

[Commentary] 'Righting' the wrong: Rights of rivers in India

Commentary by Shrishtee Bajpai on 23 June 2020

- *Over the past few years, courts in India came out with several orders declaring rivers, members of the animal kingdom and lakes as entities granting them rights equivalent to a living person.*
- *These orders may not be able to immediately control the destruction or exploitation of rivers but they could transform the legislative approach to nature and reduce the current domination of developmental projects over the protection of nature, writes Shrishtee Bajpai, an activist-researcher, in this commentary.*
- *She emphasises that discussion regarding the rights of rivers also opens up an opportunity to understand the issues of the transboundary rivers and possible collaborations between neighbouring countries on ecological grounds.*

Imagine if the river Dibang in Arunachal Pradesh, currently at the centre of controversy because of the 3,097-megawatt (MW) Etalin hydroelectric project proposed to be built across it, had the right to flow?

What if its tributaries Tangon and Dri on whom two run-of-the-river projects are proposed, had the fundamental right to live and perform their ecological functions without any human-made hindrance, just like you and I have to life and speech?

What if the proposed diversion of 1150.08 hectares of forest land and felling of over 270,000 trees (<https://india.mongabay.com/2020/05/etalin-hydel-plants-future-now-hangs-on-its-economic-viability/>) in what official documents call "subtropical evergreen broad-leaved and subtropical rainforest" was equivalent to murder or genocide? Of the many paradoxes of human existence, this has to be one of the starkest: even as we depend for our lives on rivers, even as we venerate them in many cultures, we also pollute them, block their flow, divert them into lifeless channels, and desecrate them in every conceivable way.

Signalling a shift

In the year 2017, the Uttarakhand High Court (UHC) ruled

(<http://www.indiaenvironmentportal.org.in/files/living%20entity%20Gangotri%20Himalaya%20Uttarakhand%20High%20Court%20Order%20on%20Ganga%20and%20Yamuna%20rivers%20and%20glaciers>) that the rivers Ganga and Yamuna, the Gangotri and Yamunotri glaciers, as well as other related natural elements are 'legal persons' with all duties and liabilities of a living person. Subsequently, in 2018, the same high court ruled

(<http://www.indiaenvironmentportal.org.in/files/horse%20cart%20Nepal%20India%20Uttarakhand%20High%20Court%20Judgement%20on%20Horse%20Cart>) that the entire animal kingdom has rights equivalent to that of a living person. Then, as recently as March 2020, the Punjab and Haryana High Court declared (<https://www.hindustantimes.com/chandigarh/sukhna-lake-is-a-living-entity-with-rights-hc/story-Jrt8vKUy8kqIUw>) Sukhna Lake in Chandigarh city as a living entity, also with rights equivalent to that of a person.

This trend of granting rights to nature, taking place across the world, signals the beginnings of a radical shift from an extractive mindset to one where conservation safeguards are being extended to nature. For instance, in 2008, the Ecuador 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". Several towns in the United States of America have made by-laws that recognise the rights of nature.

Similarly, New Zealand in 2014, recognised the Te Urewera National Park as a legal entity with rights, powers, duties, and liabilities as a 'legal person'. This was followed by the law passed in 2017 granting legal personhood status to the Whanganui River ecosystem. 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). In 2018, the rights of Wild Rice were recognised. On January 2019, the Dhaka High Court in Bangladesh recognised the river Turag as a living entity with legal rights and held that the same would apply to all rivers in Bangladesh.

Read more: Etalin hydel plant's future now hangs on its economic viability

(<https://india.mongabay.com/2020/05/etalin-hydel-plants-future-now-hangs-on-its-economic-viability/>)

The rights of rivers

But can laws or judgments granting rights to rivers reverse the trajectory of destruction? What would it mean for a river to have rights? Would the law that has been largely used as a means to sanction environmental destruction, resolve contested articulations of the relations between humans and the non-human, between culture and nature, between development and environment? The answer to these questions is not an affirmative yes. But the court judgments in India could be the beginning of transforming its legislative approach to nature and help in reducing the current domination of development (projects) over nature.



The Ganga river basin is home to nearly half of India's billion-plus population. Photo by Dublinsantosh/Wikimedia Commons.

What would it mean to "promote the health and well-being of these rivers"? Ordinarily granting rights would mean that a suit could be brought in the name of the river, injury can be recognised, and polluter can be held liable for harm, and made to pay compensation. But there are many complexities involved when trying to extend such a process to an entity other than human beings.

If we look at a river as an ecosystem (<https://www.thethirdpole.net/2018/07/25/why-we-need-a-new-perspective-on-rivers/>) instead of cubic metres of water, then the ambit of rights gets broadened. It includes aquatic flora and fauna, the biodiversity in its catchment areas, forests, its tributaries, groundwater, the rocks and soil in its bed and banks, and the human communities immediately dependent on it. The rights of rivers in that sense would mean that the ecological causes and conditions making up the natural habitat are to be protected to maintain a river's identity and integrity. This does not put an end to fishing or other localised, subsistence-based human needs related to the river, but rather pushes for a healthy relationship respecting the river as an ecosystem, as described above.

In the same way, the destructive activities that damage the river including dams, pollution, diversions, industrial fishing and trawling, sand mining could not only be challenged but stopped altogether.

When would the river's rights be violated?

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 the restoration of a river to the healthy state it was in prior to violation, e.g. dismantling dams that have drastically altered its nature it can no longer be recognized in its original form (including, for instance, flowing only through tunnels, in so-called run-of-the-river hydro projects)?

In some parts of the world, dams have been in fact been decommissioned, to enable the river to run free again, helping restore their 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.

Read more: Are clean rivers a distant dream for India? (<https://india.mongabay.com/2019/02/are-clean-rivers-a-distant-dream-for-india/>)

How can we implement these rights?

In the case of UHC order, several government functionaries, and a couple of independent lawyers were named as the 'parents' (i.e. custodians who would ensure that the rights are protected, since the rivers, like a human baby, cannot be expected to do so themselves). The follow-up order of the Court widened the ambit: "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". But a question remains: will state functionaries have the independence to act in the interests of the river if the government is itself a violator?

The possible solution could be to use the principles of agency, guardianship and custody, similar to those appointed for human parties incapable of representing themselves, such as minors or disabled persons. Custodianship or guardianship could be a body of local communities related to the river, relevant government agencies, and civil society, with a multi-scale or nested institutional framework to enable participation across the entire stretch of river. This should also include the representation of various subsistence-based livelihoods relating to the river.

Opportunities and challenges ahead

The most critical challenge is can rights be protected without changing the current development paradigm? There is a fundamental contradiction between the current extractive approach of 'development' and the rights of nature. Any paradigm shift also needs questioning of fundamental forms of injustices, including capitalism, statism, anthropocentrism and patriarchy.

Second, rivers don't necessarily follow human-made political boundaries. Indus, one of longest that runs through China, Pakistan, and India, doesn't flow as per political boundaries. Its contiguity demands a cross-boundary approach. A river dammed in upper reaches on China will affect the river downstream in India and Pakistan, just as the Farakka Barrage in India has affected the Ganga's flow in Bangladesh. Hence, the rights of rivers discourse open up an opportunity, albeit complex, of understanding the issues of transboundary rivers, and possible collaborations between neighbouring countries on ecological grounds.



In 2018, India's Central Pollution Control Board identified 351 polluted river stretches on 323 rivers across India. Photo by Ministry of Water Resources/Wikimedia Commons.

Third, there is still very limited understanding across the world on how a law on the rights of rivers can be implemented. What would be the best ways to ensure custodianship, restitution, compensation? Importantly, can we achieve the rights in the current legal framework which is anthropocentric, and excludes customary ways of relating to nature? We need more imaginative lawyers, activists, judges to help move towards an eco-centric and diverse legal framework.

Finally, environment activists and communities have been arguing for a need of cultural change that can bring about the ethic of care with regard to the rest of nature. Indigenous people have had such an ethic in their worldviews and ways of living. In recent times, eco-feminists, gift economists, eco-spiritualists, have also argued for the recognition of nature's rights as part of attitudinal shifts in human beings. 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.

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Banner image: River Yamuna. Photo (<https://www.flickr.com/photos/blinkofanaye/39461599631/in/photolist-23861Kr-NPxL5-24E2tP3-njE7h9-Npn9ow-585Rjk-23861J4-Lp5LM1-4iBc1X-blyvez-2imRSGQ-aB3Tn-7E54iC-rEqRQM-rnWySN-ybmsk4-6QEvtf-3pLVv7-9czBJQ-RNaEZp-2ipmt55-a4yyBA-2AuXg-5uaQg-2hMkuyq-9cwe9Z-a4yyK9-9cwsjv-9czsHj-5NHfk9-9cwcUX-9cwkPk-5NcYX-9czmc1-7x7TC9-5u13L-9cwxex-aB3NK-3bhWv-aTVdun-8minq5-5NCY6B-bpNNSM-2hMoeNC-JmPe4G-HTzIZa-qjpn7-ehXPHK-NheYmQ-2j2SC8y>) by Blink O'fanaye/Flickr.

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