

Riparianism And Indian Water Jurisprudence

Jitesh Kadian,
Research Scholar
Department of Law
Jagannath University, NCR-Haryana

INTRODUCTION: Water is one of among the basic necessity of life and it is also a scarce resource. Also it is predicted that the third world war will be fought for the water strength in the world. The word "Riparian" is originated from the Latin word "ripa" which means the river bank. To understand the real meaning of the word riparianism we must be aware about the riparian owner and littoral owner. The person property which is located on the bank of river, lake or a water course while the littoral owner is one who has the land adjoining the sea or ocean and they are having the tides regularly. Littoral is originated from the word Latin word "litus" meaning seashore or coast. Riparian rights are the natural rights that are inherited by an individual through the residence or birth in that specific area. These rights are allotted to the individual who are living at the shore of river or lake. But one condition should be kept in mind that these rights are limited. In the terms of law it means ownership of land near the river bank or any other body of the water. The riparian right is also contiguous to land – Water can't be separated from land ownership i.e. transfer of land = transfer of right. The one thing to be kept in mind that the Riparian Right must be Reasonable – it should meet the economic needs of society and benefit the society at large and also we should maintain the natural flow of water – from quantity and quality before and after use. No injury should be caused to the downstream users. Also we can have the shared priority that share shortages equitably according to portion of land ownership.

HISTORY: Riparian Rights or Riparian Law takes breathe from the Common law than any legislation. These rights get their path to be confessed by the common law because they have their base from the long usage of practices and case law than by any legislative statute i.e. written codified act of parliament. In some cases the principles of common law are in conflict with the legislative laws.

MODERN PHILOSOPHY OF RIPARIANISM: The people who are land adjoining the water body or river have the riparian right, this was totally concept of the viable theory but what to do for people who are living from the river, how they have to satisfy their needs from other source or the same river. With the upcoming of the technology, the water can be carried from one place to another through channelized water systems i.e. through pipe lines. Also the full flow of river can be over turned to the other direction, the geographical duct among land and water resources can be achieved. When we discussed suitability of the geographical closeness of water, we are not having rights to claim for person, to achieve the justice. The people who are not living in the vicinity of water, they are having the equal right as much as the person who is living on the shore. The riparian rights are accepted as the customary principles as there are no wishes on the dispersal of water resources among the people. When there was more water, there were less people and at present the situation totally vice-versa there is water but water has not been channelized to the people. So in such case the riparian rights provide the zero help for dispersal of water among the people and hence provide the no justice to them. It has been declined where the matters of distribution of water became more serious.

In the same way, in India the rights of Riparian Doctrine have been rejected in many ways by the Tribunals. "The Narmada Water Disputes Tribunal invoked the notion of "agreement", almost as a 'treaty' between two states, as the legal basis for distribution in 1974, so that Rajasthan, which has been a non-riparian state, could receive some water".

RIPARIAN RIGHTS:

Some of these following are Riparian Rights -

- Authority to use the river bank as well as water bed
- Save of soil from Erosion
- Swimming
- Boating
- Navigation
- Fishing
- Usage of water
- Rights for Domestic Purpose like Drinking Water

- Access to and from water

LEGAL FRAMEWORK:

In the global government is guided by the 3 common but differentiated doctrines i.e.

1. Doctrine of Public Trust
2. Doctrine of Riparian Rights
3. Doctrine of Prior Appropriation

When we talk about the situation in the India, all the above doctrines fall within the ambit of the Indian Easements Act 1882. "In the Indian Constitution, water is in the state list as Entry 17 subject to the provisions of Entry 56 of List I i.e. Union list". "A person who owns land adjoining a river or a water stream is recognized by this right" has been explained under Easement Act. "A riparian owner is bestowed with the right to use water stream which flows past his land equally with other riparian owners". Section – 7 defines the act as "that every riparian owner has the right to continued flow of waters of a natural stream without any destruction or unreasonable pollution".

The acquisition of customary rights under the Easement Act 1882 can be acquired under the 2 basic rules:

1. Long usage
2. Local Custom

However the riparian rights are not absolute. But it doesn't mean to say that rights are independent and absolute can be enjoyed without having anytime of disturbance from the outside group. In short we can say that all these rights are under the subject of the Government for shake to regulate the collection, dispersal of water from rivers and lakes flowing through the natural channels.

ISSUES RELATED TO OWNERSHIP: The most ask able question now a days is that who is the owner of water? The water being the scares and less available recourse we need a centralised system of water laws to have a control over it. Now days, the states prefer to

have the decentralisation system of rights to determine the ownership over the water. The question of ownership arose in the following regards:

- Individual Private Property (Ground Water).
- Public Property (Surface Water Resources).
- Common Property (Tanks or community Resources).
- Common Pool Recourse – these are those which are marked for the use of public but no one has right (e.g. Village tanks).
- No man's property (open access bodies).

"The rights and privileges conferred upon owners of land bounded by water take many forms and have given rise to the use of special terms to describe various legal aspects of water boundaries".

Despite of all these regulations, the states have enacted their own regulation acts to regulate irrigation. It have the power to regulate the Surface water within the territory. The river water can't be distracted from its natural course without the government approval. In real sense we are lacking with the clear and well defined framework to regulate the water. There is lack of special check and balance mechanism on water and violations are rampant. With respect to passage of time the situation are becoming more poor as in this regard as states while performing its duties there was problem in allocation and exploitation of resources. All the disputes brought to the court which is the very time consuming and costly affair. Still despite of all these things there is clear cut absence of certain sort of rules and regulations. The judgements provide by the court are ad hoc and it is very obvious to see the same judgements in the court.

HOW TO DETERMINE THE ENTITLEMENT OF COMMON POOL OF WATER RESOURCES IN THE RIVER BASIN?

The answer for the above question is very controversial. It can be dealt only through the principles of the International law. We can use the Harmon Principle – right of the region to use the water that flows through. Also we also use the prior appropriation principle and

Helsinki / Dublin rules – for the optimum utilization of basin resources – it is basically for the common benefit of public at large.

DOCTRINE OF PRIOR APPROPRIATION:

The doctrine basically states about that *“the first person to put the water to a beneficial (productive) use has the best legal right to continue to use the water”*. It is basically the western approach and in short we can say that *“First in time, first in right”*.

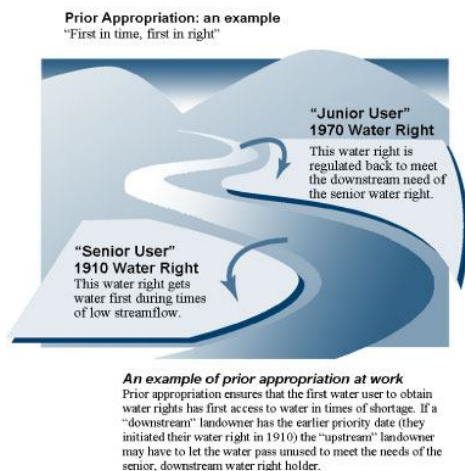


figure 1 – (PRIOR APPROPRIATION)

RIPARIAN DOCTRINE:

It basically states that "Land owners entitled to "reasonable use" subject to other's rights".

It is basically the principle of English common law. In the short we can say that "Early users have no priority over later users".

Riparian right = Right of upstream = Right of Downstream and this idea is basically gets its significance from the Eastern approach.

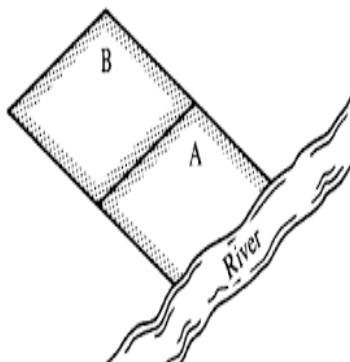


figure 2 – Riparian Doctrine

CALIFORNIA DOCTRINE:

It is basically the joint combination of the Riparian and Prior Appropriation Doctrine. In short we can summarise it as the "*Most Reasonable beneficial use*". The main reason of invention of this doctrine is that unbalanced topography of the California. E.g. there is plenty of water in North and Most of people are in the South.

THE TERRITORIAL SOVERIGNTY DOCTRINE:

The doctrine is basically consist of the 2 trunks:

1. Firstly is talks about the "Might is Right" Principle.
2. Secondly it talks about the "Slavery".

It is also by the other names like "Harmon Doctrine" or the Doctrine of "absolute sovereignty".

The doctrine is based upon the story of 1886 the Harmon, the Attorney General of USA, he decided that he didn't want to distribute the water of river Grande to the Mexico and he said that all water belongs to his own country. "The riparian state, according to the Harmon's 'might is right' theory can do whatever it pleases with water flowing in its territory without regard to its effects upon the rights of the lower co-riparian's".

"The second basis of this theory of territorial sovereignty can be traced into the Roman Law understanding of 'servitude', where all that attached to one's property or territory was a 'slave' to it". The owner of property can use his right in anyway as he/she like to best use it. "This notion of private property when extrapolated for the whole dominium generates the territorial sovereignty principle".

THE EQUITABLE APPORTIONMENT:

The doctrine basically states about the equality and fairness policy. This policy is to be followed in the distribution of resources. While doing the distribution, it must be done in consonance of the legal process and with keeping all the facts in the mind, "Audi Alterum Partem" and decision to be taken by the Appropriate authority. It always be done in consonance to the merit or need. "The concept also demands a criterion for deciding the desert that is the limits of the substantive matter, which needs to be distributed".

THE PUBLIC TRUST DOCTRINE:

The doctrine is based upon the concept of the Trusteeship (and towards the ownership of the property). "The notion of trusteeship, where a nation, state, a community or a group is entrusted with the safe-keeping and use of a resource, is also the only genuine communitarian legal theory, that is, one which presupposes the obligation of a group as a whole and not merely that of individuals". E.g. river such as Ganga, Yamuna, Sutlej etc.

POSITION IN INDIA: There is no formal premise to decide water distribution in various portion of stream or river. The Article 39(b) of Indian Constitution states that "certain regulation need to be followed by the state and state must do the following things for securing the policy goals." – "That the ownership and control of the material resources of the community are so distributed as best to sub serve the common good". The disputes in India relating to the Inter-State Rivers are done in using both these principles. During the pre-independence period courts in India used the rights of appropriation and post-independence period scenario became changed due to vast expansion of the irrigation and agriculture technology.

CASE STUDIES:

1. **"MC Mehta V UOI"**¹ -

It was also known by the Ganga River Pollution case. The apex court in the judgment revived the doctrine of Riparian Rights. The petitioner in this case stated that he is riparian owner and his rights are affected by the nuisance done by people in the River Ganga.

Court accepted the fact that owner has the riparian right alongside he is also protecting and acting as savage for the people who are using the river water. The Court came to a conclusion that "the said nuisance was indiscriminate in its effect and it would not be reasonable to expect any reasonable person to take proceedings to stop it as distinct from the community at large".

2. **"Vippalapati V Raja of Viziram"**²

¹AIR 1988 SC 1115

² AIR 1937 Mad 310

It was the forward case of the Ganga Water Pollution case. In this case petitioner argued that construction of dam was obstructing the Riparian rights. The court held that "the riparian rights are encompassed of a right to access free flowing water without any obstruction even if the obstruction is by a dam".

3. **"Sethramananmalingam V Anada Padyach"**³

The dispute was relating to the lower and upper riparian rights and was also dealing with the riparian rights for the artificial bodies. The Court held that "that there should be no material decrease in the water for lower riparian". Also the riparian rights are only got over the natural rivers not over the artificial bodies.

4. **"Malipat MADhatil V Neelamance"**⁴

It was also based upon the same issue of the lower and upper riparian. "Hence, the Court in clear and cogent terms held that the judicious use of water by the upper riparian owners should not be in such a manner that it injures the rights of the lower riparian owners".

5. **"Ram Sewak Kaz V Ramgir Choudhary"**⁵

In this case court held that Riparian Right is a Natural Right. "The right is automatically conferred on a person by the very reason of him or her being a riparian owner whether upper riparian or lower riparian".

6. **"Robert Fischer V Secretary of State"**⁶

"It was ruled that the Government did not incur any power to regulate in public interest, the collection retention and distribution of water provided that it did not inflict any injury on any other riparian owner and diminish the water supply that they have traditionally enjoyed".

7. **"Tata Iron and Steel Co. Ltd V State of Bihar"**⁷

In this case Tata Company claimed that company claimed the right over the usage of river Swarnarekha water mainly for the industrial application and in the mean time company supply was restricted stating that there is scarcity of the resource. The Company then went to the court and said they are having the riparian right over the

³ AIR 1934 Mad 583

⁴ AIR 1938 Mad 649

⁵ AIR 1954 Pat 320

⁶ (1908)2 Ind Cas 352

⁷ 2004(3) BLJR 1948

water of the river. The court rejected the claim stating that absolute right cannot be claimed. Every one stands at equal footing in the eyes of the Government and it's the right of government to take decision for the welfare of the Public at large.

SUGGESTIONS: The rights can be classified into 2 types – Natural Right and Statutory Right. The riparian right is basically the natural right inherited by the person who has ownership of land on the bank of the river. The rights are equal for the upper riparian and lower riparian, they both enjoy the equal statuses for it. If there is prevailing the custom or some people are using the right for long term then we cannot block their riparian right. Even in the normal course the people start using the river water, it can be traced as the riparian right. "More than the period, it is the residence, uses of water and the need for use of water by the riparian that confers on him the status of a riparian tinted with riparian rights". Indian courts in this regard always favored to accept and maintain the riparian rights. All conventional land based ways to deal with water rights, including rights to groundwater, never again give a sound premise to the economical the board and utilization of water assets. Subsequently the need to better oversee water assets is typically the fundamental motivation behind why present day water rights routines are presented. The way that water rights are property rights, or semi property rights, implies that essential enactment is normally important for division change and the presentation of current water rights. The main formal advance during the time spent acquainting present day water rights is with spot water under state proprietorship or control through such enactment. New institutional game plans are important for the organization of present day water rights. Such courses of action, as a water organization, ought to incorporate systems for partner investment. A water organization may have ability all through the pertinent purview. It might on the other hand be built up explicitly to deal with a given aquifer or water body. Obviously it is important to present the fitting forces and legitimate obligations on such an element on the off chance that it is to be ready to work successfully. As to their substance, present day water rights commonly determine the volume of water that might be disconnected. This might be communicated as a fixed sum or as an extent of the accessible water.

There is a pattern towards constraining the term of water rights as this makes future re-distribution conceivable even at the cost of security for rights holders. Moreover, present

day water rights are commonly subject to a scope of general and explicit conditions, including a condition requiring the installment of water expenses or charges. Rupture of such conditions can prompt the privilege being lost. In an expanding number of purviews water rights might be exchanged. Water rights exchanges are, in any case, by and large rather deliberately directed by the water organization to limit negative effects on outsiders and the condition. Most exchanges water rights have included rights identifying with surface water. In any case exchanges rights to groundwater have occurred in various wards. The proof proposes that transferable water rights can prompt the financially increasingly effective utilization of water assets. Leaving aside contentions over the proficiency of business sectors for water rights, the certainty remains that gave that exchanges are uninhibitedly gone into and seen as advantageous by the two gatherings they do eventually offer a generally uncontentious methods for re-doling out water from low an incentive to high esteem employments. Albeit worldwide experience seems to point to an extensively regular way to deal with present day water rights, in light of a common arrangement of suspicions and results, it must be obviously stressed that there is no a solitary best practice display. As of late noted by the Australian Productivity Commission, the "selection of game plans depends, to some degree, on the monetary qualities of water, the one of a kind highlights of every ward, including its lawful systems and existing hierarchical courses of action catchment hydrology inside purviews". So in the end I want to say that we should shift and opt for the new water legislations rather than focusing upon the old riparian rights.