Assessing the legitimacy of Environmental Personhood

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ABSTRACT

An order of Uttarakhand High Court, granting "living entity" status to the Ganga and Yamuna rivers, left the centre flummoxed by the logistical nightmare that its implementation entailed, the centre had to approach Supreme Court. The High Court had appointed the director of Namami Ganga and Advocate General as legal parents but one could only wonder what this parenting job necessitated. Bestowing of this status on environmental entities owes its genesis to the work of Christopher, "Should Trees Have Standing?". Personhood is conferred, to ecological entities, to stress on the need to conserve environment for its own intrinsic value rather than to conserve for human benefit. However, the modalities of this environmental measure need to be assessed to prevent any unintended adverse impact on environment. Environmental personhood, if conceptualised and enforced incorrectly, can lead to unfavourable outcomes such as excluding indigenous groups and other interested parties from making representations in courts, and leading to other complexities in the restoration process of these bodies. This paper aims to assess the legitimacy of Environment Personhood as an effective means to curb pollution and further degradation of environmental bodies.

INTRODUCTION

All across the globe, humans are recognised as "Natural Persons" with a set of inalienable rights. The legal systems have, also, come to recognize some non-human entities as legal persons, Corporations being the best-known type of legal person. The grouping includes states and municipalities; religious, educational and charitable institutions; societies, co-operatives, trusts, and even ships.[2] Attribution of personhood or legal personality is done through the creation of a legal fiction, whereby even inanimate objects are deemed to be the bearers of rights and duties.[3] Therefore, the capacity to be a right-bearer and executer of duties is a prerequisite for a "Legal Person". If an entity has a legal personality, it has a right to appear in court and demand legal action to be taken against the one who has harmed it. If a legal person cannot speak or act for itself to protect its rights and benefits, one or more humans may be appointed by the court to represent its legal interests and speak or act on its behalf. The law may recognize this person as a guardian, trustee, or agent.[4] Legal persons are treated as legally separate from the humans who represent them this way.

Rights of nature is an global movement and an evolving theory in environmental jurisprudence which advocates for the natural eco-system to be granted the status of a legal right holder, as opposed to it being regarded property to be owned and exploited by humans. Professor Christopher Stone, in the year 1972, proposed that the American legal system should "give legal rights to forests, oceans, rivers, and other so-called 'natural objects' in the environment."[5] Stone's article has become one of the founding texts for the 'rights of nature' movement. According to Professor Stone, an approach of 'guardianship' could be followed to allow suits to be brought directly in the name of the injured natural objects, in order to give them a standing in their own right, implying that the guardian/representative of the natural object

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[2] Christopher D Stone, "Should Trees Have Standing? Toward Legal Rights for Natural Objects" 45 S Cal L Rev 450, 451(1972).

[3] Lee Jean, Defining Personhood, Journal of Young Investigators (2002).

[4] Supra 3.

[5] Id.

would not have to show direct injury to his/her own interests in order to establish standing. In his dissenting opinion, J. Douglas drew inspiration from this article and opined that standing could be accorded to the environment itself where injury to the environment was shown, i.e. the litigation could be instituted in the name of the injured inanimate object itself.[6] Many a countries have bestowed upon their rivers rights of personhood to protect from degradation and pollution. This brings us to question whether the attribution of legal personality to natural bodies is a tool with enough teeth. This paper aims to deconstruct the ground breaking cases wherein such rights have been ascribed to water bodies in India, while briefly stating same foreign examples. In the latter part, it attempts to address the complexities and uncertainties associated with it.

EXEMPLIFICATIONS FROM ABROAD

The Indian judgments follow thoroughly on the heels of domestic legislation in New Zealand, which recognised the Whanganui river and its catchment as a legal person. These events have attached media and scholarly attention as these have been the most significant works in orb of assigning rights to water bodies, since 2010, when Bolivia passed the 'Law of Mother Earth', granting legal rights to nature.[7] It would be prudent to gain some fundamental knowledge of these activities, before deliberating upon the Indian cases. Some of the examples are as stated below:

1. Te Awa Tupua/Whanganui River (Aotearoa New Zealand)

On March 20, 2017, the Whanganui River became a legal entity under New Zealand law when the Te Awa Tupua (Whanganui River Claims Settlement) Act, 2017 received royal assent after being passed by Parliament.[8] Section 12 of the act declares Te Awa Tupua to be "indivisible and living whole, comprising the Whanganui River from the mountains to the sea"[9], while the section 13 confers powers, rights, duties and liabilities of a person on it. The most noteworthy feature of the act is setting up of a fund, called the Te Korotete, which receives contributions from any source including the Crown, for the development and protection of health and well-being of the Te Awa Tupua.[10]Further, the Act provides guidelines for the management and regulation of activities such as fishing.

2. Vilcabamba River (Ecuador)

Judicial recognition of its constitutional rights was bestowed on the River on March 30, 2011.[11] The case came before the Provincial Court of Loja because the Vilcabamba's flooding had affected an American couple's riverside property and instead of seeking compensation, relying upon the constitutional rights of nature, filed an action for remedy to the contamination.[12] The judgement was instrumental as it held nature's right above any individual's right as "a 'healthy' environment is more important than any other right and affects more people."[13] The court also laid out a list of specific action such as cleaning up of debris, environmental permits and protection from oil spills.

3. Rivers of Bangladesh

In early July of 2018, Bangladesh became the first country to grant all of its rivers, legal rights. Its rivers will be treated as living entities in a court of law. The landmark ruling by the Bangladeshi Supreme Court

[6] Sierra Club v. Morton, 405 U.S. 727 (1972) (U.S.A).
[7] Ley de Derechos de la Madre Tierra 2010 (Bolivia).
[8] Te Awa Tupua (Whanganui River Claims Settlement) Act, 2017 (New Zealand).
[9] Id., § 12.
[10]Id., §§57-59.
[11] Richard Fredrick Wheeler y Eleanor Geer Huddle, Director de la Procuraduria General del Estado en Loja y otros (30 March 2011).
[12] Peter Burdon and Claire Williams, "Rights of Nature: a constructive analysis," in Douglas Fisher, ed., Research Handbook on Fundamental Concepts of Environmental Law (Edward Elgar Publishing, 2016).
[13] Erin Daly, "The Ecuadorian Exemplar: The First Ever Vindications of Constitutional Rights of Nature", 21(1) RECIEL 63, (2012).

is meant to protect the world's largest delta from further degradation from pollution, illegal dredging and human intrusion. However, little improvements can be seen as the rivers remain slacked with debris.

ASCRIPTION OF RIGHTS TO RIVERS AND OTHER WATER BODIES IN INDIA

Environmental Personhood is no new phenomenon for the Indian Soil. An alteration from the then predominant anthropocentric perspective to a rather eco-centric one, in the approach of judiciary, could be seen from the late nineties.[14] Discrete elements of the nature have been accorded with this status in the recent past. In the year 2013, Ministry of Environment and Forests had declared cetaceans as "non-human persons" while refusing a proposal for construction of Dolphinarium. The Supreme Court had granted rights against exploitation and cruelty to animals in the case of Animal Welfare Board of India vs A. Nagaraja[15]. Further, the High Court of Uttarakhand ruled that "The entire animal kingdom including avian and aquatic are declared as legal entities having a distinct persona with corresponding rights, duties and liabilities of a living person."[16] While all the citizens were assigned the role of loco parentis.

While there have been no major legislations regarding same, the Public Trust doctrine enjoins upon the Government to protect natural bodies for use of general public.[17] The courts have heavily relied on the doctrine of parens patriae refers to the public policy power of the state to intervene on behalf of someone in need of protection. The judges reasoned that the 'Courts are duty bound to protect the environmental ecology under the "New Environment Justice Jurisprudence" and also under the principles of parens patriae.'[18]The most debated development was in the case of Mohd. Salim[19], followed by Lalit Miglani [20]. The Sukhna Lake[21] case has rekindled the flames which were put off by the Stay order of Supreme Court.

Deconstruing the Judgements of Uttarakhand High Court

In March 2017, the Uttarakhand High Court granted legal person status to nature in two separate rulings. In the first judgment, concerning the Rivers Ganges and Yamuna, the Court declared the two rivers, as well as all their tributaries 'juristic/legal persons/living entities having the status of a legal person'.[22] The second ruling concerns a petition initiated by Lalit Miglani, an advocate in the High Court, who explicitly sought to extend legal personhood to all other natural objects in the State of Uttarakhand, including the Gangotri and Yamunotri glaciers that provide headwaters for the Ganges and Yamuna.[23] This section aims to deconstruct the nature of legal rights conferred upon these bodies, delve into the reasoning provided by the court while discussing the chasms of it.

While in the first judgement the court has relied on the well accepted theories of personhood as propounded by the Supreme Court in many judgements i.e., 'to be in law a person which otherwise is not' and, which 'like any other person in law, is also conferred with rights and obligations'.[24]However, the court has inflated the meaning of legal persons in the latter case, making it conflate with the definition of 'natural person', by explicitly stating that the rights of these entities 'shall be equivalent to the rights of human beings and the injury/harm caused to these bodies shall be treated as harm/injury caused to the human beings'.[25] It illudes to equate harm to nature with harm to humans, which is significantly different to the way in which environmental law traditionally protects natural objects by simply regulating human impacts. This new definition debunks

[14] Godavarman Thirumulkpad v. Union of India & Ors.,(1997) 2 SCC 267.
[15] Animal Welfare Board of India vs. A. Nagaraj and Ors. (2014) 7 SCC 547.
[16] Narayan Dutt Bhatt v. Union of India, (2018)SCC OnLine Utt 645.
[17] M.C. Mehta vs Kamal Nath & Ors., (1997)1 SCC 388.
[18] Lalit Miglani v State of Uttarakhand & others, (2017) WPPIL 140/2015 (High Court of Uttarakhand)
[19] Mohd. Salim v. State of Uttarakhand, (2017) SCC OnLine Utt 367
[20] Supra 18.
[21] Court on its own motion v. The Chandigarh Administration and Ors, 2020 (1) RCR (Civil) 985.
[22] Supra 19.
[23] Supra 18.
[24] Shiromani Gurudwara Prabandhak Committee, Amritsar v Shri Som Nath Dass & others (2000) AIR 1421.
[25] Supra 19.

the long-established theories of distinction between legal rights and human rights.[26] Legal personhood is a precise legal creation that enables law to deal with a particular entity without conferring human rights (such as civil and political rights), or inferring any statement about the morality of the legal entity.[27] The blurring of this distinction sits rather uncomfortably with the continuing debate concerning the appropriateness and ability of human rights to protect the environment from human impacts.[28]

Apart from widening the definition of legal entity, the meaning of 'harm' was expanded by noting that "plucking of one leaf, grass blade also damages the environment universally"[29] The Court combined this extensive definition of harm with the imposition of a strict liability approach and noted, "Any person causing any injury and harm, intentionally or unintentionally to the Himalayas, Glaciers, rivers, streams, rivulets, lakes, air, meadows, dales, jungles and forests is liable to be proceeded against under the common law, penal laws, environmental laws and other statutory enactments governing the field."[30]

As mentioned earlier, the doctrine of parens patriae is depended on to justify the impediment. The grave risk from pollution and climate change was cited as reason for the potent legal progression. In the Ganges and Yamuna case, the duty to protect nature was extended by the Court's assessment of the status of the rivers as 'sacred and revered ... central to the existence of half the Indian population'[31]. However, the over-reliance on the religious duties of certain part of the population while creating an entirely new and innovative legal development seems like a weak line of legal argument.

In both the cases, the listed natural objects are to be considered as minors under the law. In Ganges and Yamuna case, the Court declared a group of officials, including the Chief Secretary of the State of Uttarakhand and the Advocate General of the State of Uttarakhand to be loco parentis as the human face to protect Ganga and Yamuna and their tributaries.[32] Similarly, in the Glaciers case, the Court ordered the Chief Secretary of the State of Uttarakhand, together with a range of legal advisors, academics and judges to act as 'the persons in loco parentis as the human face to protect, conserve and preserve all the Glaciers including Gangotri & Yamunotri, rivers, streams, rivulets, lakes, air, meadows, dales, jungles, forests wetlands, grasslands, springs and waterfalls in the State of Uttarakhand.'[33] This highlights three major fallacies in the judgement. As some post are trans regional as the rivers themselves, there has been an overreach of power by the High Court. Secondly, in both the cases the court has not provided any certain set of duties for these guardians. Lastly, the responsibility of acting on behalf of the natural objects is imposed on existing roles in the state government, rather than creating new, independent positions.

Canvassing the Legal Status of Sukhna Lake

The High Court of Punjab and Haryana took cognisance of a letter by Mr. Guatam Khanna. On the direction of court, Amicus Curiae Tanu Bedi drew a writ petition addressing the problems of siltation, depleting water quality, loss of water space among others. The Court came down heavily on the Chandigarh administration as well as the State governments of Punjab and Haryana and designated the area around the Sukhna Lake Wildlife sanctuary to be an eco-sensitive area. A sum of Rs Hundred Crore was set as the fine that each of the State governments will have to pay, as exemplary or punitive damages which would, in turn, be used for bettering the state of the lake. The court made a departure from the ordinary fashion in its concluding remarks by invoking parens patriae jurisdiction and declared that Lake Sukhna would be a 'legal entity' for "survival, conservation and protection"[34].

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[26] Ngaire Naffine, Law's Meaning of Life: Philosophy, Religion, Darwin and the Legal Person (Hart Publishing 2009).
[27] Ibid.
[28] Conor Gearty, 'Do Human Rights Help or Hinder Environmental Protection?' (2010) 1 JHRE 7.
[29] Supra 19.
[30] Ibid.
[31] Supra 18.
[32] Ibid.
[33] Supra 19.
[34] Supra 21.

It is the other concluding remark which creates an air of conflict. The court observed, "the preservation, conservation and saving of environment is based on the doctrine of public trust."[35] However, the Rights of Nature movement started as a rejection of anthropocentric perspectives such as the public trust doctrine, following a more ecocentric approach. The next ambiguity is regarding the introduction of legal personhood. Since, the genesis is placed on doctrine of public trust, which was already functional but has not been able enough to protect the lake.

By appointing all the citizens of Chandigarh as loco parentis, making them the human face of the lake to take up legal action for protection of it. The court has failed to recognise the primary culprit in the devastation of the body, i.e., human activities. Therefore, the entire exercise seems to be in vain as ultimately its guardianship is bequeathed on humans, who are the exploiters and whose dereliction from their duties resulted in its damage. Moreover, this bestowment leads us to another problem. When a body artificially made a legal person, an authority is made the guardian who can sue and be sued. In this case, the judgement has in full length discussed the liabilities of any polluter, however, the liabilities of the lake are left unaddressed. The responsibilities of these natural bodies in natural calamities was the reason behind the stay order on Mohd. Salim case. This recent judgement has failed to take into consideration the stay order.

CHALLENGES

While the legislations such as in New Zealand were debated for years before being implemented, the judicial pronouncements in India seem hasty and not well thought of. They have failed to tailor the judgement in the fashion most suit from the Indian fabric. New Zealand's grant of personhood to the Whanganui River was heavily preceded on the Maori world view, which esteems the river to be personified.[36] In India, no such demands had been made from any communities, thereby, undermining the importance of this status. The Courts have even failed to incorporate the take-aways from foreign examples. In Columbia, the Court appointed guardians but these guardians included one representative from the Government and one representative of the claimant communities. In the Indian cases appointing the residents of the entire state or only a few officials is a sway from one end to another. A middle ground should have been sought.

The question of whether giving legal personality to these bodies would also include the flora and fauna in it is the first question to be addressed in this behalf. Yet another development of the Uttarakhand High Court Judgment, Narayan Dutt Bhatt v Union of India and Ors.[37] where the division bench comprising of Justices Rajiv Sharma and Lokpal Singh declared the entire animal kingdom to be legal entity, complicates the state of affair even more. When water bodies, humans, flora and fauna are all entitled to rights that are identical in scope and measure, how would courts determine whose right is to be given prominence when the interests of each are weighed against the other? In other words, the courts fail to delineate the base on which we are to infer that rights of these bodies would override those of humans or animals, when in fact, all of them possess the rights of living persons. In the absence of this, omission of humans and animals from the banks are vulnerable to challenges in courts of law.

Another challenge for the implementation and enforcement of legal rights for nature is the requirement to form, or nominate an organisation, or person to speak for nature. Intricacy is introduced by the very nature some of these bodies. Rivers are transnational and flow through many states even in India. Therefore, for a body to be held accountable, failing to upkeep them is a difficult task. The apparent unwillingness of the state government to embrace these new responsibilities means that it will be important for the Court to be able to hold the state government to account. Therefore, a new national authority should be incorporated rather than burdening existing officials. For example, Australian Parliament enacted a new legislation for the safety of Yarra River and recognised it as a "single, living entity." However, the Act does not declare the river as a

[35] Id., ¶162.

[36] Catherine J. Iorns Magallanes, Nature as an Ancestor: Two Examples of Legal Personality for Nature in New Zealand, available at https://journals.openedition.org/vertigo/16199 (Last visited on December 1, 2020).

[37] Narayan Dutt Bhatt v. Union of India, 2018 SCC Online Utt 645, ¶99.

legal person or appoint a legal guardian for it. Instead, it has formed an independent statutory advisory Council which has only representatives of Traditional Owners, local communities and environmental and agricultural industry groups. This not only gives the body a voice but takes in account the view of the primaries in account.

The last criticism of the theory of attribution of personhood is the selfish nature of the same. It is argued that human beings have always credited personhood to 'things' only to suit their best interests.[38] The grant of personhood to deities and corporations has been for the legal ease of humans in terms of seeking representation from or looking after the property holdings by them. Reflection of it can be seen in the Sukhna Lake judgement by basing the attribution on Public Trust Doctrine, as a departure from eco centric approach. A policy which preserves the nature for its very existence is to acknowledged.

CONCLUSION

Constructing nature as a legal subject is a profound legal and cultural shift in environmental law, the newness of the advancement leaves courts in a tricky position. It is pertinent to note that the court through these judgements have shown willingness to actively participate in the preservation of nature. They have enthusiastic in their approaches and have realised the pressing need to conserve nature. It has also dawned upon them that the current safeguards are doing little to fulfil the constitutional mandate. Now, A concrete and far-sighted proposal is to be chalked out, which needs to be practical and jurisprudentially sound. Mere bestowment of personhood on natural objects without a plan of action might comfort the minds temporarily but is bound to fail the test of time. Conceptualizing a rights-based framework for protecting nature confronts us with a plethora of impediments. An approach which combines the duties of citizens as well as the government and balances it with the rights of these bodies is to be followed. However, blurring the line between human rights and legal rights can have unaccounted practical shortcoming to it such the potential liability of nature causing harm to humans. Therefore, these rights should be listed and nothing should be left open for interpretation.

Moreover, these rights change the way human interact with the environment. Till now, they were habitual of protecting nature as something belonging to them, now, armoured with a set of rights, the nature is capable of taking actions on its behalf. However, this is only an illusion as a human has to take the cause to a court of law. This hampers the very reasoning behind ascription of these rights as humans would see rights of natural objects as conflicting and competing with their own rights. It important for the governments to educate its citizens before subjecting them to any laws with harsh penalties. Lastly, an independent body with structure in state and district level which has representatives from all the stake holders is required to bring about an actual change.

Restoring our environment is a all drawn battle, sadly, it is also one against time. Therefore, swift and sustained actions are required. Judiciary alone, can not be a soldier, equal efforts from legislative and executive can only promise us a win.

[38] Akshita Jha & Adrija Ghosh, *Is Being A 'Person' Essential For The Environment To Hold Rights? Assessing The Legitimacy Of Environmental Personhood And Alternative Approaches?*, < http://nujslawreview.org/wp- -FOR-THE-ENVIRONMENT-TO-HOLD-RIGHTS_-ASSESSING-THE-LEGITIMACY-OF-ENVIRONMENTAL-PERSONHOOD-AND-ALTERNATIVE APPROACHES.pdf> (last visited on 2nd December, 2020).