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Saga of River to the Courtroom: Natural Entities like Rivers and Lakes Should be Considered as Legal Person

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ABSTRACT

Designating rights for nature is a potentially powerful way to open up the dialogue on nature conservation around the world and provide enforcement power for an ecocentric approach. The notion of a juristic person underlines the Judges' argument for rights for river Goddesses and the argument that river Goddesses also constitute nature. Other legal and legislative initiatives in which rights of nature have been articulated around the world give some basis for this, as they have joined cultural or indigenous ideas of personhood with the preservation and conservation of nature. Conferring rivers a legal personhood is a great venture where this is accomplished by various countries. This paper looks at a fusion of legal traditions, religious worldviews, and practices of environmental protection and advocacy in the context of India. Apart from this, analysis of Bangladesh and New Zealand part was also put forwarded. It takes two specific legal cases in India and examines the recent high-profile rulings designating the rivers Ganga, Yamuna, and their tributaries and glaciers as juristic persons.

I. INTRODUCTION

“Rivers are the arteries of the earth and lifelines for humanity and millions of other animals and plants. It is no wonder they have been venerated, considered as ancestors or mothers and held as sacred symbols²”

The idea of personification of nature or other non-human entities is not new to the human history. There has always been the belief or practice that all natural elements are gods or living entities be it in India or other countries.

Instances and depictions in the religious scriptures or legends suggest and clarify that personification of nature is not a novel concept, but a forgotten one. The humans are claimed to be civilized because of their adherence to law and morals. When we look at the earth, ocean, rain, rivers and mountains, they are always beyond control and outside the law, complicating the process of granting legal personhood.

But the most widely accepted, Salmond's definition of a 'person' states, “a person is any

¹ Author is a LLM student in India.

² Ashish kotharet al; “Now Rivers have the same legal status as people, we must upheld their rights”

being, regarded by the law as capable of rights and duties, irrespective of the fact they are human or not.”³When interpreted, this definition clearly allows the inclusion of rivers and other non-human entities into the class of persons, though not natural, yet as legal persons. In a rapidly changing climate and environment, protection of all natural resources is quite indispensable and conferring legal rights to them is a welcoming solution as it imposes duty on the State and fellow human beings to protect and preserve the natural resources. The Courts who are the protector of rights, have accepted this ideology and thus have started granting legal personhood to rivers, recently.

II. BLENDED STORIES OF PERSONHOOD AND RIVERS

The concept of legal personality is a convenient legal fiction that allows non-human entities to hold legal rights and requires them to fulfill corresponding legal responsibilities to others⁴. The capability of enjoying rights and performing duties can be seen as a pre-requisite for legal personality.⁵ If an entity has legal personality, it has standing a right to appear in court and take legal action against others who have harmed it.

If a legal person cannot speak or act for itself to protect its rights and interest, one or more human may be allowed to represent its legal interest and speak or act on its behalf. The law may recognize the person as a guardian, trustee or agent. Legal

persons are real and imaginary to whom personality is attributed by law by way of fiction where it does not exist in fact. Law attributes by legal fiction a personality of some real thing. A fiction thing is that which does not exist in fact but which is deemed to exist in the eyes of law. A legal person has legal existence but its personality is fiction. Personification is essential for all legal personality but personification does not create personality. Personification is a mere metaphor.

The term ecological jurisprudence is considered by some as more inclusive than that of an Earth Jurisprudence its semantically inscribed planetary boundaries. Nature, the environment or even single eco-system are seldom easily quantifiable as bounded entities with geographically clear borders. Within the complex spectrum of establishing where a legal subject end and another begins, however, rivers are somewhat more easily identifiable, their very being premised on historical boundaries that measure their watery ambit from river bed base.

And yet, rivers still elude a final, clearly defined, and uncontroversial description. As a result, rivers inhabit a limited space, one that is at the same time somewhat geographically bounded and yet metaphorically transcended, physically shifting and culturally porous

The river is the living symbol of all the life it sustains or nourishes fish, aquatic insects, water ouzels, otter, fisher, deer, elk, bear, and all other

³ Manishranjan, “*Meaning and Kinds of Person*“, Legal Services India, available at <http://www.legalservicesindia.com/article/2316/Meaning-and-Kind-of-Person>

⁴ Hutchinson, “The Whanganui River as a Legal

Person” (2014)39:3 Alt LJ 179@179-180

⁵ James DK Morris & Jacinta Ruru, “Giving Voice to Rivers” Legal Personality as a vehicle for recognizing the indigenous people’s relationships to water?” (2010)14:2 AILR 49 at 50,54

animals, including man, who are dependent on it or who enjoy it for its sight, its sound, or its life. The river as plaintiff speaks for the ecological unit of life that is part of it. Those people who have a meaningful relation to that body of water—whether it be a fisherman, a canoeist, a zoologist, or a logger—must be able to speak for the values which the river represents and which are threatened with destruction⁶.

If talking about the legal rights of the river as a legal person then the river would be an extremely abused child. The “right to flow” could be seen as a fundamental river right because the capacity to flow is essential to the existence of river⁷. However, the granting of legal personhood to a river emphasizes how changing values, influenced by traditional world views, can act to effect a transition from a natural object being considered as property predominantly for human use, to legal person. This change provides a mechanism for natural object to be proactively protected, rather than reactively addressed through seeking to clean up any degradation turned in the condition of such natural object

Water is an entity endowed with its own personality, its own health, and, arguably, its own spirit independent of human beings or their influence. Accordingly, water can be conceived as a specific being—a person. A quality allocated to “persons” is the capacity to interact with the

components of their environment; therefore, it is defined by a set of connections arising from the agency of each actor involved⁸. Thus, granting water legal personhood begins to make sense as this entity would be recognized per se, and these social interactions could be considered mutually to its existence rather than separately.

For a bigger thrust of socio-political scientific development, evolution of fictional personality to be a juristic person becomes inevitable. In addition to the constitutional and legislative initiatives, a series of cases have now been successfully litigated in numerous civil and criminal law jurisdictions around the world, making it apparent that the emergence of an ecological jurisprudence is not an isolated event.

III. INTERNATIONAL PERSPECTIVE OF LEGAL PERSONHOOD OF RIVERS

Bangladesh follows a handful of countries that have subscribed to an idea known as environmental personhood. It was highlighted in essays by University of Southern California Law Professor Christopher D. Stone, collected into 1974 book titled “Should trees have standing towards legal rights for natural objects?”. Stone argued that “if an environment entity is given legal personality”, it cannot be owned and has the right to appear in court.

⁶ *Sierra Club v. Morton*, 405 U.S. 727, 743 (1972).

⁷ “Cormac Cullinan, *Wild Law: A Manifesto for Earth Justice*, 2nd ed (White River Junction, VT : Chelsea Green Publishing, 2011), Quoted in Meg Good, “The river as a legal person : evaluating nature right based approaches to environmental protection in Australia” (2013) 2013:1

⁸ See BRUNO LATOUR, *FACE A GAIA: HUIT*

CONFÉRENCES SUR LE NOUVEAU RÉGIME CLIMATIQUE 67 (2015) (explaining how the concept of agency is employed in its philosophical aspect it is the capacity (and the effectiveness associated with that capacity) to act in a given environment that has the power to influence a given situation).

Traditionally, nature has been subject to western conceived legal regime of property-based ownership. "An owner has the right to modify their features, their natural features or to destroy them all at will." Many indigenous communities recognize nature as a subject with personhood deserving of protection and respect, rather than looking at it as a merchandise or commodity over which are property right should be exercised.

Many of these initiatives are driven by a desire to protect rivers, seen as the planet's lifeblood. In Ecuador, the Vilcabamba River became the world's first ecosystem to have its rights defended and recognized by a court (Kauffman and Martin 2017a). New Zealand's Whanganui River (Te Awa Tupua) also has legal rights (New Zealand Government 2017). More recently, court rulings recognized the rights of the Atrato River in Colombia in 2016 and of the Ganga and Yamuna Rivers in India in 2017 (Republic of Colombia Constitutional Court 2016; Uttarakhand High Court 2017). Internationally, a

transnational network of lawyers and activists, coordinated by the Earth Law Center, are drafting a Universal Declaration of the Rights of Rivers (Earth Law Center 2017).

The Whanganui River, which is New Zealand's third largest river and also its longest navigable river, was granted legal personhood⁹. Through the passing of the Te Awa Tupua (Whanganui River Claims Settlement) Act, 2017 ('the Te Awa Tupua Act')¹⁰, the river was recognized as a legal person, and was accorded "all the rights, powers, duties, and liabilities of a legal person"¹¹. This brought to a close one of the longest standing litigations in New Zealand, whereby the Whanganui Iwi, a Maori tribe, sought to have their deeply significant ties with the Whanganui River recognized and respected¹².

Historically, a large part of the Maori population was dispersed along the river and exercised several rights and discharged certain duties in connection to the river¹³. In 1840, the Treaty of Waitangi was signed between the British Crown

⁹ The Guardian, New Zealand river granted same legal rights as human being, March 16, 2017, available at <https://www.theguardian.com/world/2017/mar/16/new-zealand-river-granted-same-legalrights-as-human-being> (Last visited on June 6, 2018); Lacy Cooke, New Zealand river world's first to obtain legal status as a person, March 16, 2017, available at <https://inhabitat.com/new-zealand-riverworlds-first-to-obtain-legal-staus-as-a-person/> (Last visited on June 6, 2018).

¹⁰The Guardian, New Zealand river granted same legal rights as human being, March 16, 2017, available at <https://www.theguardian.com/world/2017/mar/16/new-zealand-river-granted-same-legalrights-as-human-being> (Last visited on June 6, 2018); Lacy Cooke, New Zealand river world's first to obtain legal status as a person, March 16, 2017, available at <https://inhabitat.com/new-zealand-riverworlds-first-to-obtain-legal-staus-as-a-person/> (Last visited on June 6, 2018).

¹¹ The Guardian, New Zealand river granted same legal rights as human being, March 16, 2017, available at <https://www.theguardian.com/world/2017/mar/16/new-zealand-river-granted-same-legalrights-as-human-being> (Last visited on June 6, 2018); Lacy Cooke, New Zealand river world's first to obtain legal status as a person, March 16, 2017, available at <https://inhabitat.com/new-zealand-riverworlds-first-to-obtain-legal-staus-as-a-person/> (Last visited on June 6, 2018).

¹² Press Release, NEW ZEALAND GOVERNMENT, March 15, 2017, available at <https://www.beehive.govt.nz/release/whanganui-river-settlement-passes-third-reading> (Last visited on June 7, 2018).

¹³ Summary of the historical background to the Whanganui River claims of Whanganui Iwi, available at <https://www.govt.nz/treaty-settlement-documents/whanganui-iwi/whanganui-iwi-whanganui-riverdeed-of-settlement-summary-5-aug-2014/background/> (Last visited on June 7, 2018).

and Maori chiefs, which recognized the Maori ownership of the Whanganui River, surrounding land, forests, etc. and assured the Maori people of the protection of their rights¹⁴. While in the Maori version of the treaty, the Iwi retained sovereignty over their river and land, the English version said that the Maori people had ceded all sovereignty over their land to the British Crown while continuing to possess and enjoy their land without external interference¹⁵. Despite this, the treaty was breached by the Government and the Crown assumed control and management of the natural resources over time and the Iwi realised that their interests were being exploited instead of being protected.

Over the years, the Whanganui Iwi kept asserting their rights and interests over the river¹⁶. As such, their claims to ownership became the subject matter of litigations in courts between 1938 and 1962¹⁷. In 1962, the Court of Appeal held that the Maori people had lost their customary ownership of the riverbed through the grant of titles to riparian blocks to the Crown¹⁸. So nevertheless, the abuses and the breaches of

the treaty became a rallying point for the Maori people, who continued to demand redressal of their grievances. Subsequently, the Waitangi Tribunal in 1999 found in its report that the Treaty of Waitangi had guaranteed Whanganui Iwi rights of ownership, management, and control of the river and that these rights had never been renounced or surrendered by them¹⁹. Thereafter, negotiations were underway between the Whanganui River Maori Trust Board and the New Zealand government regarding the settlement of historical claims²⁰. In 2014, a final deed of settlement was signed by the Iwi concerning their historical claims. This deed was given effect to by the the Te Awa Tupua Act, which recognised Te Awa Tupua as a legal person²¹ and appointed the Te Pou Tupua as to be its representative²¹.

The indigenous Maori people regard mountains, rivers, etc. as Tupuna or ancestors²². Their deep and cherished relationship with the river finds reflection in the common tribal saying, "Ko au te awa, ko te awa ko au" or "I am the river and the river is me". As such, the recognition of the

¹⁴ Patricia Burns, *FATAL SUCCESS: A HISTORY OF THE NEW ZEALAND COMPANY* 153 (Henry Richardson, 1989).

¹⁵ James D. K. Morris & Jacinta Ruru, *Giving Voice to Rivers: Legal Personality as a Vehicle for Recognising Indigenous Peoples' Relationships to Water?*, 14 *AILR* 2 49 (2010).

¹⁶ Summary of the historical background to the Whanganui River claims of Whanganui Iwi, available at <https://www.govt.nz/treaty-settlement-documents/whanganui-iwi/whanganui-iwi-whanganui-riverdeed-of-settlement-summary-5-aug-2014/background/> (Last visited on June 7, 2018).

¹⁷ Library of Congress, New Zealand: Bill Establishing River as Having Own Legal Personality Passed, available at <http://www.loc.gov/law/foreign-news/article/new-zealand-bill-establishing-river-as-having-own-legal-personality-passed/> (Last visited on

June 7, 2018).

¹⁸ *Re the Bed of the Whanganui River* (1962) NZLR 600.

¹⁹ WAITANGI TRIBUNAL, *The Whanganui River Report*, 263-265, 269 (1999).

²⁰ Library of Congress, New Zealand: Bill Establishing River as Having Own Legal Personality Passed, available at <http://www.loc.gov/law/foreign-news/article/new-zealand-bill-establishing-river-as-having-own-legal-personality-passed/> (Last visited on June 7, 2018).

²¹ Bill Establishing River as Having Own Legal Personality Passed, available at <http://www.loc.gov/law/foreign-news/article/new-zealand-bill-establishing-river-as-having-own-legal-personality-passed/>

²² Morris, *supra* note 180, 49-50.

Whanganui river as a legal person was in line with the tribal philosophy that nature is personified and has its own life force²³. Recognising this, the Act besides appointing the Te Pou Tupua, provided for the Te Karewao, an advisory group to assist the Te Pou Tupua as well as a strategy group 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", called the Te Kipuka, to jointly advance the well-being of the river. Most importantly, the Act set up a trust, members of which have standing to be heard in any matter relating to or affecting the Whanganui River and to be treated as interested persons or a party. The Act clearly delineated the functions and composition of each of the above institutions.

Furthermore, the Act is also fairly detailed in terms of the effect of the extension of personhood to the river and its beds. From the application of legislations to Te Awa Tupua to the limits on the alienation of land forming part of Te Awa Tupua, including the effects of the vesting of land in the Whanganui Iwi as well as the rules governing different categories of land as classified by Act, the legislation is largely comprehensive.

The Act also set up a fund, called the Te Korotete, which can receive contributions from any source including the Crown, for the

advancement of the interests, health and well-being of the Te Awa Tupua. Additionally, the Act provided guidelines for the management and regulation of activities on the surface of the river, 4 including fishing and customary food gathering. It also required the submission of applications for resource consent relating to activities proposed to be conducted in connection with the river to relevant authorities under the Resource Management Act, 1991, for official approval²⁴.

IV. STORY OF GANGA AND YAMUNA

The Ganges or Ganga River flows for over 2500 kilometers across the northeast of India into Bangladesh from the Gangotri Glacier in the eastern Himalayas, in the Indian state of Uttarakhand, through the Gangetic Plain of North India, before splitting into two rivers in West Bengal-the Adi Ganga and the Padma-and finally emptying into the Bay of Bengal.²⁵ The Yamuna (also known as the Jumna) is the longest tributary of the Ganges²⁶. It originates from the Yamunotri Glacier in the lower Himalaya in Uttarakhand, and travels over 1000 kilometers before merging with the Ganges at Triveni Sangam, Allahabad-one of the four sites of the Kumbha Mela²⁷.

The Ganges and Yamuna are important to the spiritual lives of millions of Indians due to their sacred status in Hinduism. The Ganges is revered

²⁴ Schedule 6.

²⁵ Gerald R. Pitzl, Ganges River, in *ENCYCLOPEDIA OF ENVIRONMENT AND SOCIETY* 722-23 (Paul Robbins ed., 2007)

²⁶ 174. See Nishat & Dhruv Sen Singh, The Yamuna River: Longest Tributary of Ganga, in *THE INDIAN*

RIVERS: SCIENTIFIC AND SOCIO-ECONOMIC ASPECTS 123, 123 (Dhruv Sen Singh ed., 2018).

²⁷ 175. See generally Anil Kumar Misra, A River about to Die: Yamuna, 2 *J. WATER RESOURCE & PROTECTION* 489, 489 (2010) (discussing pollution and need for cleanup of the Yamuna)

as Ganga Mata or Ganga Maa-the divine mother-who sustains and nurtures life, while the Yamuna is worshipped as Yami-the Lady of Life-daughter of the sun god Surya and twin sister of Yama, Lord of Death²⁸. Both rivers are believed to have miraculous cleansing powers-"[a]ccording to Hindu beliefs, a dip in River Ganga can wash away all the sins." The rivers are also believed to be self-purifying, a belief that somewhat paradoxically encourages their pollution²⁹

Beyond Hinduism, these rivers make an essential contribution to the livelihood of around 40 percent of the Indian population, who rely on them for water, agriculture, industry, and navigation³⁰. In the case of the Yamuna, this contribution includes providing around 70 percent of Delhi's water supplies. Despite their economic and cultural importance (and, perhaps, in part, because of them) both rivers have been heavily polluted by domestic sewerage, industrial waste, agricultural run-off, and excessive abstraction³¹. In this sense, the rivers sing a complex song-one of competing cultural and spiritual identities, of development and survival, and of neglect.

In granting legal personhood to the Ganges and Yamuna rivers and the surrounding natural

environment, the court relied on existing theories of legal personhood, including corporate personhood, which grant legal personality, rights, and obligations to "any subject matter other than a human being" Justice Sharad Sharma argued: A juristic person can be any subject matter other than a human being to which the law attributes personality for good and sufficient reasons. Juristic persons being the arbitrary creations of law, as many kinds of juristic persons have been created by law as the society requires for its development³².

In the Ganges and Yamuna case, for example, the court described the rivers as "breathing, living and sustaining the communities from mountains to sea."³³ This characterization led the court to the conclusion that the rivers were not only entitled to the right to private law remedies, but also to "fundamental rights." In the Glaciers case, the court also appears to equate these fundamental rights with human rights.

In 2016, the Uttarakhand High Court had ordered the removal of illegal constructions and had also directed that the Ganga Management Board be constituted³⁴. The order also directed that mining of the Ganga river bed and its highest flood plain area be prohibited. In addition, the Court had

²⁸ 176. DEANNA J. CONWAY, MAIDEN, MOTHER, CRONE: THE MYTH AND REALITY OF THE TRIPLE GODDESS 64 (1994).

²⁹ Many Indians reportedly believe that there is nothing wrong with dumping waste into the Ganges and Yamuna, because the self-purifying powers of the rivers are able to cleanse away any contamination. See, e.g., George Black, What It Takes to Clean the Ganges, NEW YORKER (July 25, 2016), <https://www.newyorker.com/magazine/2016/07/25/what-it-takes-to-clean-the-ganges>.

³⁰ See generally Dilip Kumar, River Ganges - Historical, Cultural and Socioeconomic Attributes, 20

AQUATIC ECOSYSTEM HEALTH & MGMT. 8, 8-9 (2017) (discussing the symbolism and the influence of the Ganges River).

³¹ See Rai, *supra* note 175, at 3; R. C. Trivedi, Water Quality of the Ganga River- An Overview, 13 AQUATIC ECOSYSTEM HEALTH & MGMT. 347, 348, 349-50 (2010) (analyzing results of water quality monitoring);

³² Ganges and Yamuna case at para. 16.

³³ Ganges and Yamuna case at para. 17

³⁴ Mohd. Salim v. State of Uttarakhand, 2017 SCC OnLine Utt 367, 11 (referring to judgment dated 5.12.2016).

directed the Central government to reach a settlement as to the sharing of water between the States of UP and Uttarakhand in a time-bound manner. When the PIL came before the Court, it was found that encroachments and the constructions along the river remained and the Central Government had not notified any settlement on the issue of water sharing³⁵.

In the course of this matter, alarmed by the destruction and neglect of the rivers, the Court exercised its *parens patrie* jurisdiction and declared the rivers Ganga and Yamuna as well as all their tributaries, streams, including every natural water body flowing from or with these rivers as living entities "having the status of a legal person with all corresponding rights, duties and liabilities of a living person".³⁶ The Director of the Namami Gange Programme as well as the Chief Secretary and the Advocate General of Uttarakhand were declared to be the legal parents of the rivers, the "human face to protect, conserve and preserve Rivers Ganga and Yamuna and their tributaries". The Advocate-General was deemed by the Court to be the legal representative of the rivers in all legal proceedings.

A few days later, in *Lalit Miglani v. State of Uttarakhand (Lalit Miglani)*³⁷, the High Court also granted "glaciers including Gangotri & Yamunotri, rivers, streams, rivulets, lakes, air, meadows, dales, jungles, forests wetlands, grasslands, springs and waterfalls" legal personhood. The Chief Secretary of the State of Uttarakhand, the Director of the NAMAMI

Gange Project, the Legal Advisor of the NAMAMI Gange Project, the Advocate General of the State of Uttarakhand, the Director (Academics) of the Chandigarh Judicial Academy and Mr. M.C. Mehta, a Senior Advocate at the Hon'ble Supreme Court were declared "the persons in loco parentis, [or] 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."

In these judgements, we find that the Court drew inspiration from the instance in New Zealand. In *Mohd. Salim*, the Court granted rights to rivers through the attribution of legal personality, much in the same way that the Whanganui River was recognised as a legal person in New Zealand. Further, in *Lalit Miglani*, the Court referred to the Te Urewera Act, 2014 passed by the Parliament of New Zealand which gave effect to the Tfiho-Crown settlement and declared the Te Urewera park to be a legal entity. This New Zealand enactment gave the park a "legal identity" and recognised its "intrinsic worth, its distinctive natural and cultural values." It set up the Te Urewera Board "to act on behalf of, and in the name of, Te Urewera" and also specified the kinds of activities in the park that needed authorization or permits

³⁵ Mitakshara Goyal, *Rivers as Juristic Persons*, August 18, 2017, available at <https://blog.ipleaders.in/rivers-as-juristic-persons/> (Last visited on June 9, 2018).

³⁶ *Mohd. Salim v. State of Uttarakhand*, 2017 SCC OnLine Utt 367, 119.

³⁷ Writ Petition (PIL) No.140 of 2015.

V. CONCLUSION

However, we do realize that the Ganga and Yamuna, which serve millions in the delta, need to be protected against rampant pollution and hence, we have provided an alternative, duty-based approach for protection of rights of these rivers. We believe that the rights of natural entities should be dependent upon their essential interests, which need to be protected through the imposition of duties. These need to be merely recognized by the State, instead of the creation by the State of a legal fiction, in order to grant such rights. These rights through personhood or otherwise contribute little to the objective sought to be achieved. Therefore, they should be recognized at a micro level, through a duty-based approach, fulfilling the purposes of both, the interest theory of rights and the rights of nature approach. With the incorporation of steps similar to the ones mentioned in this section of the paper, one can hope for the revival of these rivers.
