water courses and the lands adjacent to them; to use sewage water for irrigation; to undertake fishing and aquaculture activities; for navigation; and/or to discharge wastes or pollutants to water courses" (Hodgson 2006, 5)

Water, as a *thing* to be legislated, is made legible to the law on the basis of uses. There are two broad categories of water use - consumptive uses (U_C) or non consumptive uses (U_{NC}) (Hodgson 2006, 6). Both categories of use have an effect on the remainder of water uses (Hodgson 2006, 6). The use to which water is put also depend, fundamentally, on the quality of the water (Hodgson 2006, 6). Therefore, water for washing, bathing, cooking, irrigation, etc. require a higher quality of water than water used by industry for industrial processes. This consideration implies that if water is to be abstracted and then used, there could be situations in which the extent to which it can be abstracted will be limited by the need for water to be able to carry out its discharge functions. Given that the activities themselves have interrelations and impacts on each other the legal rules used to manage these various activities reflect these inherent interrelations and impacts.

A water right is legal in nature. Hodgson, for the Food and Agriculture Organization notes that water rights:

> "... are legal rights: they are created pursuant to a country's formal legal system and thus they have legal consequences. Specifically they are capable of being asserted against the state and third parties. In the case of a dispute, a right holder can legitimately expect a valid right to be upheld by a court and as necessary enforced through the machinery and coercive power of the state. Loss of, or damage to a water right is prima facie subject to the payment of compensation and the right to such compensation is enforceable in the courts" (Hodgson 2006, 6)

This implies that a person or persons who undertake an action that requires a water right in the absence of one "will be subject to legal action from the right holder and or the state body responsible for water rights administration and possibly criminal/administrative proceedings" (Hodgson 2006, 6).

Our discussion up until this point has been based on water from natural sources. In the case of non-natural sources of water as well, a water right is said to exist. These are other kinds of:

> “"Water rights" are those which relate to the supply of water through a canal for irrigated agriculture or industrial use. Such supplies are usually made on the basis of an express or implied contract the effect of which is to give the beneficiary the legal right to receive a quantity of water at a specified time, usually in return for the payment of a charge or fee. Such rights – legal entitlements to specified volumes of water - are effectively a form of "water right". In some jurisdictions the person to whom the water is delivered may also hold a classical water right that relates to the initial abstraction of a quantity of water at the natural source prior to its diversion into the relevant canal. Very often, however, while the supplier holds an abstraction water right, the person to whom the water is delivered does not. The legal basis of their "water right" is the applicable contractual or quasi contractual arrangement with the supplier. Indeed a closer analysis shows that the right in question is not merely to take a quantity of water but rather the right to a service, namely the delivery of water through the canal system. At best these are "contractual water rights" (the right to a service). Whether or not rights created in such circumstances are "water rights" the point remains that they are quite different in nature to abstraction water rights” (Hodgson 2006, 6-7)

In the context of tradable water rights it is important to note the distinction between a water right for abstraction (W_{RA}) and a contractual water right (W_{RC}). The two are not the same. In terms of the laws applicable, the concepts used to analyse them and how they operate in practice are different. That is to say that if, a water right (W_R) grants the right person (A) to remove water from a natural source (W_{RA}), a contractual water right (W_{RC}) grants the right to person (B) to receive an amount of water (X) from a non-natural source, water that has previously been extracted from the natural source.

Traditional Property Based Approaches to Water Rights –

While the colonial period explains the reason why European water law was "received" (Hodgson 2006, 9) into the legal systems of so many countries, it is not the only reason. European notions of water and water law have had a strong influence on formal water laws around the world and the ways in which they have developed (Hodgson 2006, 9). Part of the reason in colonialism (Hodgson 2006, 9). This explains why certain countries have “received” legal systems (Hodgson 2006, 9). What about the others? Other countries drew inspiration from Europe and America when modernising their legal systems (Hodgson 2006, 9).

From Europe there are two major legal traditions that have emerged - the civil law tradition and the common law tradition. The civil law tradition can be found in most European countries, almost countries in Latin America, in large parts of Africa, in Indonesia in Japan and the countries of the Former USSR (CIA World Factbook n.d.). The common law tradition emerged from English law. Australia, Canada, India, New Zealand, Pakistan, Singapore, and the United States, and the remaining African countries that are not in the civil law tradition, other Commonwealth countries and a number of countries in the Middle East employ legal systems that come from the common law tradition (CIA World Factbook n.d.).

An important difference between the legal traditions is that the courts and the judges have a greater role in making laws in the common law tradition "alongside the enactment of legislation by the relevant legislatures" (Hodgson 2006, 10). The civil law tradition, on the other hand, has been codified to a greater extent (Hodgson 2006, 10). Therefore, the court plays a greater role in interpreting already codified law (Hodgson 2006, 10).

We shall now examine traditional approaches of common law and civil law in relation with the *thing* they legislate surface water rights, ground water rights and contractual water rights.

Rights to surface water

The right to use water in both the civil law tradition and the common law tradition depended on the use or ownership of land or structures built on land that was a person had the right to use or owned. The reason why this is the case is because of the fact that historically "most water rights related to the use of water on land" (Hodgson 2006, 10). This can be traced to the influence of Roman law on both traditions (Hodgson 2006, 10). It has been argued that:

> "This approach, of conferring a privileged position on the owners of land adjacent to water courses, was one of the elements of Roman water law which had a major influence on the development of water law under the two European legal traditions. Indeed some of these influences can still be observed. Roman law, for example, denied the possibility of private ownership of running water. The Institutes of Justinian published in 533-34 held that running water was a part of the "negative community" of

> things that could not be owned along with air, the seas and wildlife. It was nevertheless recognized that things in the negative community could be used and that the "usufruct" or right to use the benefit of the resource needed to be regulated to provide order and prevent over-exploitation (Getches, 1997). Roman law distinguished the more important, perennial streams and rivers from the less important. The former were considered to be common or public while the latter were private. The right to use a public stream or river was open to all those who had access to them. Roman law, however, recognized the right of the government to prohibit the use of any public water and required an authorization for taking water from navigable streams (Teclaff, 1985)" in (Hodgson 2006, 10-11)

The common law tradition

The common law tradition deviated from Roman law. It did not "follow the distinction between public waters and private waters" (Hodgson 2006, 11). Common law "maintain(s) the principle of Roman law that flowing waters are *publici juris*" (Hodgson 2006, 11). From the principle of *publici juris* two different approaches to systems of water law and their associated water rights developed (Hodgson 2006, 11). These were: the doctrine of "riparianism" and the doctrine of "prior appropriation".

(a) The doctrine of riparianism -

A riparian right, under common law, was a part of the "ownership of the land in question" (Hodgson 2006, 11). The substance of the riparian doctrine held that:

> "... A riparian right holder had the right to make "ordinary" use of the water flowing in the watercourse. This encompassed the "reasonable use" of that water for domestic purposes and for the watering of livestock and, where those uses of water were made, abstraction could be undertaken without regard to the effect which they might have had on downstream proprietors (Howarth, 1992). In addition a riparian land owner also had the right to use the water for any other purpose provided that it did not interfere with the rights of other proprietors, upstream or downstream. Such purposes were categorised as being "extraordinary" uses of water. The limits of "extraordinary" water use have never been precisely defined, and are indeed probably incapable of full definition. But it is clear that they are subject to significant restrictions. Specifically, the use of the water must be reasonable, the purpose for which it is taken must be connected with the abstracter's land and the water must be restored to the watercourse substantially

undiminished in volume and un-altered in character. The question whether a particular extraordinary use is reasonable is a question of fact which must be determined by reference to all the circumstances. In addition to such natural riparian rights, a riparian owner could acquire additional rights in the nature of "easements", which are types of land tenure right, in accordance with relevant rules of land tenure" (Hodgson 2006, 12)

Consider, for example, person (A) owns a land right (L_R) which grants him a riparian right (RW_R) which enables him to engage in "ordinary" water use (W_{Uo}) of an unspecified quantity (X) from a flowing watercourse. Here, "ordinary" water use is a set of permissible uses to which person (A) can put quantity (X) to use, for example, domestic uses and for farm related uses. There are two criteria "ordinary" water use (W_{Uo}) of an unspecified quantity (X) by person (A) is subject to – 1. "Reasonable use" (RU), 2. Restoration Volume (RES_v) and 3. Restoration quality (RES_q). Therefore, if person (A) engages in reasonable use of water (X_{RU}) or (X_{RU}-) he will fulfil the "reasonable use" (RU) criteria. He is safe from being in violation of the law only if he returns a quantity approximately equal to (X_{RU}) or (X_{RU}-) (which he initially abstracted) back to the watercourse while ensuring that it is of a quality that meets the Restoration quality (RES_q) criterion and in a manner that person (B) and person (C) who both own a riparian right (RW_R) which grants him "ordinary" water use (W_{Uo}) of an unspecified quantity (X) from a flowing watercourse but are located downstream or upstream as the case may be. In addition to this, a person (D) could also own an "easement," defined as a non-possessory property interest that enables the use of, for example, land owned by person (F) and the easement right (EW_R) which grants him "ordinary" water use (EW_{Uo}) of an unspecified quantity (X) from a flowing watercourse.

The complexity of the riparian system is evident from the illustration above. Despite this complexity the doctrine of riparianism spread widely (Hodgson 2006, 12). It flourished in eastern America which had geographic conditions similar to England. On reaching the American west however riparianism was met by environmental constraints (Hodgson 2006, 12). The geographical context of western America "led to the development of a new doctrine, that of prior appropriation" (Hodgson 2006, 12).

(b) The prior appropriation doctrine

The prior appropriation doctrine has its origins "in the customs of miners on federal public lands who accorded the best rights to those who first used water just as they had accorded mining rights to those who first located ore deposits" (Hodgson 2006, 12) The doctrine of riparianism was invalid for application in their case because they conducted their activities on federal public lands (Hodgson 2006, 12). Despite the historic specificity of the origin of prior appropriation, it was extend to non-miners and to private lands (Hodgson 2006, 13).

The prior appropriation doctrine did not link water rights to land rights. Instead, a legal criterion of "beneficial use" (BU) was how a person (A) could get a water right (W_R). As opposed to riparianism where a person (A) was required to own a land right (L_R) to be able to have a riparian right (RW_R) which enables him to engage in "ordinary" water use (W_{Uo}) of an unspecified quantity (X) from a flowing watercourse.

Prior appropriation requires that the right (W_R) be granted where a person (A) applies a particular quantity (X) to a particular beneficial use (BU_D). As long as the particular beneficial use (BU_D) is maintained those rights (W_R) continue. (W_R) can be identified by the possession of a permit by the right holder. For the most part, water under prior appropriation is owned by no one (Hodgson 2006, 13). It is considered a "public resource" (Hodgson 2006, 13).

A valid appropriation requires: "the intention to apply the water to a beneficial use; an actual diversion of water from a natural source; the application of the water to a beneficial use within a reasonable time period" (Hodgson 2006, 13). While it is the "date of the appropriation determines the user's priority to use water, with the earliest user having a superior right" (Hodgson 2006, 13).

In the case of insufficient water, person (A) who acquired the right in time period (T) will get all the water due to them (senior appropriator); person (B) who appropriated later in time period (T+1) may or may not receive the may receive only some, or none, of the water over which they have rights (junior appropriator appropriator).

Prior appropriation is subject to certain criticisms. Consider, for example, that person (A) who acquired the right in time period (T) will get all the water due to them (senior appropriator); person (B) who appropriated later in time period (T+1) may or may not receive the may receive only some, or none, of the water over which they have rights (junior appropriator) depending on the extent of water scarcity. This means that person (A) has a more secure entitlement. A secure entitlement "tends to discourage water saving by senior appropriators" (Hodgson 2006, 14). Furthermore, there is no necessary end to the lack of water saving concerns. Due to prior appropriation being divorced from land rights, trades in water rights have long since taken place here (Hodgson 2006, 14).

The civil law tradition

In the civil law tradition, the Roman law distinction of public and private waters continued (Hodgson 2006, 14). In general, administrative permission was mandatory for using public waters (Hodgson 2006, 14). This was not the case for private waters. Hodgson, for the Food and Agriculture Organisation, illustrates this:

> "For example, the influential French Civil Code, the Code Napoleon, which was promulgated in 1804 after the French Revolution, maintained this distinction. Public waters were those which were considered to be Modern water rights – theory and practice "navigable" or "floatable" and belonged to the public or national domain. Their use required a government permit or authorization. Private waters, which were those located below, along or upon privately owned land, could be freely utilized subject to certain limitations of a statutory nature such as servitudes and rights of way. The right to use such private waters, both surface and underground, derived from land ownership which recognized the owner's right to use at pleasure the water existing upon his land without any limitation. Similarly the Spanish Water Act of 1886 considered as private all surface waters, that is waters springing in a private property and rainfall waters, but only for its use on that land and not beyond the limits of that estate. This approach was largely repeated throughout the "civil law" world in Asia, Latin American and parts of Africa" (Hodgson 2006, 14-15)

With the exception of any legal or administrative measures instituted to regulate use or grant concessions the right to use water is open to everyone. The difficulty "of accommodating different and competing uses of private waters led the courts to limit the absolute right of use by making it subject to numerous

restrictions, particularly as regards the prohibition to pollute water, etc." (Hodgson 2006, 15) Soon, the concept of private waters began to lose relevance (Caponera, 2000) in (Hodgson 2006, 15).

Rights to groundwater

Historically water law has focused on surface water. Legislating groundwater is a more recent phenomenon. Both legal traditions "conferred specific benefits on adjacent or, to be more precise, super-adjacent land owners" (Hodgson 2006, 16).

The civil law tradition

Owing to its Roman law heritage, groundwater (G) was the property of the owner, person (A), of the land it was below. An illustration of this can be found in:

> "... Article 552 of the French Civil Code which states that: Ownership of the ground involves ownership of what is above and below it. An owner may make above all the plantings and constructions which he deems proper, unless otherwise provided for in the Title of Servitudes or Land Services. He may make below all constructions and excavations which he deems proper and draw from these excavations all the products which they can give, subject to the limitations resulting from statutes and regulations relating to mines and from police statutes and regulations" (Hodgson 2006, 16)

The common law tradition

Common law has "no property in water percolating through the sub-soil until it has been the object of an appropriation" (Hodgson 2006, 16). Therefore, in order to seize groundwater below his land person (A) can sink a well or borehole. This has a detrimental effect on the groundwater and also, an effect on the land (Hodgson 2006, 17). The irony is that "the owner of land through which ground water flows has no right or interest in it which enables him to maintain an action against another landowner whose actions interfere with the supply of water" (Howarth 1992) in (Hodgson 2006, 17).

With advanced drilling technology now available, "the main legal traditions no longer offer a viable means of effectively regulating the use of

groundwater, even though they continue to apply in a number of jurisdictions" (Hodgson 2006, 17). Unsurprisingly, overdraft of groundwater is common. For example:

> "In the state of Texas, for example, the common law rules described above, sometimes described as the doctrine of "capture", still apply. In the United States most western states still apply the prior appropriation doctrine toward all or some of the groundwater within their jurisdictions, providing individuals with relatively secure rights to the use of specified amounts of this resource. Other states follow variations of the "beneficial use" doctrine, allowing overlying landowners to pump unspecified amounts of groundwater as long as they do not engage in wasteful uses or interfere with the rights of other overlying owners. Because the doctrine does not confer rights on individuals to abstract specific quantities, ground water is essentially an "open-access" resource for overlying owners (Blomquist et al., 2001). In Arizona, for example, until 1980 when the Arizona Groundwater Management Act was enacted groundwater use was governed by the beneficial use doctrine whereby a land owner can pump as much water as s/he can reasonably use on the overlying land. (Blomquist et al., 2001)" in (Hodgson 2006, 17)

Rights to water in artificial water courses -

Non-natural watercourses (H) are the only place where a landowner (A) who owns land adjacent to the watercourse (H) is not in a privileged position. Under common law, landowner has no claim over water in non-natural watercourse (H). If he draws water from (H), which is tantamount to theft because water in non-natural watercourse (H) is abstracted water. The water right holder, in this context, is the one who abstracted the water from a natural source. Moreover, water, once abstracted, is the subject of a property right.

This, as we have seen illustrated above, carries with it the legacy of their past, be that the Roman traditions or doctrines developed within the English common law (Grönwall 2008, 262) and (Hodgson 2006, 10).

A Human Right to Water: Some Illustrations -

Banerjee, amongst others, argues that a human right to water can take various forms (Banerjee 2010). It can either exist as an independent right or it can exist as a part of the broader conception of the right to life (Banerjee 2010),

as we have illustrated in the previous chapter. These essentially belong to the domain of national law and are articulated through the constitution of a sovereign nation. We will examine one example from each type. In the case of an ‘explicit’ right to water we will look at the South African experience while in the case of the ‘implicit’ right to water we will look at the India experience. And, as far as diversity of conceptions are concerned, there is also the body of international law on the subject. We will focus on United Nations and the way it has formulated and spoken about the right to water.

The Human Right to Water in International Law -

The seeds of the human right to water in international law were sown in the period immediately after the Second World War. It was in 1948 that United Nations passed the Universal Declaration of Human Rights (Banerjee 2010, 3). Banerjee points out that the Declaration made a guarantee of “a right to life and a right to a standard of living adequate for the health and well-being of himself and of his family” (Banerjee 2010, 3).

Following this, in the year 1966, Banerjee tells us:

> “...the UN adopted the International Covenant on Economic, Social and Cultural Rights (ICESCR). Article 11 paragraph 1 of the covenant recognizes a right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. Article 12 of the same Covenant recognizes a right of everyone to the enjoyment of the highest attainable standard of physical and mental health” (Banerjee 2010, 3).

Up until this point, the right to water was only an implicit part of the broader goals articulated by the UN documents. This changed in 2002. In 2002,

> “...the general comment number 15 of the Committee on Economic Social and Cultural Rights paved the way for the right to water to be accepted as a human right. It argues that without having a right to water, the realization of the two rights mentioned in Articles 11 and 12 of ICESCR cannot be guaranteed. It says that to secure an adequate standard of living and highest attainable standard of health, it is necessary for a person to have a guaranteed access to clean water. Moreover, water being essential for life, a right to water can be immediately derived from the right to life” (Banerjee 2010, 3).

It was at this time that the right was also defined to be: “The human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic use” (UN Special Rappoteur on the Human Right to Water 2014, 6).

With regards to socio-economic rights:

> “To assist states in meeting their obligations, the UN Committee on Economic, Social and Cultural Rights (CESCR) applies a tripartite model to monitor compliance by state parties with the International Covenant on Economic, Social and Cultural Rights (ICESCR) – the treaty it oversees. These are obligations to respect, protect and fulfil the rights codified in the Covenant (see, for example, CESCR 1999, para. 15; 2000, para. 33). This interpretative tool provides that the obligation to “respect” human rights imposes an obligation on states and all their organs and agents to refrain from interfering either directly or indirectly with the enjoyment of rights” (Salomon and Arnott 2014, 53)

A requirement placed on a state is that:

> “Under its mandate to interpret the Covenant, the Committee established in 1990 that, progressive realisation notwithstanding, “a core obligation” to ensure the satisfaction of, at the very least, “minimum essential levels” of each of the rights is incumbent upon every state party. The realisation of the minimum essential levels of economic, social and cultural rights are of an immediate nature (i.e.: not subject to progressive realisation) (CESCR 1990, para. 10).” (Salomon and Arnott 2014, 54)

The important underpinnings include “non-discrimination and equality” (Salomon and Arnott 2014, 57), “non-retrogression” (Salomon and Arnott 2014, 56), utilisation of the “maximum available resources” (Salomon and Arnott 2014, 55), “participation”, “accountability” and the “acknowledgement” that “rights are universal, indivisible, interdependent and interrelated” (Salomon and Arnott 2014). A key point to note here is that all these criteria are values. And, hence, they form the basis of an alternative system of valuation (Salomon and Arnott 2014).

What is the link between national and international law on Human rights?

According to the UN Special Rappoteur on the Human Right to Water, requires that national legal frameworks be “guided” (UN Special Rappoteur on the Human Right to Water 2014, 8) by the principles of international law

doctrines as articulated in the UN treaties and agreements. In particular, there is a requirement to "transpose" (UN Special Rappoteur on the Human Right to Water 2014, 8) norms prevalent in international law into domestic law through a reformulation of national laws.

But, we must note that:

> "International human rights law does not oblige States to include a guarantee of the human rights to water and sanitation in their constitutions, nor does it prescribe whether such a guarantee should be explicit or implicit. However, a constitutional guarantee is highly desirable if the rights are to have meaning within the legal framework of a country. In the absence of a clear, top-level norm, the protection of the human rights to water and sanitation may be piecemeal, spread over a number of provisions in different laws, regulations and policies, and be interpreted differently by different actors. This is problematic for two reasons: first, individuals will often find it difficult to identify and pursue their human rights. Second, legal frameworks are unlikely to do justice to every individual case. It is precisely in those cases where laws, regulations and policies – often unintentionally – do not provide for an individual's human rights to water and sanitation that a constitutional guarantee can override subordinate norms and grant the rights in practice. The formal recognition of the human rights to water and sanitation in a constitution ensures greater legal certainty regarding the existence and legal content of these human rights" (UN Special Rappoteur on the Human Right to Water 2014, 12).

- **South Africa –**

When South Africa redrafted their constitution in 1996, they "recognized a right to sufficient water and explicitly require the consideration of international law in interpreting its Bill of Rights" (Bluemel 2004, 977).

The constitution stipulates that as per the:

> "South Africa, Water Services Act, Act 108 of 1997: Section 3: 1. Everyone has a right of access to [a] basic water supply and basic sanitation. 2. Every water services institution must take reasonable measures to realise these rights. 3. Every water services authority must, in its water services plan, provide for measures to realise these rights" (UN Special Rappoteur on the Human Right to Water 2014, 32)

An important interpretation of the right to water was in the "*Grootboom* case" (Bluemel 2004, 977) where it was interpreted in a "manner similar to that recognized General Comment No. 15" (Bluemel 2004, 977). That is, to say it:

"has been interpreted to require a free minimum level of water necessary for survival, above which a progressive pricing scheme is used for cost recovery" (Bluemel 2004, 978). It is also subject to certain standards:

> "South Africa, Regulation relating to compulsory national standards and measures to conserve water 2001, paragraph 3: The minimum standard for basic water supply services is […] b) a minimum quantity […] (iii) (with an effectiveness such that no consumer is without supply for more than seven full days a year" (UN Special Rappoteur on the Human Right to Water 2014, 34)

South Africa provided "free basic water supplies to approximately twenty-seven million people, or approximately sixty percent of the population" (Bluemel 2004, 978). Stated in our representational form:

X has the right to a "free basic minimum" (Bluemel 2004, 978) supply of water, as determined by the state. In this situation, the state is the duty-bearer Y. The explicit articulation of a right to water is useful as it clearly defines to whom the duties and obligations are addressed. Moreover, it implies a positive law trait, that is, the state is obligated to take concerted action with regards to fulfilling the right. Importantly though:

> "South Africa's implementation of the right to water is not typical. South Africa already had substantial institutional and technical capacities to implement such a right, capacities that other countries without universal water access may lack" (Bluemel 2004, 978)

One of the important factors that went into South Africa's ability to provide "free basic water" (Bluemel 2004, 978) was South Africa's "level of development" (Bluemel 2004, 978). Imagine a country that was not as developed as South Africa. We would be discussing a different outcome, in that case. And, in the case of India, we shall observe precisely that. Given that there is a huge cost to realize human rights provisions, particularly a right to water, a country with fewer resources will have a significant harder time in doing so.

- **India -**

The right to water is not stated "explicitly" (Bluemel 2004, 978) in the Indian constitution. Interestingly enough, there is no mention of human rights. The term used instead of 'human rights' is "fundamental rights" (Banerjee 2010). The

right to water is "implicit, derived from the constitutional right to life, which the Indian courts have interpreted to include the right to clean and sufficient water" (Bluemel 2004, 980).

Despite this acknowledgement, the facts, as they say, in the case of India, speak for themselves:

> "... seventeen percent of the population does not have access to water, including thirty-eight percent of urban residents. Eighty percent of children suffer from water-borne diseases, and a total of forty-four million people have illnesses related to poor water quality. In addition to these water quality issues, India also suffers from water shortage problems and is well on its way to becoming a water-stressed country" (Bluemel 2004, 981).

Bluemel argues that these "problems are caused, in significant part, by the legal system of regulating water, the pressure to develop, and urban migration" (Bluemel 2004, 981). Owing to its status as a former colony of the British Empire, it had inherited the common law tradition of legal thinking. Within which, this tradition, as we have already seen in our earlier section, is riddled with legal complexities. In particular, Bluemel notes that:

> "The legal system for regulating surface and ground water in India may hamper the achievement of the human right to water implied in its constitution. Despite the implied right to water in the constitution, no Indian law establishes an explicit right to water, while some laws actually abolish pre-existing use and customary rights to water. India regulates surface water use through riparian law and a public trust doctrine, which limits the amount of usage. Riparian rights are water rights granted to owners of property adjacent to watercourses for their reasonable use, so long as their use does not interfere with either the flow of the water itself or with the use of downstream riparians. These riparian rights provide both access and quality protections to those adjoining waterways. However, the Irrigation Acts place rights to watercourses in the hands of the State, superceding the rights of communities to manage their water resources under the Indian constitution. The State can thus divert water resources and otherwise obstruct traditional water sources and collection methods, a seeming violation of ICESCR. Thus, the Irrigation Acts may hamper the effective realization of the right to water for some less prosperous communities who utilize traditional methods of water collection and supply. Finally, groundwater is minimally regulated, controlled primarily by those who own the land above it" (Bluemel 2004, 982).

Conclusion –

In this chapter we focus our discussion on rights into the context of rights to a specific thing – water. Water is fundamental to human activity. Therefore, it is not surprising to find that most societies and cultures have tried to frame rules regarding how it is used and distributed. Owing to the fact that any supply of water is part of a complex natural process – the hydrological cycle, water, unlike land, has always posed a challenge to lawmakers. The premise that we will build this chapter on follows from '*The Property Rights Paradigm*' by Armen A. Alchian and Harold Demsetz that "the structure of rights have important consequences for the allocation of resources" (Alchian and Demsetz 1973, 19)

Historically water rights shared a link to land rights (Hodgson 2006, 1). In particular, they have had strong links to rights concerning the ownership property in land where there was direct access to a source of water (Hodgson 2006, 1). Owing to the fact that the right to use water was linked to the land rights, if person (A) had to sell the use of water (W_U) to person (B), the only legal mechanism available to person (A) was to sell the land to person (B).

The questions that we addressed here were as follows -when we speak of a water right (W_R), what are we referring to? Is there *a* water right (W_R) (in the singular) or is there a set of different types of water rights (W_{Ra}, W_{Rb}, W_{Rc}, etc.)? And, if there are multiple water rights, what are they and how do they differ from one another?

We find that there are two primary ways of looking at water, in the context of rights, namely the idea that water is an object of property rights considerations or water as a human right. Within the context of a discussion around the property notions of water rights we find that there are artefacts of historical formulation that reside in the legal traditions of the world. These artefacts come from the historical and geographic specificities that led to the formulation of water rights. They were formulated in the specific geographic context of England and drew on the Roman traditions when thinking about water. Inasmuch as they share links with ownership of land, our illustrations show that if a state is seriously considering realizing a human right to water in

practice they are likely to be a impediment to such plans as we have seen illustrated in the case of India. In order to be able to bring into being systems that aim at the provision of a human right to water one would conceivably need to modify the national legal systems to effect such a change as we have observed in the case of South Africa.

In conforming to our stated premise, that is, to understand the structure of a right we relocate our attention from the structure of national legal systems and move to the province of international law. We find that the definition and the institutional structure of the human right to water as we observe in discourses of global development come packaged along with the stamp of the United Nations. And, as described in our first chapter, this right to water finds its formulation in line with concerns of universal interest and are proclaimed to be inalienable.

An unfortunate fact is that the United Nations does not impose itself on nations to adopt the idea of a human right to water. It acknowledges that attempts to realize the fulfilment of any other human right is contingent of meeting the human right to water. In the absence of this all efforts to realise human rights are going to simply be hollow. Therefore, a link must be drawn between national legal frameworks and international law, in which, national legal frameworks will necessarily need to change their character. An appropriate illustration of this argument is the case of South Africa.

But, the South African example is not a simple story. South Africa managed to change its constitution and, in that, acknowledge the human right to water but its ability to implement it is conditioned by the fact that they are not a underdeveloped nation and that a large quantum of the institutional capacities needed to operationalise a human right to water were already developed. The case of South Africa need to be taken with a pinch of salt as, despite the fact that their understanding of a right conforms, at a theoretical level, with Raz's definition following the interest theory of rights, we cannot ignore the fact that implementing a rights policy has a tremendous cost to it. In the case of scarce resources (resources in the broad sense – be they physical stocks, monetary considerations or institutional capacities) implementing a human rights-sensitive

policy may not be possible at all or, at the very least, may be easier said than done.

The case of India is not an encouraging one for human rights practice, at least, not with reference to the human right to water (Bluemel 2004).

Chapter Three

INTRODUCTION

The Hohfeldian axiom we put forward in the first chapter gave us a glimpse into the analytical structure of a right. The assertion that a right is only a right if it as a duty that matches it helps, as we have seen, open up the conversation on rights. It is not so much for a right holder to hold a right, the substance of a discussion on rights lies in understanding the nature of the obligations that the duty bearer has to fulfil.

In drawing on our theoretical discussion of the function of rights, we have established that, as per Raz, understanding rights through the lens of well being serves well as the entry point for a discussion on human rights. An important aspect of our theoretical beginnings highlights the fact that in thinking about rights it is an imperative that we acknowledge that a state, which is subject to political assessment due through the idea of human rights, base its considerations on how to implement a human rights regime on a set of diverse factors.

Mainstream or neoclassical economics with its analytical edifice has served as a means for governments to think about issues of policy and evaluate the scope for their implementation. Its popularity, in terms of making considerations based on the benefits and costs with the ultimate goal of addressing concerns of social welfare. The aim of this chapter is to show that a direct while a direct integration of human rights concerns seems an appropriate, the analytical structure of mainstream economics and the values that go along with it have implications for broader socio-political and economic considerations.

In this chapter, we begin by asking questions of mainstream economic theory, in general, and its evaluative tool welfare economics, in particular. We draw on the example of the Cochabamba conflict in our attempt to do so. In the next section, we draw on Reddy's philosophical analysis of economics and human right to examine the reasons why they seem incompatible with each other. Despite his criticisms, we look at ways in which there could be a meaningful conversation between economics and could be fostered. In our last section, we conclude.

Rights and Mainstream Economic Theory -

Let us motivate this discussion with the example of the Cochabamba conflict. The Bolivian city of Cochabamba required a steady and adequate water supply. Less than sixty percent of the population had access to a water supply network. Those who did have access did not receive water continuously. Private water merchants supplied water to the poor. Under these circumstances, Bolivia began to privatize their water supply system (Bluemel 2004, 965). Bolivia kept water a state owned commodity but granted licenses to private companies for distribution. Privatisation led to an increase in the price of water. The World Health Organisation determined that if water has to be affordable, it cannot exceed three to five percent of an individuals income (Bluemel 2004). The cost, after privatisation, increased to over twenty percent of the average household's income. (Bluemel 2004, 966) The cost increases sparked violent protests (Padding) and the government responded by stopping the private water distributors and taking water supply back into its own hands (Bluemel 2004, 965).

Behind the private water suppliers thinking is mainstream economic thinking. With respect to water, this way of addressing supply problems, advocates using the market as the means to an efficient allocation. In Cochabamba this led to a price rise. The price rise, in turn, led to deprivation because consumers did not have the ability to pay for the water. However, it is vital to note that water, in this illustration, is being seen as an economic good. With water being seen as an economic good, private water distributors have an incentive to seek a profit (Bluemel 2004). This is not surprising as "mainstream economics plays a role in the unequal assertion of people's right to clean water" (Branco 2010, 142). Due to the fact that: "Economics postulates are intrinsically contradictory to human rights, as the best possible result according to economic logic may easily constitute a violation according to human rights principles" (Branco 2010, 154).

Cochabamba serves as an interesting starting point for the discussion that will follow. It highlights a few interesting points regarding a market based mechanism for water distribution and supply. First, it shows the role economic thinking, particularly mainstream economic thinking, has to play in water supply systems. It also suggests that it is difficult for mainstream economic theory to incorporate the language of human rights into its fold. What does this tell us about the values of economic

thinking? Let us look behind the curtains on these two issues. Given that both aim at "creating a better world" (Reddy 2011, 69), it is important to understand how the two work at problems and whether there is scope for them having a "conversation" (Reddy 2011)

Mainstream and neoclassical economics can be treated as synonymous (Branco 2010). They form the bedrock of modern economic analysis (Branco 2010). Neoclassical economics is hard to define (Branco 2010). But: "is essentially a description of the equilibrium of supply and demand of goods and services in a market of consumers and firms regulated by prices. It is easier to recognise the key principles and assumptions of neoclassical analysis of the market including equilibrium, perfect competition, scarcity, utility maximisation by consumers, profit maximisation by firms, market clearance through prices and competition, factors of production, marginal analysis (of costs, revenues, utility, productivity), etc" (Salomon and Arnott 2014, 46).

This edifice is built on the view that economics is a positive science (Friedman 1953). That is taken to be "a body of tentatively accepted generalizations about economic phenomena that can be used to predict the consequences of changes in circumstances" (Friedman 1953, 39). And, in particularly "positive economics is in principle independent of any particular ethical position or normative judgments" (Friedman 1953, 4). As Keynes says, it deals with "what is," not with "what ought to be" (Friedman 1953, 4). It is, in part, a "language" intended to encourage "systematic and organized methods of reasoning" (Pigou 1925, 164) in (Friedman 1953). And, In part, "it is a body of substantive hypotheses designed to abstract essential features of complex reality" (Friedman 1953).

Human rights, on the other hand, have different concerns (Salomon and Arnott 2014, 47). Human rights concern entitlements and the qualifying criteria to enjoy them along with the consequences of using that particular criterion (Branco 2010). Branco argues "political economy based on mainstream economics contradicts the assertion of the human right to clean water" (Branco 2010). Why? The two disciplines do not share the same language (Branco 2010). Human rights, if found in economic reasoning, occurs by incorporating it with property rights (Branco 2010). Therefore, it

is unreasonable to expect to achieve socio-economic rights using mainstream economics' rules. (Salomon and Arnott 2014, 47).

That mainstream economics does not involve value considerations is not true. Analytical economics produces outcomes based on normative considerations framed on the "the Paretian premises of economic efficiency and aggregate social optimality" (Salomon and Arnott 2014, 44). Welfare economics is the source of value considerations in mainstream economics (Salomon and Arnott 2014, 47). Welfare economics is concerned with "the aggregate social utility of the members of society as a group" (Salomon and Arnott 2014, 47) by extending the idea of utility to social utility while "recognising that this is the result of decisions of all individual members and agencies and that it affects the distribution of the benefits and costs resulting from economic activity among members of society" (Salomon and Arnott 2014, 47-48) Essentially, it "sheds light on the governance of public interest" (Salomon and Arnott 2014).

Welfare economics tries to generate comparative measures of policy alternatives so that the optimal policy can be chosen. A policy would be chosen if it is Pareto optimal, that is, if any one person can be made better off without making anyone else worse off. Economists Kaldor and Hicks operationalised the Pareto principle by creating a "potential compensation test." It acknowledges that making a social policy choice creates gainers and losers but requires that if the gainers can hypothetically compensate the losers for their losses, the optimal social choice has been achieved. Public policy based on cost-benefit considerations, therefore, operate in a very narrow space (Salomon and Arnott 2014, 48). They employ narrow benefit cost analysis tools (Reddy 2011, 69). They have limited evaluative considerations (Reddy 2011, 69). Rights considerations can improve their quality (Reddy 2011, 69). They can also help prescribe action (Reddy 2011, 69). Rights can help limit the range of allowable changes to policy while keeping alternatives plural (Reddy 2011, 69).

Welfare economics and human rights law share similar concerns. Policy assessments are based on normative criteria which are "precisely the questions that fairness and rights-based claims address" (Salomon and Arnott 2014, 48). In this regard, "human rights theory can help provide a normative framework that avoids some of the pitfalls of welfare theory" (Seymour and Pincus 2008, 387).

One must note that: “At first sight Pareto-efficiency would seem consistent with efforts to meet socio-economic rights because it does not allow worsening the situation of the deprived – or of any other group – to achieve aggregate gains for society as a whole. However, Pareto-efficiency also forbids arrangements that improve the situation of the poor at the expense of the rich since it requires that no one should be made worse off. Human rights offer a theory of justice that focuses on the poor and therefore requires that we should distinguish between possible “losers” to improve the position of the poor, even at the expense of the rich. The key to the convergence of human rights policy and economic development is therefore an understanding and revisiting of what ethical criteria drives the economics of distribution and redistributive policies” (Salomon and Arnott 2014, 62).

Seymour and Pincus point out: whereas economists “reject prior reference to rules and norms in favour of rank ordering of market or social outcomes” (Seymour and Pincus 2008, 398), from the perspective of human rights, “actions and choices should be judged on the basis of adherence to particular rules or norms, rather than their outcomes” (Seymour and Pincus 2008, 389).

Economic theory is comfortable with dealing with wants (Branco 2010). It is not comfortable with dealing with rights (Branco 2010). Satisfying wants implies using concepts like cost, benefit, and price (Branco 2010). Each of which is conceptually well founded in economic theory (Branco 2010). Satisfying a want implies the ability to pay (Branco 2010). Therefore, it can be decomposed in economic theory to an issue of purchasing power (Branco 2010). Wants can be subject to positive analysis; rights oblige normative consideration (Branco 2010). Economic resources can be allocated unequally and economic efficiency would not be worse off because it (Branco 2010). Efficiency can also tolerate exclusion for resources if an individual’s budget is limited (Branco 2010). Neither is tolerable according to human rights (Branco 2010). The primary economic problem concerns achieving efficient outcomes in a market (Salomon and Arnott 2014, 47). The principles and assumptions that guide mainstream economics do not allow the requirements of human rights to translate into them (Salomon and Arnott 2014, 47). This is because, philosophically, utilitarianism renders rights unimportant for mainstream economics (Branco 2010).

A “market is unequipped to allocate rights” (Branco 2010, 151). Rights require to be met by “provision of both public and private goods. (Branco 2010, 147)” Therefore, if rights are asserted economics is forced to deal with them. (Branco 2010, 148) Satisfying rights requires using different distributive rules from those which apply to distributing goods and services (Branco 2010, 148). The responsibility of this will shift from the market to the state (Branco 2010, 148). Mainstream economic theory hates state interference in the market (Branco 2010, 148). But, the State is elected and known; the market is anonymous (Branco 2010, 151). Ensuring accountability is difficult, if not impossible in the market (Branco 2010, 151). And, it would require, at the very least, an appeal to and interference by the State (Branco 2010, 151).

In mainstream microeconomic theory, an individual seeks to maximize his utility function (Branco 2010, 148). That is, he seeks to maximize his income or leisure (Branco 2010, 148). Mainstream macroeconomics sees social utility as a sum of individual utilities (Branco 2010, 148). This is measured in terms of national income (Branco 2010, 148). Disutility for any single individual is not a grave concern here. In fact, it is possible that it raises the social utility. (Branco 2010, 149)

Another contradiction is that in economic theory deprivation is “the outcome of either nature’s random behavior or human incompetence” (Branco 2010, 151) Ergo, the good life according to economic theory is lies between “a struggle to dominate nature or to predict and mitigate its whims, and a quest for efficiency in human action” (Branco 2010, 151) As per human rights, deprivation is a violation of human rights (Branco 2010, 151).

If we think of human rights as the limits to which an individual can tolerate losses for the benefit of others, then the individuals human right must be protected even in the face of social objectives (Branco 2010, 148). Encouraging human rights requires respect for justice of means irrespective of the social objectives being pursued (Branco 2010, 148). Rights correspond to duties (Branco 2010, 151). Therefore, a right represents “the rights which individuals have over the conduct of others” (Branco 2010, 151) An individual whose right is not ensured corresponds to the failure to carry out a duty by another individual (Branco 2010, 151). Responsibility is a key issue in human rights (Branco 2010, 151).

With rights, depriving a single individual from enjoying the right or even reducing their enjoyment of the right affects the entire community in a negative manner (Branco 2010, 149). Maximum social utility is, in this regard, converse to human rights philosophy (Branco 2010, 149). Asserting human rights is equivalent to asserting a social preference. In the case of the right to water any situation other than universal coverage is inferior (Branco 2010, 150) A market is unable to address the articulation of such a social preference (Branco 2010, 150).

Using water markets as an example, Branco points out that water markets are not like the competitive market model put forward in mainstream economic theory (Branco 2010, 152). Water, unlike other goods, has unique physical characteristics (Branco 2010, 152). Its provision requires a flow (Branco 2010, 152). And, it cannot be provided like a stock (Branco 2010, 152). This poses a unique challenge in the form of "measuring and monitoring this flow is both complex and costly, which can frequently become an obstacle to determining clear property and usufructuary rights" (Branco 2010, 153) Water is an irreplaceable and indisputable good therefore it ought not be exclusively in the hands of any user or supplier. (Branco 2010, 153)

Nature is the primary 'producer' of water and it is not an economic agent (Branco 2010, 153). All consumptive water uses create externalities for example pollution (Branco 2010, 153). Externalities need to be addressed within the large framework of the State and its other responsibilities (Branco 2010, 153).

A secondary point to the thesis is: "The commodification of society, which is at the foundation of mainstream economics discourse, is contradictory with a society whose purpose is to enhance human rights. In this society accountability and universality are keywords and market ideology happens to ignore both. Human rights decline, or at least stagnation, should not be seen, therefore, as the outcome of doing wrongly the right economics, but of rightly doing the wrong economics" (Branco 2010, 154).

As Stark notes:

> "An economic society is not made up of separate, independent interacting units in the sense that the physical sciences conceive of them. Economic life has organic aspects, in the sense that past history influences subsequent conduct. Even more important, we cannot always

> identify "units" nor can we identify the causal relations between "forces" with any great certainty. (Stark 1968, 29)

One way to make better development decisions is by drawing on doctrines of international rights law regarding socio-economic rights. If we locate doctrines of international law of socio-economic rights, essentially externally-generated ethical criteria, welfare economics can be guided by principles of justice (Salomon and Arnott 2014, 44). That is, a rights-compliant normative approach to welfare economics decision (Salomon and Arnott 2014, 45).

Some Philosophical Considerations -

Reddy showed the difficulties of economics and human rights having a meaningful conversation with each other (Reddy 2011). He: "uncover(s) central tendencies and conceptual underpinning" (Reddy 2011, 64) in order to present the difficulties between the two disciplines. His thesis is that there exists a deep-seated incongruity between the normative framework of mainstream economics and normative framework of human rights (Reddy 2011, 67).

Consequentialism is the view that alternatives must be judged according to the consequences they generate (Reddy 2011, 64). It distinguishes between processes leading to an outcome and the outcome itself (Reddy 2011, 64). It requires indifference between alternative means (Reddy 2011, 64). This perspective is at odds with human rights (Reddy 2011, 64). In general, there is a disagreement with the means to achieve something (Reddy 2011, 64). Rights often defined by restrictions they impose on the actions of the individual and other agents while also generating obligations for agents to act in certain ways (Reddy 2011, 64). This conflicts with consequentialism, as generally understood. (Reddy 2011, 64).

Human rights are not purely procedural (Reddy 2011, 65). Easiest to think of them like this (Reddy 2011, 65). Contrast between approaches overdrawn (Reddy 2011, 65). Adequate account requires description of consequences that such actions are likely to generate (Reddy 2011, 65). Seemingly procedural rights based injunctions depend for their moral force upon the likely effects even if they are stated in a purely procedural way (Reddy 2011, 65). Economics and human rights may agree on practical prescriptions and disagree on procedural considerations (Reddy 2011,

65). This means that: “Results are also important and, as highlighted above, human rights in this area are concerned with outcomes but, notably, also with the distribution in outcomes. As Gauri has remarked in this regard: “The entire distribution is of concern because rights theories take seriously the idea that every human being is worthy of respect” (Gauri 2004, 472) in (Salomon and Arnott 2014, 63).

Basically, conceptually, they are not unified as they each assign importance to means and ends in very different ways (Reddy 2011, 65). Thus, it is difficult to establish mutual comprehension and cooperation (Reddy 2011, 65) but this is due to the fact that “human rights tension with and contribution to the consequentialism and welfarism of welfare economics is due to the conviction that, for a host of reasons, process matters” (Salomon and Arnott 2014, 64)

Human rights can be divided into a “range of rights” (Reddy 2011, 65). These are further “subdivided into types” (Reddy 2011, 65). Different rights generate their own “restrictions and prescriptions about actions” (Reddy 2011, 65). Thus, human rights can be thought of as having plural notions of value (Reddy 2011, 65). Economics, on the other hand, is monistic (Reddy 2011, 65). Meaning that it has a “single goal” plus it recommends an “appropriate course of action” (Reddy 2011, 65). Distinct means permit the examination of trade-offs but they are essentially in service of a singular “master goal” (Reddy 2011, 65).

“When faced with monist and pluralistic perspectives” (Reddy 2011, 66) we cannot simply declare that one is better than the other. Why? Complex moral problems can be approached from different perspectives (Reddy 2011, 66).

Economists aggregate (Reddy 2011, 66). But, their view towards aggregation is undecided (Reddy 2011, 66). They tend to be “willing to aggregate by using utility” (Reddy 2011, 66). They “attempt to interpret individuals own assessment through revealed preference” (Reddy 2011, 66) while “relying on Pareto comparisons for well being” (Reddy 2011, 66). The aggregationist approach obscures distinctions and obscures independent values (Reddy 2011, 66). But, it helps observe “valuational interdependence” (Reddy 2011, 66). Human rights are “antagonistic towards aggregation” (Reddy 2011, 66). It is better oriented to recognising “dimensional

pluralism and interpersonal pluralism" (Reddy 2011, 66). How? By demanding that adequacy "of life be assessed in diverse respects" (Reddy 2011, 66).

The object of valuation for economics is "subjective preference satisfaction" (Reddy 2011, 66). The 'preference' is viewed as "revealed by choices and being proffered by way of money" (Reddy 2011, 66). Utility, to the economist, "is an all-things-considered aggregative assessment of satisfaction" (Reddy 2011, 66). Historically, classical utilitarians were less against the idea of interpersonal comparisons. (Reddy 2011, 66) Modern economists reject this (Reddy 2011, 67). Why? They claim there is lack of normative or empirical basis to compare. (Reddy 2011, 67). This has links to the notion of economics as "a positive science" (Friedman 1953).

Human rights concerns enter both the social goals and recognition of constraints (Reddy 2011, 69). Normative constraints, that is, respect for human rights enter alongside facts about causal relations and resource limitations (Reddy 2011, 69). In this regard the authors point to Amartya Sen's work on capabilities. The strength of his work lies in its expansion of the possibilities of economics. He identified an alternative way of discussing value from which there emerged alternative norms, ways of making value judgments and informational frameworks which reject neoclassical "welfarism" and better reflect human rights concerns in development economic decision making. By exploring the doctrines as developed in international human rights law, our analysis has shown that it offers norms and value judgments both to release economic decision-making from the confines of Paretian premises as well as for meeting the legal obligations of human rights" (Salomon and Arnott 2014, 67).

Is there scope for an Integration?

Salomon and Arnott's argument is that there is. Their basic thesis is a best-of-both-worlds argument. They claim that welfare economics, in its analytical usage, is an important and relevant tool in the policymaker's arsenal. It would help make predictions on the kind of outcomes that are likely. It would also, as they argue, help provide the menu of options that are available. Their caveat is that is serves as poor way to make social choice decisions. They argue that this lies in the domain of moral

thinking with content that is necessarily normative in nature. In the normative world, value judgements hold an important place. And, a substantive body of values lies in the domain of human rights, as developed through the deliberative processes of international law in the area of socio-economic rights. This can aid in developing options in the realm of norms and value judgments and in that sense become an fundamental way of complimenting welfare economic analysis (Salomon and Arnott 2014, 68).

Scope for integration requires possibilities. Salomon and Arnott find one in the dusty jackets of history. They point out that both classical utilitarianism and human rights theory recognise that individuals are the basic unit of analysis in the sense that they are the moral locus (Salomon and Arnott 2014, 61). In that way they trace a line to their claim that welfare economics and human rights law share similar concerns. Policy assessments are based on normative criteria which are "precisely the questions that fairness and rights-based claims address" (Salomon and Arnott 2014, 48). In this regard Seymour and Pincus are of the opinion that human rights theory can help offer a normative framework that circumvent some of the drawbacks of welfare theory (Seymour and Pincus 2008, 387).

As a basic postulate, international human rights law encompasses a vision of a minimum standard of dignity (Salomon and Arnott 2014, 51). Unfortunately, it does not provide any tools for analysis, only broad principles (Salomon and Arnott 2014, 51). If we realise the goals of socio-economic rights, we would have set the universally agreed upon floor below which no one can fall. (Salomon and Arnott 2014, 64).

With regards to socio-economic rights: "To assist states in meeting their obligations, the UN Committee on Economic, Social and Cultural Rights (CESCR) applies a tripartite model to monitor compliance by state parties with the International Covenant on Economic, Social and Cultural Rights (ICESCR) – the treaty it oversees. These are obligations to respect, protect and fulfil the rights codified in the Covenant (see, for example, CESCR 1999, para. 15; 2000, para. 33). This interpretative tool provides that the obligation to "respect" human rights imposes an obligation on states and all their organs and agents to refrain from interfering either directly or indirectly with the enjoyment of rights" (Salomon and Arnott 2014, 53).

A requirement placed on State is that: "Under its mandate to interpret the Covenant, the Committee established in 1990 that, progressive realisation notwithstanding, "a core obligation" to ensure the satisfaction of, at the very least, "minimum essential levels" of each of the rights is incumbent upon every state party. -The realisation of the minimum essential levels of economic, social and cultural rights are of an immediate nature (i.e.: not subject to progressive realisation) (CESCR 1990, para. 10)." (Salomon and Arnott 2014, 54)

The important underpinnings include "non-discrimination and equality" (Salomon and Arnott 2014, 57), "non-retrogression" (Salomon and Arnott 2014, 56), utilisation of the "maximum available resources" (Salomon and Arnott 2014, 55), "participation", "accountability" and the "acknowledgement" that "rights are universal, indivisible, interdependent and interrelated" (Salomon and Arnott 2014). A key point to note here is that all these criteria are values. And, hence, they form the basis of an alternative system of valuation (Salomon and Arnott 2014). Unlike value considerations in economic theory, values in international human rights law are transparent.

If welfare economics is tempered by the aforementioned doctrines and values of international law, mainstream economics can operate in a different light. This is one manner through which mainstream economics can address the issues concerning the normative differences Reddy points out between the two fields (Reddy 2011).

The moral case against the dangers and limitations of mainstream economic theory are articulated with a particular force in *What Money Can't Buy – The Moral Limits of Markets* by Michael J. Sandel. Mainstream economic theory, according to Sandel, can be critiqued from a moral point of view by using two arguments – one concerning fairness and the other concerning the degradation of values and norms that a market relationship will corrode (Sandel 2013). We will focus on the first – the fairness argument.

In claiming that markets, the mainstream economic tool for addressing issues of distribution, are unfair Sandel illustrates a particular case. Imagine, he says, if the market was the way in which all individuals had access to a water supply. As per the rules of the market, each individual would require to purchase an amount of water

from the market by paying a market price. Now, in the event that there was an individual who can't afford to pay this market price, should he not have water? Restated, is it fair to say that his poverty should deny him of water for survival, if not to meet his basic needs? Sandel's argument, in this regard, is – no, it is not fair.

This does not mean that there have not been attempts at making an integration of mainstream economics and human rights. The difficulties of doing so are evidenced by the work of Jeffords and Shah on incorporating the right to water into the framework of mainstream economics. They point to the fact that even though: "The right is clearly gaining legal momentum in the international community; however, the extent to which governments can feasibly instantiate a justiciable human right to water remains woefully under-researched, especially in the economics literature" (Jeffords and Shah 2013, 66). Their work is an attempt to address this gap. The other way of looking at what they are saying is that there is very little literature to build up on.

There has been a long standing cross-disciplinary debate on whether water ought to be considered an economic good or not. Basically, those who say it should invariably take a didactic tone on the issue, particularly when the implications of it are mapped out. They highlight the virtues of the price system as a tool for disciplining people into an, at least through monetary means, appreciation of the fact that water is scarce. Some authors take this basic position further. They claim that both, prudent economic values as well as goals such as equity and efficiency and environmental requirements can be met (Rogers, de Silva and Bhatia 2002). What about those who say it cannot be considered an economic good? They point to the fundamental nature of water. They articulate the position that water has properties that make it unlike any other good (Savenije 2002) and (Branco 2010).

An alternative way of looking at water, when focusing on the right to water, is through the lens of an exhaustible resource (Hotelling 1931) in (Jeffords and Shah 2013). Their analysis demonstrates that there is a great difficulty in being able to supply a right to water (Jeffords and Shah 2013, 88). Providing a right to water becomes difficult because of the fact that a right to water, as per the United Nations, requires that it adheres to the "universality principle" (Jeffords and Shah 2013, 88). This is a problem for mainstream economics.

As such, goods that individuals would have access to at no explicit cost are known as free goods. Air, is traditionally though of as a free good. Given articulations such as the water-diamond paradox, it is reasonable to infer that at one point so to was water seen. But, in the presence of considerations of quality, for example, clean air or water, as the case may be, the discussion become a complex one. One in which the quality of air is available only at a price. Mainstream economic analysis, they conclude, needs to engage in some self-reflection (Jeffords and Shah 2013, 88).

As per their model, if households can afford to pay for water, the government would not need to "implement a human rights fiscal policy" (Jeffords and Shah 2013, 88). This fiscal policy is merely an acknowledgement of the fact that implementing a human right costs money. And, given that a government has a large set of responsibilities to address the limits of resources are very real. The extent of poverty, deprivation and inequality in the world is at a level where such a situation would not arise.

Conclusion –

Cochabamba, the Bolivian city serves as an interesting starting point for our discussion on the possibility of mainstream economic theory and human rights. In the case of Cochabamba, we observed that purely economic considerations, through creating private interest in water, as the basis for a water supply system have damaging results. Can this tell us anything about mainstream economics?

Our answer is yes. The logic that private companies with an agenda to recover costs use comes from mainstream economic theory. This, in turn, comes from a specific view that economics has of itself. Following Freidman, analytical economics has seen itself as a positive science.

But, there is another side to the coin. Mainstream economics does not only consist of its analytical elements. It also has an element of the normative in it. This side of economics, welfare economics, has become a popular tool at the hands of policy makers and assessors of policy. Built on a narrow benefit-cost calculus, welfare economics employs value judgements in the selection of optimal social decisions. This is problematic.

The breadth of value judgement criteria in welfare economics is limited by its insistence on the use of Pareto optimality as an evaluative tool. Pareto optimality is a very limited, and in that sense, limiting criteria for social welfare. In drawing on our theoretical discussion of the function of rights, we have established that, as per Raz, understanding rights through the lens of well being serves well as the entry point for a discussion on a dialogue between economics and human rights. An important aspect of our theoretical beginnings highlights the fact that in thinking about rights it is an imperative that we acknowledge that a state, which is subject to political assessment due through the idea of human rights, base its considerations on how to implement a human rights regime on a set of diverse factors.

Reddy's philosophical analysis of economics and human right examines the reasons why they seem incompatible with each other. The difference lies in their normative frameworks. The normative aspects of human rights are universal in scope, this is not the case with economic theory. In fact, the broad based scope of human rights is what makes integrating human rights into neoclassical economic theory extremely difficult.

Others believe that the case is less tricky. All neoclassical economics needs is a fresh supply of values in order to better assess issues of social policy. International human rights, being primarily a source of alternate modes of seeing of appreciating value serves as a novel way of having the best of both worlds – the cost calculus of economics and the values of international human rights.

CONCLUSION

To conclude, let us go back to the very beginning our endeavour. We began by laying down, what seemed like at the time, a fairly innocuous statement: X has a right to *w*. The basic intention of this, framed in the larger context of discussing a right to water, was to, at least in its theoretical context, understand the three parts of that statement namely, the right-holder X, the idea of what holding a right means and the relation between the right-holder, the right and *w*, that is subject of the right being held. We took that there is a theoretical basis for making a claim for a right, this chapter attempted to discuss what theoretical scope can be developed for an understanding of a right to water by engaging with some of the deliberations around rights.

We began by highlighting some of the semantic issues that crop up when dealing with a right, in particular, and law, in general. Moving forward from our semantic caveat, we attempted to define a right by engaging with the plural ways in which a right can be conceived of. An important part of understanding a right lies in examining the nature and its functions. To understand the nature of a right, we presented a right in the elemental form introduced by Hohfeld. Our basic inference is that for a right to truly be a right, it must possess a correspondence with a duty. To put it another way, if Y has a duty to X with respect to some *w* (that which the right is being granted in/to) it is only then that we can say that X truly has a right.

Our innocuous statement is not as innocuous anymore. At the very least, having a right, in the abstract, requires that there is a corresponding duty. This means that for X to be a right-holder there has to be a Y who is the duty-bearer. Y's duty can be best understood by saying that Y has an obligation to X to fulfil *w*. This can be further complicated by looking at the concept of *legal remedy*. The question being asked is – If a right must correspond to a duty, then does it follow that, in the absence of the obligations of a duty being fulfilled, a right must also have a remedy? We find that the answer is yes. If X has a right to *w* and Y bears the duty of fulfilling X's right to *w*, in the event that Y fails to do so, X can seek a legal remedy. The appeal to a legal remedy is much a part of the practice of law. In fact, it is quite an oft quoted legal maxim.

Understanding a right also has another equally important component, the aspect of its function. There are two dominant ways of understanding the functions of a right - the will (choice) theory of the function of a right and the well-being understanding of the function of a right.

Will theorists imagine a right being built-in with a choice about whether one is wants to exercise the right or not. This implicitly requires that X has some degree of power or control over the relationship between himself and Y. If we are to be realistic about this conception of rights, we observe that in real world interactions X may not have power or control over the relationship between say a water supply company and themselves. Nor do they have any direct, individual control over a relationship if Y is the state. At least, not in a sense that is costless or low cost, and timely. Further, given that the rights-claim in will theory is being made on the basis of the exercise of a choice, it is naive to conclude that people in advanced circumstances of deprivation are exercising their choice or any control/power regarding their rights.

Essentially, rights are problematic when thought of as being in the will of the right-holder if there is no way in which they can be secured. Following Donnelly, our central argument is that "the duties which correlate with rights are only contingently related to the capacity of anyone else to demand or waive the performance of the duty. Thus my right to life may, but need not, entail that I may release you from your standing duty not to kill me" (Campbell 1985, 11). At best we could say that if the right to water needs to be a right in the sense that will-theorists imagine it, that is, one where X has sufficient power and control to be able to make the choices that he would choose to make, it can only be one of exception. It would require us to rephrase the nature of the right-duty relationship.

Having deemed the will theory of rights inadequate in light of the context of our discussion on the right to water, we move into the other dominant theoretical understanding of a right – the interest theory of rights. According to the interest theory of rights, a claim for a right must correspond to a duty, as demonstrated by Hohfeld, by the reason why the duty bearer is obliged to make good on his obligation is because the right is being claimed by the individual in the interest of his well being. That is to say, a reason for a duty to be fulfilled lies in the benefit of the individual claiming the right.

If Y is the state we can ask – to what extent ought the state go, in terms of positive actions, in order to address the concerns around the life and subsistence of its citizens? Scholars believe that this is based on the criteria relevant to the sovereign nation. And, that the criteria that go into taking this decision are "content, urgency, utility, moral values, political credit, and bases" essentially what Raz calls "interests of ultimate value" (Raz 1986, 178).

In drawing on Raz's definition and understanding we can understand that they are important. Why? They highlight a key aspect of thinking about rights, that is, through the lens of interests that constitute an individual's well being and how that is the sufficient basis of an obligation on the duty-bearer. Stated in our representational form:

X has a right to *water* because his well-being is of ultimate value and on this facet of X's well-being/interest rests a sufficient reason for holding the *state* to be under a duty.

Having found some basis for understanding a right we attempt to examine the concept of a human right. We asked a few questions of the concept of a human right. These questions are: 1. Is a human right a right 'to' or is it a right 'from'? 2. Is there a moral grounding for human rights? 3. Do human rights correspond to duties? 4. On whom does the duty of a human right lie?

Following our theoretical discussion of the concept of a right we determined that the interest theory of the function of a right gives us an interesting way of framing the right itself, that is, as existing because it is in the interest/well-being of the right holder. At its simplest, this is a good way to understand the concept of a human right. A human right articulates concerns that are universal in nature. This is their special characteristic. That is they concern the well-being/interest of all individuals. When we consider this alongside the other special characteristic of a human right - inalienability, we find that their meat and bones, as it were, have a definite political character to it. In the modalities of articulation of a human right one thing is clear – they are constitutive of an evaluative aspect in which the state becomes the object of assessment and its practices become the approach towards crafting an assessment.

A significant realm of interest in the subject matter of human rights is the nature of the endowment they grant. Rephrased, we observe that human rights may call on their duty bearers to do one of two things – 1. Engage in positive action or 2. Not impede the functioning of the right holder. The can be either a right ‘to’ something or a right ‘from’ something. When looked at concurrently, we conclude that human rights can be thought of as the minimum standard, that is, the floor on which all individuals ought to be standing.

When examining their moral grounding, we must not forget the historical experience they have been grounded on. In a sense they are best thought of as the by-product of deliberate action. One may argue, as some scholars have, that there are moral arguments that are amenable to human rights thinking. While this is true, we have highlighted the other side of this coin – intent.

Given that human rights are not uncomplicated, we find that, in the abstract, they do correspond to duties and therefore, they are in line with the Hohfeldian axiom but the nature of the obligations in real world considerations, due to the positive and negative aspects of the human right, are incredibly complex and have the tendency to be extremely abstract. Human rights are representations of need, following Nickel and, in a broader sense come from respecting the well being of an individual, following Raz’s definition, hence, their complexity.

A necessary question that follows from this is – To whom do the obligations of a human right get addressed? We find that obligations of human rights are diffused through a variety of levels. They lie on the state, its domestic agencies, global institutions like the World Bank and the United Nations, and, ultimately, the citizens of the states themselves as it is, in the case of democratic countries, they who vote for those among them who will be their representatives. Essentially, duties in the light of human rights are circular in nature as the obligations get dispersed through a variety of levels.

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creating private interest in water, as the basis for a water supply system have damaging results. Can this tell us anything about mainstream economics?

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of appreciating value serves as a novel way of having the best of both worlds – the cost calculus of economics and the values of international human rights.

From our theoretical discussion, we saw that Raz's definition was provides a good basis for understanding a right. It is form of articulation specific to the legal and political sphere because of their special characteristics. It is these characteristics that make them difficult to account for in the realm of mainstream economics. They are subject to history and changing circumstances in the world. Above all, rights, in all their forms are nothing but techniques that are expressive of a modality of valuation.

As we observed in the section on integrating mainstream economics and doctrines on international law the entry point of one mode of thinking with another is through an attempt to reconcile the diverse ways in which they value the world. In a democratic world, and within the context of obligations that a right generates the citizens of a country carry perhaps the most important duty of all, a duty towards each other that is, a shared understanding of values and the willingness to respect these values. It is about sharing what Sandel calls a common life.

Our examination of rights in the case of water is an insight into, within a limited domain, a form of justice. A glimpse into the plurality of ways in which we seek to articulate what is just. By no means are we saying that rights are uncomplicated. Nor are we saying they are the answer. What we are saying is that rights, human or otherwise, are forms that are employed in our quest for the good life.

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99