We Are the River, the River Is Us

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As per the recent ruling of the Uttarakhand High Court, the Ganga and Yamuna rivers have rights as a "juristic/legal person/living entity." It raises a complex set of questions. What does it mean for a river, and its associated natural elements, to have rights? What does it mean for them to have rights as a "person?" How would such rights be implemented, given that rivers and other elements of nature would not be able to claim and defend such rights for themselves? What implications do these two decisions have for not just the rivers and those living in/on/along them, but for the relationship between humans and the rest of nature? This article addresses these questions in order to find solutions.

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Of the many paradoxes of human existence, this has to be one of the starkest: even as we depend for our lives on the rivers, even as we venerate them in every culture, we also pollute them, block their flow, divert them into lifeless channels, and desecrate them in every conceivable way. Peoples' movements have been pointing to the urgent need for action to revive and protect freshwater systems, for decades. Now, a series of decisions by courts or the government in three far-flung parts of the world may just provide a fresh lease of life to these movements.

On 22 and 30 March 2017, the Uttarakhand High Court (hereafter, UHC) ruled that the Rivers Ganga and Yamuna, their tributaries, and the glaciers and catchment feeding these rivers in Uttarakhand, have rights as a "juristic/legal person/living entity." A week earlier, the New Zealand Parliament had passed into law the Te Awa Tupua (Whanganui River Claims Settlement) Bill, which gives the Whanganui river and ecosystem legal personality and standing in its own right, guaranteeing its "health and well-being."

In November 2016, Colombia's constitutional court had declared that the Atrato river basin possesses rights to "protection, conservation, maintenance, and restoration," an order that only came to light in May 2017. Almost a month after the UHC order, on 4 May 2017 a one-day special session of the Madhya Pradesh assembly passed a resolution to declare River Narmada as a living entity, stating that the river is the lifeline of the state.

These decisions have spawned a complex set of questions. What does it mean for a river, and its associated natural elements, to have rights? What does it mean for them to have rights as a "person"? How would such rights be implemented, given that rivers and other elements of nature would not be able to themselves claim and defend such rights? What implications do these two decisions have for not just the rivers and those living in/on/along them, but for the relationship between humans and the rest of nature? We will try to address these questions in this essay, indicating some resolutions, but, more than that, raising the issues that need to be addressed in order to find the answers.

Both the Colombian (not available in English) and Madhya Pradesh assembly decisions were revealed at the time of writing this article. Hence, we do not take these into account further below. An additional limitation of this analysis is the authors' lack of familiarity with the situation on the ground in New Zealand. Hence, our remarks on the Whanganui decision are based solely on a reading of the bill and some commentaries that came before and after its passing.

The UHC judgment notes:

> Whereas human rights occupy centre stage and deal with human conflict, loss of natural resources threatens human survival itself. We must understand that the fundamental human rights on which human survival depends are Nature's rights. ...
> We only need a simple law that provides absolute protection to all valuable natural resources, be it forests, rivers, aquifers or lakes. The law could be a public trust doctrine, which has its basis in the ancient belief that Nature's laws impose certain conditions on human conduct in its relationship with Nature.
> It is the fundamental duty of all the citizens to preserve and conserve the nature in its pristine glory ... The Courts are duty bound to protect the environmental ecology under the 'New Environment Justice Jurisprudence' and also under the principles of parens patriae.[1]
> Rivers and Lakes have intrinsic right not to be polluted. Polluting and damaging the rivers, forests, lakes, water bodies, air and glaciers will be legally equivalent to harming, hurting and causing injury to person.
> Rivers, Forests, Lakes, Water Bodies, Air, Glaciers and Springs have a right to exist, persist, maintain, sustain and regenerate their own vital ecology system. The rivers are not just water bodies. These are scientifically and biologically living.
> The rivers, forests, lakes, water bodies, air, glaciers, human life are unified and are indivisible whole. The integrity of the rivers is required to be maintained from Glaciers to Ocean.
> We, by invoking our parens patriae jurisdiction, declare the Glaciers including Gangotri & Yamunotri, rivers, streams, rivulets, lakes, air, meadows, dales, jungles, forests wetlands, grasslands, springs and waterfalls, legal entity/legal person/juristic person/juridicial person/moral person/artificial person having the status of a legal person, with all corresponding rights, duties and liabilities of a living person, in order to preserve and conserve them. They are also accorded the rights akin to fundamental rights/legal rights. (*Lalit Miglani v State of Uttarakhand and Others* 2017)
> There is utmost expediency to give legal status as a living person/legal entity to Rivers Ganga and Yamuna r/w Articles 48-A[2] and 51A(g)[3] of the Constitution of India. (*Mohd Salim v State of Uttarakhand and Others* (2017)

The New Zealand agreement between the indigenous Whanganui Iwi (Maori) people and the Crown (the New Zealand state), the Te Awa Tupua Bill, says:

> Te Awa Tupua is an indivisible and living whole, comprising the Whanganui River from the mountains to the sea, incorporating all its physical and metaphysical elements.
> Te Awa Tupua is a spiritual and physical entity that supports and sustains both the life and natural resources within the Whanganui River and the health and well-being of the iwi, hapū, and other communities of the River.
> I am the River and the River is me: The iwi and hapū of the Whanganui River have an inalienable connection with, and responsibility to, Te Awa Tupua and its health and wellbeing …
> Te Awa Tupua is a legal person[4] and has all the rights, powers, duties, and liabilities of a legal person …
> The office of Te Pou Tupua is established … The purpose of Te Pou Tupua is to be the human face of Te Awa Tupua and act in the name of Te Awa Tupua … Te Pou Tupua has full capacity and all the powers reasonably necessary to achieve its purpose and perform and exercise its functions, powers, and duties in accordance with this Act.
> The office of Te Pou Tupua comprises 2 persons … One person must be nominated by the iwi with interests in the Whanganui River and one person must be nominated on behalf of the Crown.[5]

What, however, does it mean for a river to have rights? What would it mean to "promote the health and well-being of these rivers," as the UHC order states for Ganga, Yamuna, and their tributaries? An obvious implication (and part of the context in which the petition regarding the Ganga was filed in the UHC) is that the rivers should not be polluted. But, what about dams? Can these be allowed to be built? Can the waters be diverted to such an extent that there is virtually no water flowing in long stretches of the river, as has happened to the Ganga? How can a river, with no voice of its own, ensure such rights, or ask for compensatory action should the rights be violated? Who would be the beneficiary of such compensation?

Rights of a River

The UHC notes, "The rivers sustained the aquatic life. The flora and fauna are also dependent on the rivers. Rivers are grasping [sic][6] for breath" (*Lalit Miglani v State of Uttarakhand and Others* 2017).

They are also accorded the rights akin to fundamental rights/legal rights. For the river to have rights in the eyes of law would mean that a suit could be brought in the name of the river, injury can be recognised, the polluter can be held liable for harming, and the compensation will be paid that would benefit the river. Rights are the obligations that the society and state have for establishing sustainable relationships. Fundamental rights, in that sense, are the most basic of obligations because they emanate from the idea that they are present even if no law exists.

In the case of a river being recognised as a legal person, the most basic right would be the right to live. What would that mean? Will this include the right to flow without being dammed? Can we read rivers' right to flow free as equivalent to a person's fundamental right to speech and expression? Will it include just the river or also the species? In the case of violation of the right, what will account as damage? Will it be a crude estimation of economic facts or would it be normative enough to encompass what society "values," including aesthetics and ethics? Who will be compensated and how? Any rights-based movement, especially one that is arguing for fundamental and inalienable rights, challenges not only the legal system, but also the culture on which this system is built. Will granting the legal personhood status to the river challenge society's consciousness, or rather its amnesia towards the very ecological conditions of our own survival?

The rights of nature should mean that the ecological conditions making up a natural habitat are to be respected and protected. The river has a right to exist, right to maintain its identity and integrity. This does not put an end to fishing or other human activities related to the river, but rather pushes for a healthy relationship that maintains the essential conditions of a river: its flow, its constituent plants and animals, its catchment, where snow or rain sustains its water intake, the rocks and soil and other elements of the landscape it flows through.

Consequently, what could be challenged in the recognition of such a right are activities that badly or irreversibly damage the above conditions, including dams and diversions, industrial and urban pollution, fisheries using explosives or trawling methods, etc. Citing such rights, concerned citizens should be able to challenge government agencies, private corporations

and other entities, who indulge in or whose activities result in such violations. Simultaneously, it becomes the responsibility of relevant agencies to ensure such violations do not take place.

An additional question that arises is whether all components of the river and its catchment also get rights. For instance, are the plants and animals that live within this ecosystem also now recognised as having rights as living entities, as "persons?" If so, would this apply to each individual of each such species, or to the species as a whole?

Implementing the Rights

Assuming a common understanding of what the rights of a river could mean, the next question is: how will such rights be protected? Since the river cannot do this itself, and in the first place it is humans who are recognising its rights, there would need to be a system involving custodians or guardians, much like there is for a human infant or a person with severe "disability."

Parenthood/custodianship: In both the UHC order and New Zealand law, a set of individuals, in their ex-officio position or as named, have been appointed as "parents" of the rivers, responsible for ensuring that their rights are protected. In the case of the Whanganui, the parenthood (enshrined in the office of the Te Pou Tupua) is shared by the indigenous Iwi people and the government. Additionally, the bill appoints an advisory team comprising one person each appointed by the trustees, the Whanganui Iwi, and local authorities. It also appoints a strategy team, comprising representatives of persons and organisations with interests in the Whanganui river, including Iwi, relevant local authorities, departments of state, commercial and recreational users, and environmental groups. These bodies are supposed to help the Te Pou Tupua carry out its functions, and are always in the interests of the Te Awa Tupua.

In the case of Ganga and Yamuna, the UHC has named the following as parents:

> The Chief Secretary, State of Uttarakhand, Director NAMAMI Gange Project, Mr Praveen Kumar, Director (NMCG), Mr Ishwar Singh, Legal Advisor, NAMAMI Gange Project, Advocate General, State of Uttarakhand, Dr Balram K Gupta, Director (Academics), Chandigarh Judicial Academy and Mr MC Mehta, Senior Advocate, Hon Supreme Court. (*Lalit Miglani v State of Uttarakhand and Others* 2017)

Given the long history of struggle by the Iwi people to safeguard the interests of the Whanganui river, it is likely that they will take their parenthood very seriously; and they have the two additional bodies to help them. The UHC order for Ganga–Yamuna evokes less confidence though, for the composition of the custodians is heavily weighted towards the state. Given the sorry record of the government in protecting the rivers, it is not clear how these custodians will suddenly be transformed, or will have the independence to act in the interests of the river if the government itself is one of the violators. The inclusion of two non-officials is positive, but rather inadequate.

The second order of the court does include the possibility of wider community involvement:

> The Chief Secretary of the State of Uttarakhand is also permitted to co-opt as many as seven public representatives from all the cities, towns and villages of the State of Uttarakhand to give representation to the communities living on the banks of rivers near lakes and glaciers. (*Lalit Miglani v State of Uttarakhand and Others* 2017)

This is welcome, but, unfortunately, the court has left such co-option, as also the choice of who to co-opt, to the discretion of the chief secretary. Given the rather unfortunate recent record of state and central governments simply not filling such positions, or filling them with people who will not challenge the status quo, leaving the choice completely up to the chief secretary is problematic.

As stated above, a crucial aspect of the New Zealand agreement is the involvement of multiple sets of people from different backgrounds, on the formal bodies created to act or advise on issues relating to the Whanganui's rights. This greatly strengthens the ability of the parents to understand complex issues, to withstand pressure to compromise the river's interests, or reach resolution in the case of disputes. Such institutions and mechanisms could have been built into the Ganga–Yamuna order too, or perhaps still can be as the operational aspects of the order are worked out.

The spirit of the following observation of the UHC could mean a more democratic decision-making process through meaningful consultations at various levels: "we would hasten to observe that the local inhabitants living on the banks of rivers, lakes and whose lives are linked with rivers and lakes must have their voice too" (*Lalit Miglani v State of Uttarakhand and Others* 2017).

Assuming the chief secretary is serious about facilitating a truly consultative or participatory process involving communities, who would they choose? Perhaps the first choice could be to those who have or should have traditional, customary rights to the river such as fisherfolk, farmers along its banks, people directly engaged in river-related services, people who stand to lose immediately and heavily if the health of the river is affected.

Additionally, the chief secretary could consider those who have a record of independent advocacy on behalf of the river, its flora and fauna, and its dependent human communities. Others related to the river, such as industrialists, rich town-dwellers, big religious institutions, city administrations, etc, should have lesser representation for they already have a voice in decision-making. We would, however, not be very surprised if the complete opposite happens.

There is, then, the question: what happens if the parents or custodians fail to discharge their duty? Do they get penalised personally, do they get replaced? What if such failure is a consequence of following orders of their superiors in government? What if there is disagreement on what constitutes a violation in the first place, given the enormous grey areas left undefined in the court orders, as described above? These issues need to be spelt out when the orders are operationalised.

Restitution, restoration and compensation: A human right comes with the possibility or promise of restitution, redressal and compensation in the event of violations of such a right. What would this mean for a river? Could restitution mean, for

instance, the restoration of a river to the healthy state it was in, prior to violation? For example, the dismantling of dams that have blocked its flow or so drastically altered its nature that it can no longer be recognised in its original form (including, for instance, flowing only through tunnels inside the mountain, in so-called run-of-the-river hydro projects). In some parts of the world, dams, in fact, have been decommissioned or removed to enable the river to run free again, helping restore its health or populations of wild fish. Could restitution also mean regenerating catchment areas so that "normal" water and silt flows are re-established? All such possibilities need to be considered, and some have pretty far-reaching positive (but challenging) consequences.

It may be argued that the UHC judgment cannot be applied retrospectively, that is, affecting actions taken prior to the order. 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. The UHC order, in fact, directs that "industries, hotels, Ashrams and other establishments, which are discharging the sewerage in the rivers, are sealed" (*Lalit Miglani v State of Uttarakhand and Others* 2017). As part of the same case, in a previous instance, mining in the riverbed of the Ganga and its highest floodplain area has also been banned forthwith. The court has appointed the district magistrate and subdivisional magistrate to ensure implementation of the order.

Is it too much to ask, then, that the UHC also call for the removal of the diversions and barrages that have essentially destroyed the Ganga, Yamuna and their tributaries, and stoppage of all proposals to further dam or divert them?

What about compensation for damages caused, in addition to restitutive/restorative actions or where such actions are not possible? Who would be the recipient of such compensation? Could the human victims of damage to the river, such as fisherfolk who lose fish stocks due to pollution or changes in flow, or riverside residents who lose access to drinking quality water, be the recipients? How would such recipients be identified? Would compensation merely mean transfer of money from one government agency to another, with no citizens' oversight on how the money is used for the river and its inhabitants? Worse, could this become a form of double dispossession, such as is happening in the case of the Compensatory Afforestation Fund Management and Planning (CAMPA)?

First, forests and forest-dependent communities lose out when a forest is diverted for industry, mining, or other non-forest purposes. Then, the compensation paid by the agency responsible for diversion goes to the forest department, which uses it often for top-down plantation activity on lands on which communities or wildlife depend.

Interestingly, the New Zealand agreement has an extensive section lending itself to restitutive, restorative, and compensatory action. It acknowledges the more than a century's history of the government's decisions and actions that have violated the health of the river, and the rights, culture and well being of the indigenous people living along the river. Several specific examples are given, including the dismantling of traditional structures for fishing and river use, a hydroelectricity project, and mining.

> The Crown acknowledges that it has failed to recognise, respect, and protect the special relationship of the iwi and hapū of Whanganui with the Whanganui River …
> The Crown deeply regrets that it undermined the ability of Whanganui Iwi to exercise their customary rights and responsibilities in respect of the Whanganui River, and consequently the expression of their mana. The Crown further regrets that this compromised the physical, cultural, and spiritual well-being of the Iwi and Hapū of Whanganui Iwi …
> The Crown recognises that for generations the Iwi and Hapū of Whanganui have tirelessly pursued justice in respect of the Whanganui River. The Crown recognises and sincerely regrets the opportunities it has missed, until now, to adequately address those grievances. Redress, through this settlement (Ruruku Whakatupua) and the Te Awa Tupua framework (TePāAuroanā Te Awa Tupua), is long overdue.
> With this apology the Crown seeks to atone for its past wrongs, and begin the process of healing. This settlement marks the beginning of a renewed and enduring relationship between Whanganui Iwi and the Crown that has Te Awa Tupua at its centre and is based on mutual trust and co-operation, good faith, and respect for the Treaty of Waitangi and its principles.[7]

The acknowledgement of various specific kinds of wrongdoings, and the above unconditional apology, are strong bases for the Whanganui Iwi seeking appropriate restitutive, and compensatory measures.

Legal or Constitutional Status?

Given that these orders are from the UHC, these may not automatically apply to the rest of the stretch of the Ganga and Yamuna outside the state, even though in its first order the court specifies that it is recognising the rights of the river "from mountain to the sea." It is, of course, clear that a state's high court has jurisdiction only over that state, but what it says can be cited as a precedent in other states. In this sense, the first order's coverage of the entire stretch of these rivers could have validity across all of northern and eastern India through which the Ganga and Yamuna flow. Further action in this or other courts on the basis of petitions brought by citizens or suo motu orders by judges, and/or decisions taken by state or central governments, would need to clarify these issues of jurisdiction.

While the high court orders are legally enforceable, these are limited in the sense that these need to be cited as precedents every time, and other state courts may hold them to be non-applicable in areas of their jurisdiction. For the rights of these rivers to be given firmer footing, a national-level law and/or a constitutional provision is important. This is the case with the New Zealand agreement between the Iwi and the Crown, which is in the form of a law.

At one point in the high court order, there is recognition of this need: "We must recognise and bestow the Constitutional legal rights to the 'Mother Earth' … trees and wild animals have natural fundamental rights to survive in their natural own habitat and healthy environment" (*Lalit Miglani v State of Uttarakhand and Others* 2017).

In this context, it is relevant to mention that there is an active proposal for a national law on the Ganga. The draft National Ganga River Rights Act (2016) is:

Based on a rights-based legal framework for nature; Incorporates new environmental protection mechanisms, including community monitoring and a dedicated police force;
Designates strong anti-pollution measures alongside the establishment of Water-Conservation Zones, Organic Farming Zones, Construction-Free Zones and Open Defecation-Free Zones to ensure a clean and free-flowing River Ganga;
Designed to ensure laws are strongly enforced rather than neglected;
Makes repeat violators financially responsible for environmental remediation; and Designates strong anti-corruption clauses.[8]

The draft law lists the following objectives:

Establish the Ganga's right to exist, thrive, regenerate, and evolve;
Empower individuals, groups, and governments within India to protect and defend the Ganga's rights in the court of law;
Affirm the rights of people, plants, fish and other animals to a healthy Ganga;
Prohibit any activity that interferes with the Ganga's rights to survive and flourish;[9]
Provide that any damages that may be awarded for violations of the Ganga's rights will be used to restore its ecosystem to its pre-damaged state; and
Institute enforcement mechanisms to protect and defend the Ganga's rights.[10]

This draft is promoted by the Ganga Action Parivar, a group of professionals, engineers, scientists, activists, spiritual leaders, and environmental specialists. It is reported that the draft is actively under consideration by the central government.

Rights of Rivers Equivalent to Rights of Nature?

Could the logic of these decisions be extended to all rivers, and beyond that, to all of nature? The Ganga and Yamuna rivers are sacred to the Hindus, and the Whanganui to the Iwi; other rivers, lakes, forests, etc, are sacred to other communities. Indeed, many peoples' movements, such as those against dams on the Rathong Chu river in Sikkim and against mining in the Niyamgiri hills of Odisha, have cited the sacredness of the landscape as one plank of their opposition. In the latter case, the Supreme Court even asked the government to seek consent for mining from the Dongria Kondh Adivasi gram sabhas, recognising their cultural rights (the gram sabhas unanimously rejected the mining). And, then, if we go beyond the notion of sacredness, to encompass other essential human uses or ways of valuing nature, and its intrinsic values, should not all ecosystems be similarly extended protection?

This would, of course, not mean that ecosystems cannot be used by humans, but rather that our treatment of the rest of nature would be within the bounds of what is responsible and respectful, or what can be considered "sustainable" (encompassing also the sustenance of all life forms in the ecosystem).

While the Indian court orders and the New Zealand legal agreement may be the first instances of rivers being granted rights, the extension of rights to nature in general has taken place in several other countries before this. In 2014, New Zealand had, in fact, recognised the Te Urewera National Park as a legal entity with rights, powers, duties, and liabilities as a "legal person." In Ecuador, the 2008 Constitution was the first in the world to provide such recognition: "Nature or Pachamama, where life is reproduced and exists, has the right to exist, persist, maintain and regenerate its vital cycles, structure, functions and its processes in evolution."

While the Ecuador government has been accused of ignoring its own constitution, citizens have used this provision. For instance, people went to court in the name of the Vilcabamba river, being affected by the provincial government's actions to dump rock and earth from a road-widening project, arguing that this violated the constitution. The court ruled that such dumping interfered with the river's right to flow naturally and to perform its ecological functions.

Several towns in the United States (US) have made by-laws that recognise the rights of nature. For instance, the Grant Township,[11] a community in western Pennsylvania adopted a Community Bill of Rights Ordinance recognising that the rivers, streams, and aquifers possess the right to flourish and naturally evolve. This has been used against the Pennsylvania General Energy Company (PGE), which has been pumping waste into empty boreholes, polluting local aquifers, poisoning the drinking water and ecosystems. Although the tussle continues, the ordinance has challenged the legitimacy of the system that undermines the rights of the people and nature in lieu of profits.

Bolivia has enacted the law of Mother Earth, recognising nature's legal rights, specifically the right to life, biodiversity, regeneration, air, water, balance, and restoration. In 2009, the United Nations General Assembly adopted a resolution proclaiming April 22 as International Mother Earth Day. Later, in the same year, it adopted a resolution on Harmony with Nature (21 December).[12] Following this, a series of resolutions have encouraged national-level action on the rights of nature.[13]

Can Such Rights Be Protected?

Perhaps the only long stretch of the Ganga that is still flowing in its original course is in Bihar, the rest having been diverted into canals. Communities and civil society organisations are raising questions about a series of proposed barrages, and massive dredging that is proposed in the riverbed, which they say will destroy the river (including the endangered Gangetic river dolphin). Moreover, on a number of tributaries of the Ganga and Yamuna in Uttarakhand, the government is still planning hydro-projects, which, as researchers and activists have pointed out, will be ecologically disastrous. Can the UHC order be used to stop these obvious violations of the rivers' rights?

The fundamental contradiction between the current approach of "development" and the rights of nature, where the former is inherently exploitative of resources for ever-increasing human needs, underlies the current social milieu. As in the case of all environmental laws and the constitutional provisions related to the environment in India, when there is a contradiction between growth-centred "development" and the environment, the latter is sacrificed (Shrivastava and Kothari 2012). One part of the UHC order regarding the constitution of the Ganga Management Board is indicative of where the trade-off is supposed to happen:

> The constitution of Ganga Management Board is necessary for the purpose of irrigation, rural and urban water supply, hydro-power generation, navigation, industries. There is utmost expediency to give legal status as a living person/legal entity to Rivers Ganga and Yamuna r/w Articles 48-A and 51A (g) of the Constitution of India. (*Lalit Miglani v State of Uttarakhand and Others* 2017)

These contradictions were especially vivid in the case of the Narmada, where, within 10 days of each other, the Madhya Pradesh assembly gave it rights, while the Gujarat and central governments decided to close the gates on the Sardar Sarovar Project, which will submerge huge areas of the Narmada valley and destroy the river.

In the case of the Whanganui river, the fact that the government has admitted to several specific violations in the past, including the construction of a hydroelectric project, suggests that at least such specific activities can be stopped in the future. Other than with pollution and encroachment on the riverbanks and the riverbed, the UHC order is not specific about what can and cannot be allowed.

It should be noted that the Whanganui river protection law came after over a century of struggle by the Iwi indigenous people. Now that they have won a significant legislative victory, they are more than likely to keep a sharp eye out for any violations. In the case of the Ganga and Yamuna, unfortunately, people living along their banks, including many religious institutions, are often the ones responsible for their desecration. Will they have the wisdom and organisational capacity to turn this around, and use the UHC orders to protect the rivers?

There is another crucial difference between the two cases: demographics.[14] The Whanganui has a relatively sparse population living alongside it; the Ganga and Yamuna have amongst the world's most densely populated basins. Dense population by itself does not necessarily make environmental protection impossible, but it does make it more difficult. Hence, one has to be cautioned against the pressure of economic and industrial development on these rivers, and the challenges that will arise in operationalising the UHC orders.

Potential for Misuse

Two aspects of the UHC order merit caution. First, its heavy emphasis on the Ganga and Yamuna being sacred to Hindus:

> All the Hindus have deep Astha in rivers Ganga and Yamuna and they collectively connect with these rivers. Rivers Ganga and Yamuna are central to the existence of half of Indian population and their health and well-being. The rivers have provided both physical and spiritual sustenance to all of us from time immemorial. (*Lalit Miglani v State of Uttarakhand and Others* 2017)

This is factually indisputable, but the UHC appears to leave out the fact that for people of several other faiths too the Ganga and Yamuna are culturally and in other ways important. The singular focus on Hinduism can be misused by right-wing nationalist organisations, to hijack the order for their own cynical agenda.

This fear is not as far-fetched as it may seem. Sharma (2012) has detailed how the anti-Tehri dam movement was used in such a way by the Vishva Hindu Parishad. The aforementioned draft Ganga act talks of the Ganga as India's "national river," and "the international symbol of our nation's identity," which quite unjustifiably marginalises all other rivers.

Second, the UHC order could inadvertently also be used against communities that use these rivers and their catchment areas. Take, for instance, the following part of the order:

> 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. (*Lalit Miglani v State of Uttarakhand and Others* 2017).

One can well imagine overzealous officials, for example, of the forest department, stopping communities from grazing their livestock, or collecting medicinal plants, or in other ways going about their traditional livelihood activities, in the name of protecting the Ganga's rights. Again, this is not far-fetched, going by the way the predominantly exclusionary model of wildlife (especially tiger) conservation has been used to displace or dispossess forest-dwelling communities in many parts of India.

Different parts of the UHC orders lend themselves to different readings on this issue. For instance, in its 30 March order, the court states that "the District Magistrate, Haridwar is directed to ensure that the Beggars are not allowed to be present on the Ghats" (*Lalit Miglani v State of Uttarakhand and Others* 2017). This appears to represent a narrow sense of aesthetics and ethics, and of who causes damage to the river, and misses a holistic picture of why there are beggars in the first place.

On the other hand, the UHC order also states:

> Governments should promote and provide opportunities for the participation of interested parties, including local communities and forest dwellers and women, in the development, implementation and planning of national forest policies. National forest policies should recognize and duly support the identity, culture and the rights of Indigenous people, their communities and other communities and forest dwellers. (*Lalit Miglani v State of Uttarakhand and Others* 2017)

Following this, all decisions relating to the Ganga and Yamuna and their catchments and tributaries, should be taken with full participation of communities living there, and their traditional and customary rights should be upheld.

Which of the above interpretations will hold will depend on the balance of power in the area, on the play of other laws and policies, like the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, on further operational orders from courts, and other such factors.

Going Beyond Rights

The difficulties or possibly even impossibility of respecting the rights of rivers (and more generally of nature) within the current context of unbridled economic growth, and given the consumption-cum-demographic patterns in India, suggest that ultimately we have to go beyond a legal rights-based approach. For the rights of rivers (and more generally of nature) to be safeguarded, we need major transformations in the consciousness, values, and actions of people living along or using them. Eventually, these rights (beyond the law) have to extend to

other non-human objects, helping us move towards a society whose concern or moral consideration expands not just to the human community, but the entire earth.

This is especially crucial given the anthropocentrism of modern, Westernised, industrial humanity. Law is a modern human construct, and it not only talks in the language of rights and duties that only humans understand, but also operationalises these in a way that can further entrench human-centredness.[15] In most cases where nature's rights are being recognised in law, this is done by extending to it the concept of "personhood"; in other words, akin to humans, and therefore, having human rights. This retains an anthropocentrism, even as parts of the approach go beyond when recognising rights as "living entities." Besides, in a world where even human rights are often grossly violated, what chance does a river have?

Various environmental activists have been arguing for a need for cultural change that can bring about an ethic of care, a discourse that can alter the way we see the rest of nature. Indigenous people around the world have respected the rest of nature as a part of their world views, as a part of living. In recent times, eco-feminists, gift economists, and eco-spiritualists have also argued for recognition of nature's rights as part of attitudinal shifts in human beings, and not only as legal measures. Ultimately, we will respect, and achieve harmony with the rest of nature not so much because we have given it legal rights, but rather because it is simply the right thing to do.

Conclusions

In this article, we have pointed to how the Indian court's order and the New Zealand law are potentially breakthrough decisions, but raise difficult and complex questions of interpretation, implementation, and redressal. We have also stressed that there are fundamental contradictions between growth-led "development" and the rights of nature, or indeed, of ecological sustainability, even from a human-centred point of view. Unless these are resolved, such decisions will remain on paper, rather than be reflected on the ground. We have raised issues about legal and beyond-legal approaches to the rest of nature. Finally, we have ended with some issues to be cautious about as the court orders get used in India, including misuse by the right wing and use against the poor. Much greater public discussion and action are needed on all these issues.

NOTES

1 Parens patriae means literally "parent of the country." The parens patriae action has its roots in the common law concept of the "royal prerogative." "The royal prerogative included the right or responsibility to take care of persons who are legally unable, on account of mental incapacity, whether it proceed from 1. non-age; 2. idiocy; or 3. lunacy; to take proper care of themselves and their property" (*Lalit Miglani v State of Uttarakhand & Others* (2017)).

2 "The State shall endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country."

3 "It shall be the duty of every citizen of India … to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures."

4 "A legal person is any subject-matter other than a human being to which the law attributes personality … we may, therefore, define a person for the purpose of jurisprudence as any entity (not necessarily a human being) to which rights or duties may be attributed."

5 Te Awa Tupua (Whanganui River Claims Settlement) Bill 2016, https://www.parliament.nz/en/pb/bills-and-laws/bills-digests/document/51PLLaw23521/te-awa-tupua-whanganui-river-claims-settlement-bill-2016.

6 We assume that the word they wanted to use was "gasping" and that this is a typo.

7 Te Awa Tupua (Whanganui River Claims Settlement) Bill 2016.

8 Summary of the National Ganga River Rights Act, 2016 (Proposed): A Draft presented by Ganga Action Parivar, http://www.gangaaction.org/publications/GangaRightsAct2016-English.pdf.

9 The draft act includes "flow" as part of the river's rights.

10 Summary of the National Ganga River Rights Act, 2016 (Proposed): A Draft, op cit.

11 The Community Environmental Legal Defense Fund (CELDF) provided the legal advice to the community; it has been advocating the rights of nature in several parts of the world; see https://celdf.org/about/.

12 Harmony with Nature, United Nations, http://harmonywithnatureun.org/chronology.html.

13 Rights of Nature Law and Policy, Harmony with Nature, United Nations, http://harmonywithnatureun.org/rightsofnature.html.

14 This point was forcefully brought out in an online discussion on the UHC orders by Saral Sarkar, email dated 29 April 2017.

15 This point was brought out in an online discussion by Saral Sarkar, email dated 27 April 2017.

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