Introduction

- Water represents a regenerable but vulnerable and limited natural resource, an indispensable element to life and society, a raw material for productive activities, a source of energy and a way of transport, a determinant factor for the preservation of the ecological balance.
- water as a movable, wandering thing which because of its nature must remain common property subject to usufruct rights only.

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- For all life, water is necessary.
- There is almost no living thing that could have life without water. Water, as basic resource, is vulnerable to pollution, evaporation and deterioration.
- Water has a great economic value for power generation, irrigation, industrial activities, domestic use, recreation and so many countless activities which play a great role for continuation of life on earth.

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- An astounding ninety-four percent of the Earth's water lies in its highly saline oceans and seas
- Only the remaining six percent is fresh water, and of this, two-thirds is groundwater
- **22 March is World Water Day,**

Ctd…

- Surface water is just what the name implies; it is water found in a river, lake or other surface cavity.
- Because groundwater flows freely across international boundaries, the integrity of groundwater is an international concern.
- When polluted groundwater flows beyond a nation's borders, issues of trans boundary liability arise

Ctd..

- Though the conceptions may vary from time to time it is vital to define what does water law mean
- Is legal right to use a quantity of water from a natural source such as a river, stream or aquifer & Consequently a water right may confer a legal right to impound or store a specified quantity of water in a natural source behind a dam or other hydraulic structure.

Water right

- depending on the specific legal rules in force in a given jurisdiction a water right may be necessary:
- ❖ 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;

CLASSIFICATION OF WATER RESOURCE

- The scientific and legal classifications of water vary based on the different approaches of classifying it.
- The hydrologist generally considers all water as moving through the hydrologist cycle regardless of its location on the surface or beneath the ground.
- Considering its location, water resource can be classified into surface water and ground water; whereas considering issues related to ownership, it can be classified into public, private, nobody's water (res nullius) and common water.

I. Surface Water

- A watercourse consists essentially of a definite natural stream, flowing in a definite natural channel, and originating from a definite source of supply;
- Surface water is water in a river, lake or fresh water wetland.
- Their source may be intermittent rainfall, melting snows, seepages, springs, or overflow water that becomes separated permanently from its stream source

II. Ground Waters

- Water can be found beneath the ground almost everywhere.
- About 2/3 of the world's fresh water is ground water.
- Because of its availability and general good quality, ground water is widely used for household needs and other water purposes
- Groundwater is located underground in large aquifers and must be pumped out of the ground after drilling a deep well.

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- Groundwater and surface water(some) flows freely across international boundaries
- When polluted groundwater flows beyond a nation's borders, issues of trans boundary liability arise
- Will the Next Wars Be Fought Over Water?

1. Public water

- Public waters are those which are considered to be either the property of the state or the public authority
- Normally, these waters are inalienable, i.e., they cannot be given away permanently, but only be the object of an administrative permission.
- are also imprescriptibly, i.e., in spite of long use they do not confer upon the user any right whatsoever.

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- This legal status is to be found in civil law countries, where public water is generally considered as belonging to the public domain; that is a category of things which, in the public interest, are said to be the property of the state.
- Public waters may be such either because they have been so defined by the law establishing the public domain or because they have been so declared subsequently.
- Generally, the criteria to identify public waters vary from country to country and may include their navigability or floatability, their being of public interest

2. Private Water

- Private waters are those which the legislation considers to be object of private ownership.
- This notion stems from the concept of land ownership to which it is closely attached. It is particularly relevant in the case of groundwater, on the basis of the legal maxim that the owner of the land owns everything located above and below his land, including groundwater
- Generally, private surface water ownership is limited to rain water and to springs or waters located within ones land.
- Private ownership of water is either so defined in the legislation, or most generally, derives from the legal framework prevailing in anyone country.

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- The concept of private ownership of water, whether surface or underground, can create problems where the achievement of rational water resources management is concerned.

3. **Res Nullius**

Waters not belonging to anyone (res nullius) should be considered as nobody’s water, which, however, are still subject to the possibility of appropriation.

4. **Common Waters**: **Community or Tribal Waters**

- Common waters (res communis omnium) are those waters considered as the common entitlement of the whole community. This is the doctrine followed by common law countries; the doctrine includes waters because of their transitory, elusive nature, which defies ordinary concepts of ownership.

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- In such countries, the expression “water ownership” is avoided in legislative texts, which instead declare generally that the state has the power to control water utilizations.
- Community or tribal waters are those belonging to a given community or tribe at the local level.

USES OF WATER

- Water is one of the most vital natural resources for all life on Earth.
- The availability and quality of water always have played an important part in determining not only where people can live, but also their quality of life
- Even though there always has been plenty of fresh water on Earth, water has not always been available when and where it is needed, nor is it always of suitable quality for all uses. Water must be considered as a finite resource that has limits and boundaries to its availability and suitability for use.

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- Commercial water use: includes fresh water for motels, hotels, restaurants, office buildings, other commercial facilities, and civilian and military institutions.

- Domestic Water use: includes water that is used in the home every day, including water for normal household purposes, such as drinking, food preparation, bathing, washing clothes and dishes, flushing toilets, and watering lawns and gardens. Domestic water use is probably the most important daily use of water for most people.

- Industrial water use: Water is a valuable resource to the nation's industries for such purposes as processing, cleaning, transportation, dilution, and cooling in manufacturing facilities. Major water-using industries include steel, chemical, paper, and petroleum refining. Industries often reuse the same water over and over for more than one purpose.

- Irrigation water use: water can artificially be applied to farm, orchard, pasture, and horticultural crops, as well as water used to irrigate pastures, for frost and freeze protection, chemical application, crop cooling, harvesting, and for the leaching of salts from the crop root zone.

CONSUMPTIVE AND NONCONSUMPTIVE WATER USE

- The consumptive and non consumptive classifications of water are important when assessing the quantity of water allocated. Water used consumptively diminishes the source e.g. drinking water and agricultural production and is not available for other uses; whereas non consumptive water use does not diminish the source or impair future water use.
- Surface water use is non consumptive when there is no diversion from the water source or diminishment of the source. Additionally, when water is diverted and returned immediately to the source at the point of diversion following its use in the same quantity as diverted and meets water quality standards for the source, the water use is classified as non consumptive.
- Examples of this classification include the following:

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a. Water use in hydroelectric projects when the water is not diverted away from the natural confines of the river or stream channel. These hydroelectric projects are commonly called run-of-the-river projects.
b. Water use in some beautification ponds and fish hatcheries when the outflow is returned to the point of diversion, i.e., there is no bypass reach in the system. The continuous use of water by such a facility does not result in diminishment of the source; inflow is equal to outflow.

- Water use can be classified as non consumptive when the water is returned to the same pool from which it is diverted and the pool's water elevation is not changed by the initial start-up and stopping of the diversion.

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- The term consumptive uses implies some loss of quantity and/or quality of the water, after being used, making it unsuitable for direct re-use, and requiring proper treatment before its disposal or re-use for other purposes.

Need for water policy, legislation and administration

- As a consequence of the above-mentioned realities, the needs is being increasingly felt for more careful consideration of all the problems related to the use of water resources, among which, in first rank, are the legal and administrative aspects involved.
- The overall objective of a water policy is to achieve the maximization of benefits deriving from available water resources and the most rational management
- A sound and well-balanced water resource policy should be viewed, as the case may be, at the national, basin, regional, and local project levels.

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- It should be framed according to the existing situation and requirements in any particular state, region or basin, and be concerned with finding ways and means to satisfy existing and future water demands for different purposes on the basis of availability of water, existing uses, estimates of population growth and technical and financial possibilities.
- This requires proper planning for the allocation and management of the available water and financial resources at every level.
- To meet these new needs, innovative water laws must be designed, not only to facilitate and achieve efficient allocation or reallocation of resources and environmental protection, but also to aim towards the attainment of social, economic and other national goals

- What issues are regulated under water law? What is water law all about?
- Water law is the field of law dealing with the ownership, control, and use of water as a resource.
- The twenty-first century faces the challenge of sustainable resource governance. If previous centuries were about resource discovery, exploitation, technological mastery, and wealth, we now face the prospect of seeing our resources dwindle and disappear if humans are not able to find ways to use resources sustainably. If previous centuries were about individual resources, this century is about how these resources relate to each other and how use in one field affects uses in other fields.

- History shows the intimate connection between economic and social development of a society and adequacy and dependability of water. Once ancient peoples settled around a water supply area, the need for institutions and regulations for bringing water under control were immediately felt. Civilizations grew and prospered whenever their regulatory controls imposed upon water were efficient, and civilizations often declined or disappeared as a consequence of the softening or ineffectiveness of such regulatory controls
- Like the Nile, and the Tigris and Euphrates, the Indus and Ganges civilizations came to birth upon their banks around 3000 B.C

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- these civilizations are referred to by the name of the river valley around which they developed. Thus the Egyptian civilization is civilization of the Nile; the Hindu is the civilization of the Indus; the Chinese is the civilization of the Huang-Ho.
- i. Ancient Egyptian Water Regulations and Management
- Very little is known of the water regulations of ancient Egypt
- During the twelfth dynasty, the centralization of water administration was renewed.
- The district governors of the Old Kingdom had as their chief title ‘Digger of Canals’ and were responsible for the upkeep of canals and dykes, for patrolling and inspecting the banks when water reached its height and for organizing aid when disaster threatened.

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- In the case of floods a state of emergency was declared, and obligatory corves were organized to fight against water invasion.
- ii. Ancient Mesopotamian Water Regulations and Management
- The rivers of Mesopotamia provided water for irrigation and at the same time were means of transport.
- I. Water Law in Early Roman Law
- Early Roman law recognized three classes of water rights:

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- (i), private, which entailed unlimited and unrestricted use subject to sale, acquisition or transfer of the land over or under which the waters are located;
- (ii) common, entailing the right to use of such water to everyone for any purpose, without limit or permission; and
- (iii)) public, when owned by the State, their use being subject to State control.

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- Roman law has exerted great influence on the legislation of practically all modern nations, and, in the course of history, the water law principles have taken three major directions.
- The approach which confers a privileged position on the owners of land adjacent to watercourses, was one of the elements of Roman water law which in turn had a major influence on conceptions of water rights in the influential European legal traditions, prior to the introduction of modern water rights regimes.
- Indeed some of these influences can still be observed. For example, Roman law denied the possibility of private ownership of running water.

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- Roman law distinguished the more important, perennial streams and rivers from the less important seasonal water bodies. 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.
- In Roman law the right of ownership and use of water recognized to the landowner was necessarily limited both by similar rights of neighboring landowners and by the rights acquired by or granted to third persons by the state.

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- As to the rights of neighbors, Roman law, which regarded water as a constituent part of the land, left the owner entirely free to dispose of all the water found on his land without any consideration for his neighbors but made him liable to suffer similar treatment at their hands.
- II. Water Law in Civil Law Countries
- Water law principles in code countries are those which were codified by the Napoleonic Code and found similar treatment in the water laws of France, Spain, Holland, Portugal, Italy, etc.
- It is important to know that the feudal system, in which there was no concept of private ownership of water, and the feudal lords and the king, had full control over land and water within their jurisdiction,

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- Generally speaking, while an administrative permission was necessary for the use of public waters this was not necessary in the case of private waters
- The distinction was maintained by the French Civil Code - the Code Napoleon - promulgated in 1804 after the French Revolution.
- Public waters were those which were considered to be “navigable” or “floatable” and belong to the public or national domain. Their use required a government permit or authorisation.
- Private waters, which were those located below, along or on privately owned land, could be freely utilized subject to certain limitations of a statutory nature such as servitudes, rights of way etc.

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- The right to use such private waters, both surface and underground, derived from land ownership which recognized the right of the owner to use at pleasure the water existing upon his land without any limitation

Water law in the common law legal system

- The distinction between public waters and private waters was not, however, followed in the countries of the common law tradition
- The common law did, however, maintain the principle of Roman law that flowing waters are *publici juris* and in maintaining that those who have access to such waters may reasonably use them, thus privileging the owners of lands adjacent to watercourses.
- To acquire a riparian right it was sufficient to own land adjacent to a watercourse although in a number of common law jurisdictions the land beneath non-tidal waters, the river “bed”, is owned to the median line by the riparian land owners

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- From these basic principles, the doctrine of “riparianism” developed in England and North America in the course of the nineteenth century

- The benefits and limitations of the historical approaches
- The main advantages of these historical land-right based approaches to water rights were that they could be relatively easily stated and furthermore that they could be claimed and exercised by the land owner without the need for state intervention.

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- However, they shared a number of serious disadvantages. First of all, there was the issue of quantification. The use of how much water constituted a “reasonable use” in the common law riparian tradition? In some jurisdictions more detailed rules were developed but none were much better than general principles, as competition for water increased over time. Du Bois describes how in Swaziland the question of reasonableness was assessed in accordance with how much water was necessary for the efficient irrigation of a given land parcel rather than simply in proportion to its location or size relative to other parcels of land.

The Evolution of International Water Law

- Although international water agreements can be traced back some 800 years, modern international water law essentially has developed only in the last two centuries.
- International law provides the institutional framework, the rules for treaty making, interpretation, and dispute resolution, for countries to work together peacefully (UN 1969).
- The current global water law includes customary international water law.
- Customary international law develops through a process in which States make a claim and other States put forth counterclaims until they reach an agreement

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- Identifying customary law is a non-formalized and challenging process. Customary international water law now includes three principles.
- First, the principle of limited territorial sovereignty over national waters that limits the rights of states and requires them to consider the needs of other riparians
- *This principle emerged through a dialectic process where the claim of absolute territorial sovereignty (absolute control over national waters) competed with absolute integrity of state territory (absolute rights over waters flowing into a state from elsewhere, i.e., that waters flowing along or across national boundaries cannot be altered in terms of quantity and quality from what would naturally have occurred).*

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- Today, limited sovereignty is expressed as the principle of equitable utilization (ILA 1966, art. IV; ILA 2004, art. 12; UN 1997, art. 5), i.e., the need to share international waters according to principles of equity (fairness).
- The second principle is the no-harm principle that emerges from the Roman law maxim, *sic utero tuo ut alineium non laedes*—"Do not use your property so as to injure the property of another"
- The third principle is the obligation to settle disputes peacefully. Some states also claim historic rights, i.e., the right to use the quantity of water they have been using

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- The UN General Assembly approved the UN Watercourses Convention by a vote of 103-3 on May 21, 1997, nearly 30 years after the General Assembly requested the International Law Commission to prepare a codification of international water law. Although not yet in force (only 16 ratifications out of a minimum of 35 needed), it is seen as an authoritative, if conservative, reflection of existing customary water law (Gabçikovo-Nagymaros Project Case: ¶140).
- This convention adopts the principles of limited sovereignty (equitable utilization), no harm, and peaceful resolution of disputes by setting out a series of steps that countries need to take.

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- It recognizes the right of all riparian states to engage in discussions around a shared watercourse to deal with existing situations where actions or agreements by or between some riparians have repercussions on others

Land tenure and water rights

- In many jurisdictions, water rights have for a long time been considered as a subsidiary component of land tenure rights, a right to use water often being dependent on the existence of a land tenure right
- Indeed as the world's water resources come under increased pressure, the importance of water rights is likely only to increase. Already, around one third of the world's population live in countries that suffer from moderate to high water stress.
- Continued population growth and the effects of climate change, a phenomenon whose eventual impacts are not yet fully understood

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- the World Commission on Water estimates it is reckoned that the demand for water will increase by around 50 percent in the next 30 years and that around 4 billion people, one half of the world's population will live in conditions of severe water stress by 2025.

Territorial

- Territorial waters or a territorial sea, as defined by the 1982 United Nations Convention on the Law of the Sea is a belt of coastal waters extending at most 12 nautical miles (22.2 km; 13.8 mi) from the baseline (usually the mean low-water mark) of a coastal state. The territorial sea is regarded as the sovereign territory of the state, although foreign ships (military and civilian) are allowed innocent passage through it, or transit passage for straits; this sovereignty also extends to the airspace over and seabed below. Adjustment of these boundaries is called, in international law, maritime delimitation.

Chapter Two

THEORIES OF WATER RIGHTS

Introduction

- to allocate and use water resources in a manner which can meet the increasing demands of the world community; different jurisdictions may set up different ways of allocating water rights to citizens.
- Prominently, all legal system follow either the **riparian doctrine** or the **prior appropriating** doctrine and some the hybrid one.

RIPARIAN DOCTRINE

- Water rights have four important dimensions;

1. Acquisition: How do you acquire the water right?
2. Enjoyment: What restrictions are on the water rights?
3. Loss: Under what conditions are water rights extinguished?
4. Transfer: Where, when, and to whom can you transfer water rights?

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- The term "riparian" was derive from its Latin origin, ripa, meaning "bank of a stream.“
- Legally speaking, "riparian" may refer to land different than what geographically extends away from the stream
- The doctrine recognizes the right of a riparian owner to make reasonable use of the stream’s flow, provided the water is used on riparian land. Riparian land is that which is contiguous to a stream or other body of surface water.

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❖Acquisition:

- Land ownership accompanies the right of access to, and use of, the water, and this right is not lost by nonuse.
- Riparian rights are a form of real property, a part of land law.
- The rights are appurtenant to the land; that is, they are attached to it in the sense that a person who purchases or inherits riparian land automatically acquires the water right.

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- Under this doctrine, the law gives equal rights to the use of water to owners (possessors) of land which borders upon or touches a stream or watercourse.
- The nature of the right is usufructuary - the riparian does not own the water, but owns only the right to use it on his riparian land
- There are two theories on the use of water

1. RIPARIAN RIGHTS TO NATURAL FLOW

- According to this doctrine, the fundamental right of each riparian owner on a watercourse is to have the body of water maintained in the natural state not diminished quantitatively or impaired qualitatively.

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- he doesn’t allowed to make substantial changes in its natural conditions.
- Every riparian owner enjoys this right to the same extent and degree,
- the natural flow doctrine is criticized as too restrictive

2. REASONABLE USE AND RIPARIAN RIGHTS

- Unlike the natural flow doctrine, which seeks to preserve water in its original condition, the reasonable use doctrine facilitates domestic and commercial endeavors that are carried out in a productive and reasonable manner.

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- it determines whether a riparian has received a fair share
- Lots of factors are considered to determine fairness
- economic value , prospective value to society and probable costs
- The test of reasonableness is also applied to pollution problems where riparians have conflicting claims to purity and utility.
- The test is also applicable where the flow of the stream has been changed by dams, flood prevention structures, or where the current is changed.

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- The reasonable-use test has been criticized on the ground that it does not in fact produce results which are different from those reached under natural flow theory.
- EVOLUTION AND CURRENT PRACTICES OF RIPARIAN RIGHTS
- WATER COURSES SUBJECT TO RIPARIANRIGHTS

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- Only the owner of a parcel of land sharing a border with the water courses (touching the watercourse) has riparian rights.
- Riparian rights to use water attach only to riparian land and do not extend to any portion of the tract that is outside the immediate watershed of the water body.

NATURE OF RIPARIAN RIGHTS

- The riparian landowner does not actually own the water body, but does own numerous rights in it.
- The owner’s rights include:

❖ The right to flow of the stream

❖ the right to make a reasonable use of the water body provided reasonable uses of other riparians are not injured

❖ the right of access to the water body

❖ the right to fish

❖ the right to wharf out

❖ the right to prevent erosion of the banks

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- The ownership of riparian land not only creates rights it also creates duties.
- Each riparian land owner has a duty to refrain from interfering with the rights of fellow riparians.
- Generally, Any riparian doctrine has the following characteristics:

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- Riparian rights are of equal priority
- Ownership of land which is riparian to a stream confers rights to the use of waters of this stream
- An owner of such land may use the water only on the riparian tract of land and may not use it himself or sell it to others (it cannot be transferred)
- The Right is not quantified, rather it extends to the amount of water which can be reasonably and beneficially used on the riparian parcel
- Riparian rights are correlative, during times of water shortage; the riparian proprietors share the shortage
- Water may be used only upon that portion of the riparian parcel which is within the watershed of the water source
- The riparian rights remains with the land when riparian lands are sold
- A riparian right is not lost by non-use

LIMITS OF RIPARIAN RIGHTS

- i. Reasonable Use Limitation
- The reasonable use rule allows riparian landowners to use adjacent water if the use does not interfere with the reasonable uses of other riparians.
- Reasonableness thus is determined in comparison with the uses of other riparians.
- The determination of the reasonableness of a use of water depends upon a consideration of the interests of the riparian proprietor making the use, of any riparian proprietor harmed by it and of society as a whole.

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- the purpose of the use
- the suitability of the use to the watercourse or lake
- the economic value of the use
- the extent and amount of the harm it causes

Limitations to non-riparian uses

- Most countries laws restrict use of water to riparian land.
- Because non-riparian uses are unreasonable per se, they are adverse to the other riparian.

LOSSES OF RIPARIAN RIGHTS

- Riparian water rights cannot be lost through non-use and are indefinite in duration.
- This is because, riparian rights attach only to riparian land, it follows that the owner of a riparian parcel also owns riparian rights in the adjacent water body whether those rights are exercised or not.

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- Use cannot create the right and disuse cannot destroy it.
- however, riparian rights can be lost through prescription.
- Prescription is a process of involuntary transfer from one party to another.
- Under prescription, a party making open use of water for the proper time period, gains title to the water right superior to that of the original holder.

PRIOR-APPROPRIATION DOCTRINE

- Is also known as “first in time-first in right”
- The main features of this doctrine states that priority of rights must be based upon actual use.
- the general principle is that water rights are unconnected to land ownership, as in riparian doctrine, and can be sold or mortgaged like other property.
- The first person to use a quantity of water from a water source for a beneficial use has the right to continue to use that quantity of water for that purpose.

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- Subsequent users can use the remaining water for their own beneficial purposes provided that they do not impinge on the rights of previous users.
- Therefore, Priority of rights is the distinguishing feature of appropriation doctrine.
- Another feature of an appropriative right is that the water may be used in connection of non-riparian as well as riparian lands.

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- The appropriation system creates two kinds of users; Senior and Junior Appropriators.
- A senior appropriator is a user whose appropriation is prior to all others.
- Appropriators who enter into the inappropriate supply of water after the senior appropriators are known as junior appropriators.
- Senior appropriators who want to withdraw more water than their vested amount are considered to be junior appropriator for that additional withdrawal.

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- In this doctrine, priority is given to those with older water rights.
- the date of the appropriation determines the user’s priority to use water, with the earliest user having a superior right.
- If water is insufficient to meet all needs, those early in time of appropriation (senior appropriators) will obtain all of their allocated water; those who appropriated later (junior appropriators) may receive only some, or none, of the water to which they have rights.

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- There are four essential elements of the prior appropriation doctrine: intent, diversion, beneficial use and priority of water rights.
- Intent: The Doctrine of Prior Appropriation entails that the acquisition of water requires that the appropriator demonstrate an intent to appropriate the water.
- Diversion: A common method of diversion is to build a dam across a stream, directing water into a cannel or ditch.
- Other methods of diverting water include reservoir, flumes, pumps, and even water wheels.

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- The diversion requirement historically provided notice to present and prospective appropriators that water had been appropriated.
- Beneficial Use: Beneficial use is perhaps the most important characteristic in defining a prior appropriation water right.
- Countries which follow prior appropriation consider domestic, municipal, agricultural, and industrial uses to be beneficial uses. Recognized types of beneficial uses may be defined and elaborated by countries laws.

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- Priority of Water Rights: The final essential feature of the prior appropriation doctrine is the priority of a water right.
- WATERS SUBJECT TO APPROPRIATION
- Water resources subject to appropriations differ from countries to countries and from states to states.
- Streams, Lakes, Ponds and Springs

TRANSFER AND LOSS OF APPROPRIATIVE WATER RIGHTS

- Regarding transferability of water rights, generally speaking, appropriative water rights are transferable property.
- There are, however, three major requirements which inhibit the transfer of an appropriative water right:

1. Though an appropriative right does not depend on land ownership, some countries do require that the water is appurtenant to the land on which it is used. So in time of transfer, the rules prohibiting the severance of water right from the land on which the water is appurtenant should be considered,

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2. Showing that there will be no jury to other appropriators; and

3. Establishing the extent of the water right for transfer

- means of losing appropriative water rights are non-use or abandonment.
- The right does not come into existence without application of water to beneficial use and cannot continue to exist without the continuance of beneficial use.

- Which System of water rights is use in Ethiopia? Why?