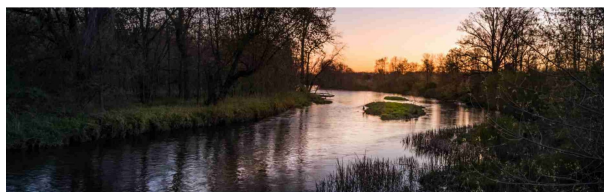


Summary of RIVERS AND HUMAN RIGHTS: WE ARE THE RIVER, THE RIVER IS US?

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(By Ashish Kothari and Shrishtee Bajpai)



Ayan Sinha, National Law University, Jodhpur , B.A. LL.B. email: ayan.sin@gmail.com , Phone: +91 8697673324 ♦ In a nutshell what has the Uttarakhand High Court stated in its judgment declaring that the Ganga and Yamuna rivers as separate legal entities having specific rights? The Uttarakhand High Court in the case of

Lalit Miglani v State of Uttarakhand and Others

, has, in a nutshell, stated that the Ganga and the Yamuna rivers their tributaries, and the glaciers and catchment feeding these rivers in Uttarakhand, have rights as a "juristic/legal person/living entity. The High Court has expressly stated that the rivers are not mere water bodies but are scientifically, biologically and ecologically living entities and that the rivers and its surrounding ecological system needs to be accorded with the status of a legal person with consummate rights and obligations so as to ensure adequate conservation and protection. ♦ Practically, what does it mean when we say that the rivers shall have rights, under the four corners of the law? For the river to have rights in the eyes of law would mean that a legal suit could be brought in the name of the river, injury caused to it can be recognized in a court of law and the polluter can be held liable for harming the river and its ecology conflated with the fact that compensation shall be paid for reversing the damage caused to the river. Rights of the river would mean the obligations that the society and state have for establishing sustainable relationships with the river and other such entities. ♦

What are the nature of the rights that are to be accorded to a river when it is declared as a separate legal entity?

First and foremost this would mean that the river shall have the fundamental right to live. In context of a juristic person, what does this mean? Perhaps, we can infer that the river has a right to exist, right to maintain its identity and integrity. Practically, speaking this would mean that what could be challenged, as part of the recognition of such a right, are activities that badly or irreversibly damage the essential conditions that sustain the river. For instance activities like building dams and diversions, industrial and urban pollution, fisheries using explosives or trawling methods i.e. activities which cause permanent irreversible damage to the river. ♦ Since the river itself cannot enforce these rights, which agencies/officials should be made responsible for enforcement of the rights of a river? Ideally, concerned citizens should be able to challenge government agencies, private corporations and other entities, who indulge in or whose activities result in irreparable damage to the river and its ecosystem. However, in reality and practice, certain relevant agencies ought to be entrusted as custodians to ensure that the rights provided to the river are not alienated. The Uttarakhand High Court had named, among others, the Chief Secretary, the Advocate General as well as renowned advocate, Mr. M.C. Mehta, as custodians for ensuring the rights of the rivers are protected. ♦

What are the shortcomings of the custodianship model prescribed by the High Court?

The problem with the judgment is that the composition of the custodians is heavily weighted towards representatives from the state. It is a legitimate concern that the state has been, for years, complicit in violating the rights of rivers and promoting vested commercial interests which might prejudice the new regime of rights which are sought to be protected. In New Zealand, the law mandates that the indigenous people who are dependent on the river be appointed as 'parents' who would protect the rights of the river. In India the High Court has only made it recommendatory that the Chief Secretary 'may' involve local communities living near the banks of the rivers or near the glaciers to be part of the custodianship process. However everything has been left to the discretion of the state representatives and this could lead to a lack of engagement with the local communities who depend on the rivers as well as a lack of diversity among the list of custodians. ♦ What are the kinds of compensation/restitution that the river, as a legal entity, can seek? In respect of restitution, there is a legal argument that the judgment of the High Court and its principles cannot be applied retrospectively. But, as in the case of pollution, where pre-existing polluting sources have to be tackled, if blockage or drastic alteration of the river's flow is considered a violation, pre-existing sources of such violation too need to be tackled. In fact, if the standard that has to be upheld is 'irreversible damage' to the river, then a case can be even be made out that barrages and dams which have caused such damage may have to be dismantled. This may have far reaching, radical consequences. The question also arises that in cases where restitution is not possible, what kind of compensation is to be provided to communities who have been affected by the damage caused to the rivers i.e. fishing communities who lost fish stocks, villages near the river bank who lost access to clean water. In case it is monetary compensation the problem that arises is that the transfer of money may be effected to a government agency which may result in the actual community members never receiving the compensation. ♦ What is the exact jurisdiction of the Uttarakhand High Court or in other words what is the extent of to which this judgment can be enforced? In legal terms, the territorial jurisdiction of the Uttarakhand High Court is only restricted to the state of Uttarakhand. In other words, the judgment and its principles would only be applicable to that portion of the Ganga and Yamuna rivers which flow geographically in Uttarakhand. The High Court judgment only has persuasive value when it comes to convincing High Courts of other states. Therefore, a better solution so as to strengthen this new rights regime for the rivers is to enact a national level law via Parliament or, if possible, push for a Constitutional amendment. For guidance the draft National Ganga River Rights Bill may be helpful. ♦ Can this recognition of the right of the two rivers lead to a wider recognition of the right of nature as a whole? There are several examples across the world which show that there can be a wider recognition of rights which are accorded to nature as a whole as opposed to certain rivers or forests, specifically. Bolivia has enacted the law of Mother Earth, recognizing nature's legal rights, specifically the right to life, biodiversity, regeneration, air, water, balance, and restoration. Ecuador, too, has taken specific steps in this regard. ♦ What are the potential loopholes or lacunas in the judgment of the Uttarakhand High Court? Apart from the aspect of not including local communities among the custodians, there are also portions of the judgment which may prove to be problematic. The judgment focuses excessively on the importance of the Ganga and Yamuna from the perspective of the Hindus while ignoring the fact that there may be several other communities which too might consider the rivers to be scared, both culturally and economically. This might cause the entire movement to accord rights to nature and rivers to be hijacked by right wing cultural organizations. Also, a very important lacuna in the judgment is the fact that certain parts of the judgment may cause more harm than good for the local communities. The judgment has stated that whoever intentionally as well as unintentionally harms/injures the river and its adjoining ecosystem may be prosecuted. This can cause overzealous government officials stopping local communities from grazing their livestock near the rivers or even for that matter not allow beggars near the rivers. These kind of steps would be unethical and would miss a holistic picture of why there are beggars in the first place. ♦ In the longer term, what is the solution to resolve the inherent contradiction between protecting the rights of nature/rivers and promoting the current model of development? There is no easy answer to this. While creating a rights based approach might be a short to medium term solution in protecting the rights of rivers and other natural resources, in the longer term there needs to be a serious rethink about the anthropocentric approach that we have towards development or even law for that matter. For several centuries we have believed in an industrial civilization where maximum exploitation of natural resources for the purpose of economic development has been the norm. Perhaps it is time to have an attitudinal shift whereby we look at how indigenous communities have revered nature and its resources and lived with nature in harmony rather than see it as an object of exploitation for the furtherance of an anthropocentric society.

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