IS BEING A ‘PERSON’ ESSENTIAL FOR THE ENVIRONMENT TO HOLD RIGHTS? ASSESSING THE LEGITIMACY OF ENVIRONMENTAL PERSONHOOD AND ALTERNATIVE APPROACHES

Akshita Jha & Adrija Ghosh

Over the course of history, personhood has been granted to various entities such as corporations, deities, ships, animals, etc. It has been noted by various scholars that such instances of attribution of personhood have been largely arbitrary. The latest addition to the list of entities that have been granted personhood is a river. The primary justification for this has been the need for effective conservation of these rivers, which are deemed to be of immense significance and value to the local population in the countries, and which have resorted to the grant of personhood for the protection of these rivers. However, on closely examining such a grant of personhood to the Ganga and Yamuna in India, it may be noted that such arbitrary attribution of personhood achieves nothing but the creation of an avenue for the State to divest itself of its duties of preservation and conservation of these rivers. This paper attempts to highlight the fallacies associated with the theory of personhood in light of the recent grant of legal personhood to the Ganga and the Yamuna. It also highlights the practical difficulties associated with taking this step in the Indian context as opposed to the attribution of rights or legal personality to rivers in other jurisdictions. Lastly, the paper provides an alternative, duty-based approach for the protection of the said rivers.

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I. INTRODUCTION

The concept of a juristic person entails the attribution of personhood to entities other than humans.\(^1\) The chronological progression of history shows that not all humans have been regarded as persons since the advent of civilised society.\(^2\) For instance in ancient Rome,\(^3\) France\(^4\) and America,\(^5\) slaves were not considered to be persons and were deprived of rights which were enjoyed by ordinary citizens.\(^6\) However, as time progressed, slaves,\(^7\) corporations,\(^8\) deities,\(^9\) ships,\(^10\) and some

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\(^1\) Lee Jean, *Defining Personhood*, JOURNAL OF YOUNG INVESTIGATORS (March, 2002).
\(^3\) P. W. Duff, *Personality in Roman Private Law* 242 (1938).
\(^5\) Id.
\(^6\) Id.
\(^7\) Jean, supra note 1.
\(^9\) Id., 12.
\(^10\) Id., 43.
animals came to be the subjects of the grant of personhood, in various jurisdictions. The reasons that were put forward to justify such grants of personhood were varied. They ranged from socio-economic and political development, to respect for beliefs of people, also including the need for protection of some of these entities. Nonetheless, some books of jurisprudence have regarded the idea of such attribution to be arbitrary and inherently selfish.

Attribution of personhood or legal personality is done through the creation of a legal fiction, whereby even inanimate objects such as idols, ships, corporations etc., are deemed to be the bearers of rights and duties. However, jurisprudential literature still associates personhood with humanity or human-like traits such as a living entity, capable of breathing and consuming food. This is why legal scholars and activists are still striving to get fetuses, animals, plants, etc., recognised as legal persons. Interestingly though, the latest attribution of personhood has been to rivers in New Zealand and India. Rivers have also been recognised as holders of rights in Columbia and Ecuador. The Whanganui river in New Zealand was the first river in the world to be granted personhood on account of its deep ties with the indigenous tribes and the need for its preservation, conservation and protection. A few days later, the High Court of Uttarakhand in India also granted legal personhood to two rivers, namely, the Ganga and the Yamuna. This was done in the course of deciding a Public Interest Litigation (‘PIL’), in which the petitioner had prayed for a ban on illegal mining on riverbeds in Uttarakhand. The Court took cognisance of the deep religious significance of the rivers as well as their national importance. Thus, in light of the deterioration of the condition of the rivers and the need for their overall development, the Court exercised its parens patriae jurisdiction, and granted legal personhood to the rivers. The Advocate General of

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12 Dewey, supra note 8, 672.
14 Taylor, supra note 11, 33.
16 Jean, supra note 1.
18 Id.
21 Id.
22 Id. ¶11.
23 According to the doctrine of parens patriae, the State as the guardian, has the power and authority to protect the rights and interests of those who are unable to do so themselves. Courts have also been seen to act as guardians of persons non sui generis. The doctrine has also been recognised as imposing a duty upon the State to protect non-human entities. See Aruna Ramachandra Shanbaug v. Union of India, (2011) 4 SCC 454, ¶129; Animal Welfare Board of India v. A. Nagaraja, (2014) 7 SCC 547, ¶33.
the State of Uttarakhand, the Director of NAMAMIGange Project, and the Chief Secretary of the State of Uttarakhand, were designated persons in loco parentinis of the rivers. This judgment, however, has met with severe criticism. It must be noted that the ‘rights of nature’ theory, (a theory which calls for natural entities to be considered as rights-holders, through the grant of legal personality, or through a mere recognition of their rights, without direct recognition of them as legal persons), has existed in environmental jurisprudence for quite some time now. However, the recent grant of personhood to rivers has sparked a debate over the practicality and propriety of such a theory.

This paper attempts to address the concerns associated with the attribution of legal personhood to rivers. Part II of the paper discusses the jurisprudence associated with the theory of personhood and analyses the existing literature. Thereafter, in Part III, we elaborate upon the ‘rights of nature’ discourse and its application in different parts of the globe. Part IV of the paper addresses the latest instances of the grant of personhood/rights to rivers and provides a comparative analysis of the same, while also critically analysing the judgment of the Uttarakhand High Court, in light of the rights of nature paradigm in other jurisdictions. Having analysed the several issues concerning legal personhood for natural objects, in Part V we adopt an analytical approach and comment on the situation in India with special emphasis on the propriety of attributing rights to nature, through the grant of legal personality, to the holy rivers. We also provide an alternative to the approach adopted

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26 *In loco parentis* when used to refer to a person, implies that the person so addressed has been appointed ‘in place of a parent.’ See, Black’s Law Dictionary, *What Is In Loco Parentis?* available at https://www.google.com/search?q=in+loco+parentis+black%27s+law+dictionary&oq=in+loco+parentis+bla&aqs=chrome.0.0j69i57j69i64l3.6340j0j1&sourceid=chrome&ie=UTF-8 (Last visited on June 27, 2018).
29 Rights of nature is a global movement and an emerging theory in environmental jurisprudence which advocates for the natural eco-system to be granted the status of a legal holder of rights, as opposed to it being regarded property to be owned and exploited by humans. See Global Alliance for Rights of Nature, *What is Rights of Nature?*, available at http://therightsofnature.org/frequently-asked-questions/ (Last Visited on February 15, 2019).
30 This was the case in New Zealand and India, where the rivers were attributed legal personality. Even the first proponent of the rights of nature, i.e., Professor Christopher Stone, recommended this manner of attributing rights to nature. See, Christopher D. Stone, *Should Trees Have Standing?: Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972).
31 This was the case in Bolivia and Ecuador. In Bolivia, there was no direct grant of legal personality upon nature. Nature, however, was deemed to enjoy rights guaranteed by the Constitution. Similarly, in Ecuador, rights of “Mother Earth” were recognised without a grant or attribution legal personality. See Gwendolyn J. Gordon, *Environmental Personhood*, 43 C.JEL 1 54-55 (January 11, 2018).
32 Safi, *Supra note 28*. 
by the Uttarakhand High Court, based on the jurisprudential theories discussed in the parts above. In Part VI we provide our concluding observations on the subject. In this paper, we restrict ourselves to analysing the grant of personhood as well as the grant of rights to persons, independent of the demands for and propriety of attributing legal personality or rights to any other objects or entities.

II. JURISPRUDENTIAL THEORIES OF LEGAL PERSONHOOD

Due to the lack of an elaborate definition of a 'person' and highly contesting views of various scholars on the same,33 Black’s Law Dictionary’s definition can be used to initiate the discussion. It defines a 'person' as “any being whom the law regards as capable of rights and duties.”34 However, the actual initiation of the debate on legal personality can be traced back to the works of Gaius, a Roman scholar.35 He was the first scholar to classify the law into the law of persons and the law of things.36 However, Gaius did not clarify the characteristics required for an entity to be categorised as a person or a thing.37 In addition to that, slaves were classified as persons and objects of ownership at the same time.38

It can be reasonably inferred from this that the Romans used legal personality or persona in different senses, namely, in the original sense of the word pointing towards attribution, and later, referring to the significance of being a ‘human individual.’39 It should be noted that this distinction of Gaius was adopted in Justinian’s Iuris Civilis which was the basis of Roman Law on the European Continent.40

Followed by Gaius, Hugues Doneau,41 a French renaissance humanist and professor of law, is said to have taken the initial steps for the development of the technical, legal concept of personhood.42 He critically studied Corpus in an attempt to establish the systematic foundations of law,43 and used the word persona or person in

35 Gaius, Institutiones or Institutes of Roman Law 13 (translated by Edward Poste, 4th ed. 1904).
36 Id.
40 The trifurcation is mentioned in Institutes, which is the third part of Corpus Juris Civilis; See Peter Birks, Grant Mcleod & Paul Krueger, Justininan’s Institutes (1987).
41 Hugues Doneau is also known as Hugo Donellus.
43 See Ernst Holtmöer & Johanna M Baboukis, Doneau, Hugues in Stanley N. Katz, The Oxford International Encyclopedia of Legal History (2009) (Doneau was not the first humanist jurist; he was preceded by Franciscus Conanus, who would start systematising Roman law in a critical manner); See Peter Stein, Systematization of Private Law in the Sixteenth and Seventeenth Centuries in Kurki et al., Legal Personhood: Animals, Artificial Intelligence and the Unborn 552 (2017).
a new sense.44 *Persona*, according to him, was then the ‘point of departure of legal analysis’ and an individual having a positive *status liberates* (free-state of an individual), *civiatris* (individual having civil and political rights), and *familae* (individual bearing responsibility of his rights).45 After following up on Doneau’s research, Hermann Vultejus wrote that while *homo* or human can be used to refer to a human being, *persona* or person is a “*homo habens caput civile*” or a human being with a civil standing.46 In other words, the concepts of a ‘human being’ and ‘legal personhood’ were differentiated and the word ‘person’ also started being used in order to define a ‘human-like’ being.

Later ideas for the development of the theory of legal personhood came from many scholars like Hugo Grotius, Samuel von Pufendorf, Wolff etc.47 The inference that can be drawn from a cumulative study of these jurists, is that the legal theory with respect to this was developing towards the idea of understanding law in terms of general principles and concepts.48 ‘*Person*’ served as a central notion of attribution of rights and duties.49 For instance, Wolff provided a distinction between *persona moralis* and *homo moralis*, wherein the former was the subject of rights and duties, indicating a potential right holder/duty bearer while the latter referred to a human being actually holding the concerned rights and duties.50

Another noteworthy contributor to the theory of personhood was Salmond. In his book, he defined a ‘person’ in the same fashion as the Black’s Law Dictionary.51 He regarded the capability of bearing rights and duties as the determinant of personhood.52 He referred to persons as substances to which rights and duties could be later attributed.53 Salmond argued, (which later came to be known as the “interest theory”), that “no being is capable of rights unless also capable of interests which may be affected by the acts of others.”54 Thus, according to Salmond, a person could be defined as any being to whom the law attributes a capability to have interests, and therefore, making them capable of rights, acts and duties.55 In addition to that, Salmond also provided a distinction between natural and legal persons. He regarded natural persons as beings that who have been endowed with legal personality, by the law, in accordance with reality and truth; and legal persons as beings that could be real or imaginary, to whom personality has been attributed by the way of fiction.56

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44 HUGO DONELLUS, COMMENTARIES ON THE CIVIL LAW 1527-1591 (1589).
45 Id.
46 Christian Hattenhauer, Der Menschals Solcher Rechtsfähig– Von der Personzur Rechtsperson in ECKART KLEIN & CHRISTOPH MENKE, DER MENSCH ALS PERSON UND RECHTSPERSON 44–46 (Berliner Wissenschafts-Verlag, 2011) (Basically, an entity comprising of characteristics mentioned above would be deemed as a legal personality).
47 Id.
48 Id.
49 Id.
50 Id.
51 SALMOND, supra note 15, 335.
52 Id.
53 Dewey, supra note 9.
54 SALMOND, supra note 15, 335.
55 SALMOND, supra note 15, 541.
56 Id.
A. OVERVIEW OF CONCEPS OF PERSONHOOD IN CONVENTIONAL WESTERN LEGAL THEORY

Philosopher Kaarlo Tuori had remarked that the distinction between persons and non-persons is the basis of applicability of law that is shared by a majority of Western legal systems. He had also added that the concepts like “legal subjectivity” i.e. legal personality and “subjective right” were basic categories of legal application that supported the “conceptual space for modern law.”\(^{57}\) This concept divides the world into persons and non-persons and concepts have an ‘extension’ or external behaviour and an intension or ‘internal’ characteristics.\(^{58}\) The western theory of legal personhood therefore argues that an important internal characteristic of a “legal person” is “someone or something that holds rights and/or duties.”\(^{59}\) However, on the application of modern theories of rights, where legal personhood has also been granted to entities that do not have these required internal characteristics, it can be observed that the external and internal characteristics may vary from the defined understanding.\(^{60}\)

Major Western systems follow certain shared principles when it comes to the definition of “legal person”. The distinction between a natural person and an artificial/legal person is present across the legislative application of Western jurisdictions.\(^{61}\) In these jurisdictions, the following are the necessary traits of the paradigmatic natural persons:

1. **Humanity:** Only humans are attributed the status of natural persons.\(^{62}\) This condition however, is not very explicit among the local laws, but it is a clear silent presumption for defining natural persons.\(^{63}\) In this regard, the Austrian Civil Code explicitly states, “every human being has innate rights that are obvious to reason, and is therefore to be considered a person.”\(^{64}\)

2. **Birth:** The foundation of the condition of being ‘born’ in order to attain legal personhood dates back to the Roman law.\(^{65}\) It is a widely accepted condition across a majority of Western jurisdictions.\(^{66}\) However, it has been greatly questioned in the recent past during discussions on abortion laws because anti-abortionists argue that

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\(^{57}\) KAARLO TUORI, CRITICAL LEGAL POSITIVISM 186–188 (2002).

\(^{58}\) Id., 186 (The former has to do with what entities in the world the concept corresponds to, and the latter tells us, roughly put, why they are covered by the concept. W.V.O. Quine used the examples of “cordate” (creature with a heart) and “renate” (creature with a liver) to illustrate this: both concepts have the same extension (because every creature that has a heart also has a liver) but different intensions).

\(^{59}\) Kurki, supra note 42.

\(^{60}\) Id.


\(^{63}\) See, supra note 59.

\(^{64}\) See generally TERESA RODRIGUEZ, INTRODUCTION TO SPANISH PRIVATE LAW: FACING THE SOCIAL AND ECONOMIC CHALLENGES 34 (2010) (The condition is explicitly recognised in the German Civil Code, as was noted above, as well as in Part 1, §1 of the Italian Civil Code. In Spanish law, the neonate must live for at least 24 hours outside of the womb in order to be deemed a legal person); For French law See, e.g., PHILIPPE MALAURIE, COURS DE DROIT CIVIL- LES PERSONNES, LES INCAPACITÉS 27 (5th ed., 1999) (“For natural persons, legal personality appears at birth [...] and disappears at death [...].")
fetuses are living entities and ‘legal persons’, and thus, should be treated the same way, i.e., by not giving anyone the right to kill them. If fetuses are to be considered as ‘legal persons’ similar to other human beings, the requirement of being ‘born’ in order to attain legal personhood does not hold ground. In this regard, many a times, stillborn children have been excluded from the ambit of legal persons, whereas children born alive have occasionally been benefitted retrospectively.

3. Alive: It is a widely accepted view that dead people are not regarded as legal persons. However, dead people across jurisdictions do possess some limited legal rights, though they are not considered to be within the ambit of legal persons. In toto, personhood is limited to the life of people.

4. Sentience: In addition to the criteria mentioned above, other criteria that many argue that is required for the grant of legal personhood is sentience. It has been argued that if human beings lack sentience, they do not qualify as persons in the eyes of law. This is why anencephalic infants, who do not possess a brain cortex and lack sentience; and also have been subjects of controversy in and around the United States.

It is to be noted that the above criteria are required for the determination of whether an entity/being, is a person and is not an indicator of legal competence of a person to enter into binding contractual relations. From these arguments put forth by foreign authors regarding the grant of personhood to entities which possess characteristics mentioned above, it can be fairly concluded that in order to be granted personhood, an entity must have human-like traits such as birth, sentience, etc. However, this narrows the ambit of such grants and leads to a clear exclusion of entities, be it living or non-living, such as artificial intelligence and the environment. At the time these arguments were formulated for the grant of personhood, the fight was to recognise women, slaves and other human beings as persons and thus, the argument that everything that has human-like traits is a ‘person’, made sense. However, in the current paradigm, when all humans already have the same rights and the debate is about entities/beings such as animals, environment and artificial intelligence, these approaches have become outdated and overly conventional.

B. INTEREST THEORY

68 NEIL MACCORMICK, INSTITUTIONS OF LAW, AN ESSAY IN LEGAL THEORY 79 (2007).
70 See generally MATTHEW H KRAMER, RIGHTS, WRONGS AND RESPONSIBILITIES 56 (2001).
71 Kurki, supra note 42.
72 Berg, supra note 64, 377–379; JÖRG NEUNER, ZURRECHTSPÄHEIT DES ANENCEPHALUS 651 (2013) (Jörg Neuner analyses anencephalic infants from the point of view of German law and concludes that they are “full legal persons” because the relevant organs – heart, lungs and brain – are still functioning).
73 Kurki, supra note 42.
The interest theory defines rights as being attributable to entities that have interests and whose interests are furthered by duties. No reference is made to the human-like traits of an entity unlike the aforementioned approaches that dominated Western legal theory. The question that naturally follows is concerning the category of entities that can actually have interests, keeping in mind the different interpretations of ‘interests’ that may be forwarded. Kramer, for instance, resolves this by keeping sentient beings as the primary group constituting the class of entities that are interest-theory right holders. Joel Feinberg proposes a similar view when talking about the rights of animals and fetuses, and generally, in the context of Western ethics wherein, the sentience of a person is considered to be an important condition for being a moral patient, in consonance with the equal consideration of interests. In other words, in order to be capable of holding interests, Kramer and Feinberg argue for the requirement of sentience. They argue that as per the interest theory, interests can only be held by those beings that are capable of seeing and perceiving things. This formulation of the interest theory is something we dispute, and shall elaborate upon in the later part of the paper.

However, it must be noted that under the interest theory, one need not be a legal person to be able to possess rights. Some selected rights can be granted to those entities/beings that do not qualify as legal persons. It might be noted that some interests of animals and fetuses are generally recognised in Western jurisdictions and are protected by law. As per the interest theory, both of them already have legal rights, on account of having interests, the protection of which are duties imposed on others; however, neither of them is a legal person since, they do not fulfill the requirements needed for a grant of legal personality. Similar views have been expressed with regards to slaves and the minimum of rights that they could be said to have possessed. Thus, they had some rights as per the interest theory, for instance, the right of not to be killed at will.

Thus, the crux of the interest theory is that personhood can only be granted to certain entities that among other things, are capable of perceiving things, but some selected rights can be granted to these other entities, as according to the modern interest theory, the interests of certain entities (which may not be legal persons) are “sufficient reasons” for holding someone to be under a duty. The interest theory mainly deals with the general considerations that determine to whom any legal duty is owed. It postulates that an entity holds a right when there exists a

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74 This is a crude simplification of Kramer’s interest theory, but it preserves the features of the theory that are relevant for the argument.
75 KRAMER, GETTING RIGHTS RIGHT 49 (1975) (Kramer has a more extensive conception of interests, as he thinks that interests can be ascribed to, for instance, blades of grass, but the normative protections of sentient beings are according to him the primary group of such protections that can be called rights).
77 Id.
78 Kurki, supra note 42.
81 WILLIAM A. EDMUNDSON, AN INTRODUCTION TO RIGHTS 129 (2004).
82 KRAMER, REFINING THE INTEREST THEORY OF RIGHTS 32 (1975).
duty correlative to that right, which is in the interest of the right-holder. Interests may be subjective or objective. The most commonly accepted form of the interest theory of rights takes interests to be subjective or psychological, which requires right-holders to have mental faculties. However, in this paper, we argue that the objective approach to interpreting ‘interests’ should be adopted to allow the inherent value of natural ecosystems to be considered as the basis for the attribution of certain specific rights to them. This will result in the accrual of “non-psychological benefits” to nature, such as the “fulfillment of natural purposes and the preservation of functional integrity”. One of the significant achievements of the interest theory has been the specification of the divide between personhood holders and other entities that are not granted personhood but are still capable of holding legal rights. This idea has further been explored in Part V of this paper.

C. WILL THEORY

As per the will theory, holding of rights by an entity is equated with control over its duties. This control has been characterised as the one exerted by rational beings with a sound mind similar to a human adult. In this theory, it is also argued that legal personality constitutes active and passive elements. The former requires the mental capabilities akin to an adult human brain while the latter merely requires sentience. The proponents of the Will Theory include such names as Bernard Windscheid, Herbert L. A. Hart, Nigel Simmonds and Hillel Steiner.

This theory claims that having a right entitles entities to make free choices from available options. It departs from the interest theory on the grounds that an essential point of having a right is not protection of interests but exercise of freedom of choices. Right holders are conferred with a range of control over the duties owed by others towards them. Therefore, a legal right under this theory is not a tool of passive protection but rather a delegation of active powers to make discretionary use of some duty-imposing rules.

The criticisms of this theory arise in connection with issues related to infancy and non-sentient beings. This is because it is very difficult to presume that law has given the authority to these entities to exercise their will to control the duties. Additionally, will theory becomes difficult to reconcile with the theory of inalienable or inherent rights that can be exercised without any regard to the free

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83 Id.
84 ANDREW KEMOHAN, ENVIRONMENTAL ETHICS: AN INTERACTIVE INTRODUCTION 87 (2012).
85 Id.
86 Id.
87 Kurki, supra note 42.
88 Id.
89 Id.
91 Id.
92 Id.
93 Id.
95 Id.
will.\textsuperscript{96} Therefore, will theory does not have much use in the modern context of grant of personhood.

III. RECOGNITION OF NATURE AS A HOLDER OF RIGHTS

India granted legal personhood to the Ganges and the Yamuna, to ensure protection of their rights, close on the heels of New Zealand; which had passed a legislation recognising the Whanganuiriver as a legal person in March, 2017.\textsuperscript{97} At the outset, it is necessary to point out that the idea of attributing legal personality to natural objects so as to protect their rights is not new to environmental theory. The first time that such a proposal was made, was by Professor Christopher Stone in his article, ‘Should Trees Have Standing? – Toward Legal Rights for Natural Objects’,\textsuperscript{98} where he suggested that nature should be given a voice of its own, a direct standing in court.\textsuperscript{99}

A. ORIGINS OF THE ‘RIGHTS OF NATURE’ THEORY

Professor Stone in the aforementioned article suggested that the natural environment should have rights.\textsuperscript{100} However, these rights did not necessarily need to be the same body of rights that human beings possessed.\textsuperscript{101} According to Professor Stone, it was not right to deny the natural environment rights, merely because it could not speak, and thus, he proposed that there must be guardians to represent nature, oversee its affairs and speak for it in court.\textsuperscript{102}

In this regard, he proposed that natural objects be considered ‘persons’ or holders of rights, such that they may be represented in Court by legal guardians,\textsuperscript{103} since they themselves were incapable of protecting their own rights. According to Professor Stone, this approach of 'guardianship' would allow suits to be brought directly in the name of the injured natural objects, as they would now have standing in their own right,\textsuperscript{104} implying that the guardian/representative of the natural object would not have to show direct injury to his/her own interests in order to establish standing. Professor Stone also pointed out that if this approach were to be adopted, the courts would have to take into account injuries to the environment and not injuries to the persons as users of the environment.\textsuperscript{105} Furthermore, giving the environment legal standing would mean that the environment itself would be the beneficiary of favourable judgements, and the damages awarded therein.\textsuperscript{106}

\textsuperscript{96} See HLA Hart, \textit{Are There Any Natural Rights}, 64 PHILOSOPHICAL REVIEW 2, 175–191 (1955).
\textsuperscript{97} The Conversation, \textit{Three rivers are now legally people – but that’s just the start of looking after them}, March 24, 2017, available at https://theconversation.com/three-rivers-are-now-legally-people-but-thats-just-the-start-of-looking-after-them-74983 (Last visited on June 27, 2018).
\textsuperscript{98} Stone, supra note 30.
\textsuperscript{99} Id.
\textsuperscript{100} Stone, supra note 30, 456.
\textsuperscript{101} Id., 457.
\textsuperscript{102} Id., 464.
\textsuperscript{103} Id., 464, 473.
\textsuperscript{104} Id., 481-482. (“[D]amage to and through them [natural objects] would be ascertained and considered as an independent factor”).
\textsuperscript{105} Id., 473-474.
\textsuperscript{106} Id., 480.
Subsequently, Douglas J., in his famous dissent in *Sierra Club v. Morton*, drew inspiration from Professor Stone’s 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. In this case, the Sierra Club, a non-profit organisation, dedicated to environmental protection, claimed that its interests in the conservation, protection and sound management of natural parks would be harmed if Walt Disney were allowed to construct the Mineral King Resort in the Sequoia National Forest. The Ninth Circuit found that the Sierra Club did not have standing to sue since it had not alleged a unique, private injury to its own interests. Sierra Club thereafter appealed before the U.S. Supreme Court, where the majority agreed with the Ninth Circuit. However, Douglas J. dissented and held that “[t]hose who have [an] intimate relation with the inanimate object about to be injured, polluted, or otherwise despoiled are its legitimate spokesmen,” and thus, should be allowed to represent the natural object in Court.

However, there are several ambiguities in Douglas J.’s dissent. Although the dissent has surely left a mark in the field of environmental law, it has hardly provided a clear theoretical and legal basis for the development of an eco-centric model whereby the natural environment is allowed to possess rights, and thus, enforce them.

It is not clear from his dissenting opinion whether he believed that the natural environment of Mineral King, a valley in the southern part of Sequoia National Park, California, as a whole, should have been given legal standing in Court, or whether there were specific ecological units that should have received the grant of legal personality, and consequently, legal standing. It is also not clear from his judgement, what body of rights the environment could possess, and therefore, be enforced in a court of law. Moreover, his theory of guardianship is also exceedingly vague and leaves us confused with regard to the substance of his dissenting opinion.

According to him, “[t]hose who hike [...] [Mineral King], fish it, hunt it, camp in it, frequent it, or visit it merely to sit in solitude and wonderment are legitimate spokesmen for it, whether they may be few or many.” However, on the other hand, he also said in his judgment that “those who merely are caught up in environmental news or propaganda and flock to defend these ... areas” were not qualified to be guardians or representatives in Court. This seems to be a departure from what Professor Stone had suggested. According to Professor Stone, the “friends” of nature, who had shown an abiding interest in its preservation, and were competent to deal with the technicalities, would be qualified to be considered guardians of the

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108 Id., 741-742 (Douglas J. dissenting).
109 Id., 730.
110 Sierra Club v. Hickel, 433 F.2d 24 (9th Cir. 1970).
112 Id., 745 (Douglas J. dissenting).
114 Id.
115 Id.
117 Id., 752.
environment, and therefore, would also be capable of enforcing the rights of the natural environment, in its own name. In direct contradiction, it seems that Douglas J. only argued for allowing those who had a personal stake in the protection of a natural ecosystem or object, to have legal standing to enforce nature’s rights. This, in fact, seems to be a reiteration of the gist of the majority opinion in the case.

If substance of Douglas J.’s judgement was that legal standing was to be given to only those who could display that they were frequent users of the natural environment then Douglas J’s opinion seems to be telling us in a roundabout, albeit sympathetic way, that to qualify as a guardian, one would have to first show a legal interest and only then could such guardian proceed to enforce the rights of nature. In this regard, Blackmun J.’s argument seems more realistic and legally robust. He does not go so far as to say that nature should have standing. Instead, he opines that it would benefit the environment if the law were to expand standing to give organisational or associational standing to environmental groups and organisations which have shown bona fides in its protection and preservation. In any case, it is important for us to acknowledge the fact that despite leaving a lot of questions unanswered, Douglas J.’s dissent in Sierra Club is extremely symbolic and has paved the way for the progress of the rights of nature movement.

B. IMPLEMENTATION OF THE ‘RIGHTS OF NATURE’ THEORY

This part deals with the recent implementations of the ‘Rights of Nature’ theory. It is pertinent to note that the rights of nature movement is aimed at recognising nature as a holder of rights, and also aims to move away from the predominant discourse, wherein nature is treated as a mere object of protection because of the underlying human interest in doing so.

In this regard, few countries, such as Ecuador, Bolivia, India, New Zealand, and also a few local governments in the United States, have implemented rights of nature regimes. However, not all of them recognise the rights of nature through a grant of personhood. In this part of the paper, we therefore attempt to review these different regimes so as to determine the nuances of the different approaches that have been adopted.

1. Ecuador

Ecuador created history in 2008 by adopting the rights of nature theory and incorporating it in its Constitution. The Constitution of Ecuador now accords nature certain rights, and exhorts that “all persons, communities, peoples and

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118 Stone, supra note 30, 466.
121 Adam Sowards, Should nature have standing to sue?, January 19, 2015, available at http://www.hcn.org/issues/47.1/should-nature-have-standing-to-sue (Last visited on June 27, 2018).
122 Gordon, supra note 31, 53.
123 Id.
124 Id., 53-55 (In Ecuador and Bolivia there has been no direct recognition of nature as a ‘person’).
nations can call upon public authorities to enforce the rights of nature.\textsuperscript{127} However, the rights of nature have been made subject to the requirements of national development,\textsuperscript{128} and all natural resources are still considered to be the inalienable property of the State.\textsuperscript{129} Ecuador’s dependence on extractive industries which heavily exploit natural resources seems to be ironic against the backdrop of the rights of nature theory being incorporated within the Constitution.\textsuperscript{130} Thus, while in a few matters, the rights of nature have been upheld,\textsuperscript{131} in certain cases, development has been given precedence.\textsuperscript{132}

Although the success of recognising the rights of nature in Ecuador is still debated, it must be noted that the constitutional recognition of such rights has been a significant step towards the inculcation of an ecocentric ethic in the field of environmental law. This is on account of Ecuador having adopted the path of environmental constitutionalism or eco-constitutionalism, whereby every person or community has the power to seek the exercise of public authority to enforce the rights of nature, through normal constitutional processes.\textsuperscript{133} Ecuador has hence moved away from the more anthropocentric orientation of human environmental rights (the

\textsuperscript{127} Id., Art. 7 (These rights include the “right to exist, persist, maintain and regenerate its vital cycles, structure, functions and its processes in evolution”).
\textsuperscript{128} Jayatilaka, supra note 125, 9.
\textsuperscript{129} Id.; See the Constitution of the Republic of Ecuador, 2008, Art. 408.
\textsuperscript{131} (The rights of nature in Ecuador were successfully upheld in the case of Wheeler c Director de la Procuraduría General Del Estado de Loja, where the Vilcabamba-Quinara road expansion project parallel to the Vilcabamba river, was in breach of nature’s rights, due to the dumping of construction debris into the river, resulting in the narrowing of its width and flooding of nearby areas, subjecting the surrounding populations to significant risks. The Provincial Court of Justice allowed nature’s rights to prevail and held the Provincial Government responsible for flooding damages.) See Jayatilaka, supra note 128, 33; (Another case where the rights of nature were upheld was the Galapagos Shark Finning case, where the Ninth Circuit Court in the Province of Guayas decided in favour of the rights of nature, and ruled that the captain and the crew members of the industrial fishing vessel Fer Mary I were guilty of fishing for a protected species (sharks), within the Galapagos Marine Reserve.) See Craig M. Kauffman & Pamela L. Martin, Can Rights of Nature Make Development More Sustainable? Why Some Ecuadorian lawsuits Succeed and Others Fail, 92(C) World Development 7 (2017).
\textsuperscript{132} (In the case concerning the Condor Mirador Mining Project, concerning an open-pit mining project, in a bio-diversity hotspot, it was held, despite proof of the fact that the mining project would damage the protected area and the ecosystems it housed, that the public interest in development took precedence over the protection of nature. This case is currently under review before Inter American Court of Human Rights. Also, quite surprisingly in the Tangabana Paramos case - a constitutional matter, where a lawsuit was filed to remove the pine plantations in the Paramo of Tangabana, as the pine plantations were interfering with the rights of the paramo under the Constitution, to maintain its vital cycles - it was held that the claimants not being owners of the land were not competent to bring the suit before the court. This decision was also upheld by the provincial court. This was upheld despite the fact that the Constitution of Ecuador allows anyone to bring a suit on behalf of nature. An appeal against the decision has been made before the Constitutional court.) See Craig Kauffman and Pamela Martin, Rights of Nature Lawsuits in Ecuador, available at https://blogs.uoregon.edu/craigkauffman/rights-of-nature-lawsuits-in-ecuador/ (Last visited on July 2, 2018).
original subject of the environmental constitutionalism), and has therefore expressly given environmental constitutionalism a clear eco-centric orientation.\footnote{134}{Paola Villavicencio Calzadilla Louis J. Kotze, Environmental Constitutionalism and the Ecocentric Rights Paradigm: The Rights of Nature in Ecuador and Bolivia in New Frontiers in Environmental Constitutionalism (Erin Daly, Louis Kotze et al., 2017) (published by the United Nations Environment Programme).}

However, it must be noted that nature in Ecuador has not been granted legal rights, through recognition of personhood.\footnote{135}{Gordon, supra note 31, 54.} The Constitution of Ecuador merely recognises nature as a bearer of rights.\footnote{136}{Id.} However, some others believe that this grant of rights has also been through the process of recognition of nature as a legal person,\footnote{137}{See Anna Leah Tabios Hillebrecht, Disrobing Rights: The Privilege of Being Human in the Rights of Nature Discourse in Can Nature Have Rights? Legal and Political Insights, RCC Perspectives: Transformations in Environment and Society 6 (Anna Leah Tabios Hillebrecht & Maria Valeria Berros, 2017); Jens Kersten, Who Needs Rights of Nature? In Can Nature Have Rights? Legal and Political Insights, RCC Perspectives: Transformations in Environment and Society 13 (Anna Leah Tabios Hillebrecht & Maria Valeria Berros, 2017).} even though the Constitution of Ecuador does not specifically refer to nature as a legal person. However, this does not take into account the fact that nature, in Ecuador, is deemed to be a rights-holder, distinct from “persons, communities, peoples, nations” and “natural persons and legal entities.”\footnote{138}{Gordon, supra note 31, 54.}

2. Bolivia

In 2009, Bolivia accorded similar rights and protection to natural ecosystems.\footnote{139}{Dinah Shelton, Nature as a Legal Person, ¶25 (September, 2015), available at https://journals.openedition.org/vertigo/16188#ftn59 (Last visited on July 2, 2018).} The Bolivian Constitution, like the Ecuadorian Constitution, allows any person to legally defend the rights of the environment.\footnote{140}{The Constitution of the Republic of Ecuador, 2008, Art. 34.} The rights of nature as recognised in Bolivia include the right to life and the right to exist; the right to continue vital regeneration cycles and processes free from human alteration; the right to pure water and clean air; the right to ecological balance; the right to restoration of life systems affected by human activities, right against genetic modification, etc.\footnote{141}{Jayatilaka, supra note 125, 8.}

Again, the Framework Law on Mother Earth and Integral Development for Living Well, which is the most recent law in Bolivia, which grants nature comprehensive rights, seeks to establish a balance between developmental activities and environmental protection.\footnote{142}{Id., 10-11.} This law has also been opposed by indigenous groups which claim that the law needs to establish a mechanism whereby their consent is obtained before proceeding with such developmental projects.\footnote{143}{Shelton, supra note 139.}

Interestingly, in Bolivia too, nature has not been recognised as a legal person but has instead been “[f]or the purpose of protecting and enforcing its rights”, deemed to be in the nature of “collective public interest”.\footnote{144}{Ley de Derechos de la Madre Tierra, Law 071, Art. 5, 2010 (Bolivia).} In this context, are the “inherent rights” of nature recognised.\footnote{145}{Id.} In both Ecuador and Bolivia, nature has been personified as Pachamama or Mother Earth which is deemed to be living
entities.\textsuperscript{146} However, there has been no grant of legal personhood, as such. Despite such personification largely based on the worldviews of indigenous people, the rights and responsibilities of Earth have not been compared to that of living persons or natural persons. Instead, there has been recognition of nature’s right to protect its vital interests, along with the imposition of certain duties on persons, communities and legal entities.

This seems to be an adoption of the interest theory of rights. The only missing link is the absence of sentience. However, we argue that having interests is not dependent upon the requirement of sentience. If within the interest theory, animals and fetuses can have rights despite conflicting debates as to them being sentient beings, natural ecosystems — which are entities and whose sentience is also the subject of much debate — can also hold rights then. Moreover, the argument that one cannot have rights within the interest theory if one lacks rudimentary cognitive awareness,\textsuperscript{147} and thus, is not aware of one’s own interests, effectively implies that irreversibly paralysed “vegetating” humans cannot have rights and fetuses cannot have rights.\textsuperscript{148} Such a stance goes against the tenets of human rights and should therefore stand rejected, and hence, fetuses and newborns in fact, have rights within the interest theory because of their potential to have rights and not because of their awareness of the same.\textsuperscript{149} All humans, irrespective of their awareness of their interests enjoy certain basic rights such as the right to life and human dignity. If newborn children or vegetating humans are deprived of these rights on the basis that they cannot possibly be aware of their own interests then we will have an anomalous situation. In such a case, questions such as the legality of withdrawal of care or of treatment would not need to be debated at all; as it could be assumed that in the absence of a right to life or of a dignified death, their care-givers or families could take any decision in respect of the continuation or termination of their life. Also, the proposition that newborn babies do not have the right to life is not only preposterous but also extremely dangerous. Hence, we cannot say that the precondition for having rights is an awareness of one’s interests. Possession of interests should be enough and these interests should be dependent on correlative duties. Thus, we adopt Kramer’s approach whereby an entity holds a right when there exists a duty correlative to that right, which is in the interest of the right-holder.\textsuperscript{150}

Nature can thus have rights according to the interest theory since it has interests that need protection even though, it may not have cognitive awareness of the same.\textsuperscript{151} If potential to have interests entitle fetuses and newborns to have rights,\textsuperscript{152} sentience or cognitive awareness should not be a criterion for nature to be a holder of rights. Thus, the recognition of interests is best done through an objective determination, on the basis of duties owed; instead of it being a subjective analysis of one’s own interests.

\textsuperscript{147} It resulted in the potential or capacity to have interests that is a compound of desires, aims, and beliefs.
\textsuperscript{149} Id.
\textsuperscript{150} KRAMER, supra note 82.
\textsuperscript{151} Id.
\textsuperscript{152} Id.
3. Local recognition in the U.S.A

Even before Ecuador and Bolivia recognised the rights of nature, nature’s rights were recognised in an ordinance passed by Tamaqua Borough of Schuylkill County, Pennsylvania, where the natural ecosystems in the area were recognised as legal persons, capable of enforcing civil rights. This ordinance, passed in 2006, executed what Professor Stone had envisioned. It allowed residents to file suits on behalf of the natural ecosystem, against injury caused to the land through the application of sewage sludge. Moreover, it also provided that the damages that would be recovered in these lawsuits would be used to restore the affected and injured ecosystems and natural communities.

Similar rights of nature ordinances have been passed in other parts of America, such as in Santa Monica, California, Pittsburgh, Pennsylvania, Shapleigh, Maine, Barrington, New Hampshire, etc. Most of these local ordinances have not been tested in Court, and some from the rest of them have been invalidated. For instance, in October 2015, the U.S. District Court for the Western District of Pennsylvania invalidated parts of the Community and Nature’s Rights Ordinance, on the ground that the Township had exceeded its authority in regulating the development of oil and gas well through the said ordinance. However, it did not address the question of whether nature had a right to sue in its own name.

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154 Tamaqua Borough Sewage Sludge Ordinance, 2006, §7.6 (Tamaqua Borough, Schuylkill County, Pennsylvania, the United States of America).
155 Id., §12.2.
156 City of Santa Monica Sustainability Rights Ordinance, 2013, 4.75.040(b) (Santa Monica, California, the United States of America) (“Natural communities and ecosystems possess fundamental and inalienable rights to exist and flourish in the City Of Santa Monica. To effectuate those rights on behalf of the environment, residents of the City may bring actions to protect groundwater aquifers, atmospheric systems, marine waters, and native species within the boundaries of the City.”).
157 Home Rule Charter of the City of Pittsburgh, Pennsylvania, 2010, §618.03(b) (“Natural communities and ecosystems, including, but not limited to, wetlands, streams, rivers, aquifers, and other water systems, possess inalienable and fundamental rights to exist and flourish within the City of Pittsburgh. Residents of the City shall possess legal standing to enforce those rights on behalf of those natural communities and ecosystems.”).
158 Large-Scale Groundwater Extraction Ordinance of the Town of Shapleigh, Maine, 2009, §§ 99-12, 99-17(“Any Town resident shall have standing and authority to bring an action under this article's civil rights provisions, or under state and federal civil rights laws, for violations of the rights of natural communities, ecosystems, and Town residents, as recognized by this article”).
159 Community Bill of Rights Ordinance, 2014, §2 (“Ecosystems, including but not limited to, wetlands, streams, rivers, aquifers, and other water systems, possess rights to exist and flourish within the Town of Barrington. Residents of the Town shall possess legal standing to enforce those rights on behalf of those ecosystems”).
161 Id.
162 Id.
163 Id.
nature activists therefore argue that for a paradigm shift, the rights of nature theory need to be implemented by changing the Constitutions of States.  

Despite such adverse rulings, it must be noted that the rights of nature movement no longer remains at the periphery of the legal system, as more than 150 local communities, in more than twenty four towns and cities have passed rights of nature ordinances in the United States.  

Most of these ordinances deal with gas drilling and hydraulic fracturing. Since 2010, more than eighteen municipalities in California, New York, New Hampshire, Maine, Maryland, Ohio, Pennsylvania, and Virginia have enacted Community Bills of Rights which prohibit natural gas drilling and hydraulic fracturing or fracking, which threaten to harm endangered ecosystems.

Most of these ordinances and community legislations elevate the rights of the community over corporate personhood rights and make sure that corporations are unable to wield the Commerce and Contracts Clauses of the US Constitution to override the communities’ decisions. Furthermore, these rights of nature ordinances also display how even communities which do not consist of indigenous populations with distinct worldviews, can attribute rights to the ecosystem, in order to ensure its protection and well-being.

IV. RECOGNISING RIVERS AS PERSONS IN THE ‘RIGHTS OF NATURE’ PARADIGM

In this part of the paper, we have attempted to analyse the cases of recognition of rivers as persons, with reference to the ‘rights of nature’ theory. Rights of rivers have been recognised in Ecuador, New Zealand, Columbia and India. In New Zealand, Columbia and India, the attribution of rights has been through the attribution of legal personality to rivers. In Ecuador, the constitutional rights granted to nature, have merely been recognised by the Courts in the context of rivers.

For the purpose of this paper, the instances of attribution of rights to rivers have been analysed below and the motivations behind doing so have also been explored and compared.

A. BACKGROUND

1. New Zealand

The Whanganui river, which is New Zealand’s third largest river and also its longest navigable river, was granted legal personhood. Through the passing

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164 Id.
166 Id., 138.
167 Id.
168 Id.
of the Te Awa Tupua (Whanganui River Claims Settlement) Act, 2017 (‘the Te Awa Tupua Act’),\(^{172}\) the river was recognised as a legal person, and was accorded “all the rights, powers, duties, and liabilities of a legal person”.\(^{173}\) 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 recognised and respected.\(^{174}\)

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 river.\(^{175}\) In 1840, the Treaty of Waitangi was signed between the British Crown and Maori chiefs, which recognised the Maori ownership of the Whanganui River, surrounding land, forests, etc. and assured the Maori people of the protection of their rights.\(^{176}\) While in the Maori version of the treaty, the Iwi retained sovereignty over their river and land, the English version of the same treaty 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 interference.\(^{177}\) Despite this, the treaty was breached by the Government and the Crown assumed control and management of the natural resources over the years, and the Iwi realised that their interests were being exploited instead of being protected.\(^{178}\)

Over the years, the Whanganui Iwi kept asserting their rights and interests over the river.\(^{179}\) As such, their claims to ownership became the subject matters of litigation in courts between 1938 and 1962.\(^{180}\) 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 Crown.\(^{181}\) 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

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\(^{172}\) Te Awa Tupua (Whanganui River Claims Settlement) Act, 2017, §12 (“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”).

\(^{173}\) Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, § 14.


\(^{176}\) Patricia Burns, FATAL SUCCESS: A HISTORY OF THE NEW ZEALAND COMPANY 153 (Henry Richardson, 1989).


\(^{178}\) Id.


\(^{181}\) Id.; Re the Bed of the Whanganui River (1962) NZLR 600.
been renounced or surrendered by them. \(^{182}\) Thereafter, negotiations were underway
between the Whanganui River Maori Trust Board and the New Zealand government,
regarding the settlement of historical claims. \(^{183}\) In 2014, a final deed of settlement was
signed by the Iwi, concerning their historical claims. \(^{184}\) This deed was given effect to
by the Te Awa Tupua Act, which recognised Te Awa Tupua as a legal person, \(^{185}\) and
appointed the Te Pou Tupua, \(^{186}\) to be its representative. \(^{187}\)

The indigenous Maori people regard mountains, rivers, etc. as Tupuna or ancestors. \(^{188}\) 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”. \(^{189}\) As such, the recognition of the Whanganui river as a legal person is in
line with the tribal philosophy that nature is personified and has its own life force. \(^{190}\)

Recognising this, the Act besides appointing the Te Pou Tupua, provided for the Te Karewao, an advisory group to assist the Te Pou Tupua, \(^{191}\) 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 Köpuka, to jointly advance the well-being of the river. \(^{192}\) Most
importantly, the Act set Upa trust, members of which have been given standing to be
heard in any matter relating to or affecting the Whanganui River, and to be treated as
interested persons or a party. \(^{193}\) 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

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\(^{184}\) Id.

\(^{185}\) Te Awa Tupua (Whanganui River Claims Settlement) Act, 2017, §69 (Te Awa Tupua is the area “comprising the River from the mountains to the sea, its tributaries, and all its physical and metaphysical elements, as an indivisible and living whole”).

\(^{186}\) Id., §§18, 20 (Te Pou Tupua is the office created by the Act “to be the human face of Te Awa Tupua and act in the name of Te Awa Tupua”. The Te Pou Tupua comprises two people, one nominated by the Iwi – keeping in mind the interests of the Whanganui River – and another nominated on behalf of the crown).


\(^{188}\) Morris, supra note 180, 49-50.

\(^{189}\) Id., 50.

\(^{190}\) Id., 49-50.

\(^{191}\) Te Awa Tupua (Whanganui River Claims Settlement) Act, 2017, §27.

\(^{192}\) Id., §29.

\(^{193}\) Id., §§72-73.
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, 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 approval.

2. India

Shortly after the passing of the Te Awa Tupua Act in New Zealand, the Uttarakhand High Court in India, extended legal personhood to the Ganges and the Yamuna. This was done in the course of a Public Interest Litigation (‘PIL’), which challenged illegal mining and stone crushing, and constructions along the Ganges. In 2016, the Uttarakhand High Court had ordered the removal of illegal constructions and had also directed that the Ganga Management Board be constituted. The order also directed that mining of the Ganga river bed and its highest flood plain area be prohibited. In addition, the Court had also 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 sharing.

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, living entities, “having the status of a legal person with all corresponding rights, duties and liabilities of a living person”. 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

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194 Id., §§57-59.
195 Id., §§ 64-65.
196 Id., §66.
197 Id., §67.
198 Id., Schedule 6.
199 Ashish Kothari, Mari Margil & Shrishtee Bajpai, Now rivers have the same legal status as people, we must uphold their rights, April 21, 2017, available at https://www.theguardian.com/global-development-professionals-network/2017/apr/21/rivers-legal-human-rights-ganges-whanganui (Last visited on June 7, 2018).
202 Id.
203 Id.
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’), 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 Tūhoe-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 authorisation or permits.

3. Ecuador and Columbia

The first instance of attribution of rights to a river by a Court of Law was in the case of the Vilcabamba, in Ecuador. In this case, a road was being constructed along the Vilcabamba River and rocks and other construction material were being deposited on the river bed. The case was brought before the court by some affected citizens. The ruling did not recognise the river as a legal person explicitly, but recognised the plaintiff’s right to sue on the basis of Article 71 of the Constitution of Ecuador. The Court recognised that nature had rights and held that the contractor constructing the road had to follow a set of environmental guidelines

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206 Id.
207 Id., ¶20.
208 Writ Petition (PIL) No.140 of 2015.
209 Id., 63.
210 Id., 64-65.
211 Id., 41-42.
213 Id., §§17-20.
214 Id., §§55, 58.
215 Pecharroman, supra note 173, 29.
216 Id.
217 Id.
and recommendations that the Ministry of Environment had previously issued.\textsuperscript{218} The Court however did not order that the construction be ceased.\textsuperscript{219}

The most recent instance of attribution of legal personality to a river has been in the case of the Atrato River in Columbia, which was recognised as a legal person and a holder of rights, about a month after the Ganges and Yamuna were granted legal personhood.\textsuperscript{220} The Constitutional Court of Columbia declared that the Atrato River basin possessed the rights to “protection, conservation, maintenance, and restoration.”\textsuperscript{221} However, there is a departure in the reasoning of Court from that which guided the grant of personhood to rivers in New Zealand and India. In Columbia, the Atrato River was declared a holder of rights because of what it provided for and contributed towards human well-being, and not because the river was itself equated to human life.\textsuperscript{222}

Illegal mining along the bed of the river was resulting in its pollution and degradation and was harming the health of the community inhabiting the surrounding areas.\textsuperscript{223} The Government refused to stop these activities, and consequently, the case was brought before the court.\textsuperscript{224} The Court recognised that there existed “serious violation of the fundamental rights to life, health, water, food security, the healthy environment, the culture and the territory of the ethnic communities that inhabit the Atrato River basin and its tributaries, attributable to the Colombian State entities,” and on this basis, the right of the river to be protected, preserved and restored by the State and the communities was recognised.\textsuperscript{225} The Court attributed legal personality to the river and directed the government to appoint two representatives of the river, a member of the community and a representative of the government.\textsuperscript{226}

B. CRITICAL ANALYSIS OF THE GRANT OF PERSONHOOD TO RIVERS IN INDIA, WITH REFERENCE TO THE MANNER OF SUCH GRANTS IN OTHER JURISDICTIONS

The question that necessarily follows after the discussion above is whether such attribution of legal personality to natural objects, is the best approach to address environmental problems in India. In this section we have therefore highlighted the practical problems with the grant of personhood to the Ganges and the Yamuna, while also drawing comparisons with the situation in other jurisdictions, \textit{i.e.}, New Zealand, Ecuador and Columbia. The concerns as to the actual import and effect of the judgement are discussed below.

\textsuperscript{218} \textit{Id.}
\textsuperscript{219} \textit{Id.}
\textsuperscript{222} \textit{Id.}
\textsuperscript{223} Pecharroman, \textit{supra} note 173, at 30.
\textsuperscript{224} \textit{Id.}
\textsuperscript{225} \textit{Id.}
\textsuperscript{226} \textit{Id.}
1. Concerns regarding the ascription of rights to rivers and other natural objects by High Court

The Uttarakhand High Court has not only declared the two rivers and the “glaciers including Gangotri and Yamunotri, rivers, streams, rivulets, lakes, air, meadows, dales, jungles, forests, wetlands, grasslands, springs and waterfalls” to be legal persons, but has also accorded them substantive rights as possessed by a living person, while imposing upon them duties and liabilities similar to that of a living person. However, the Court has not defined the content of these rights and duties, nor has the Court determined how the balance between the rights of these natural entities and the rights as well as interests, both economic and social, of natural persons, shall be struck. There is no clarity as to the content of the rights possessed by the rivers, and it is not clear from the judgements if the rights of the rivers shall extend to the creatures in its ecosystem, or even whether, all the rights of the rivers are to be given precedence over human interests, in their exploitation, for fulfilling everyday needs.

Merely saying that rivers possess rights does not serve as an effective guideline. The High Court has also not sufficiently justified why only these natural entities should be considered to be legal persons, and should henceforth, enjoy rights, while other natural entities are denied such status.

In fact, the fallacy that exists in the belief that simply giving rights to nature will solve our environmental problems has been pointed out. Cynthia Giagnocavo and Howard Goldstein believe that it does great harm to simply ascribe rights to the natural environment. They argue that once nature is given a “voice” in the Court, and its rights are denied by the courts in the interest of human needs, there is a legitimisation of such a denial of nature’s rights, and thus, protection of the environment takes a backseat.

The above, for instance, has already happened in Ecuador and Bolivia, where human interests in developmental activities have been given precedence over the rights of nature. Rights of nature arguments have been successful only in a few cases, and have never been successful against large extractive industries. For instance in Ecuador, the 2009 Mining Law was upheld by the Constitutional Court, even when it prejudiced the rights of nature. Such a result has the effect of laying down a precedent, justifying the deprivation of the rights of nature so as to allow the

228 Kothari, supra note 199.
229 Emmenegger, supra note 148, 581.
231 Id., 369-370.
232 Id., 370.
234 Gordon, supra note 31, 53.
235 See Kauffman supra note, 132.
continuance of extremely harmful activities undertaken by humans for the fulfilment of their ever growing needs. If the Inter-American Court of human rights also happens to uphold the decision of the Constitutional Court of Ecuador, the rights of nature will effectively be reduced to insignificance.

Cynthia Giagnocavo and Howard Goldstein also point out that while rights generate discourse, they destroy the feeling of community or collectiveness, as now humans and corporations view the environment as the “other”, possessing competing rights. They also highlight how when it comes to adjudication, the competing interests and rights of the State may always be allowed to prevail over those of nature. Even in Ecuador, as argued above, the results are always not in line with the rights of nature philosophy. In the case concerning the open-pit mining project in El Condor Mirador, a biodiversity hotspot, the Court allowed the mining to proceed even when the environmental impact assessment had established that there would be contamination of the spot, which would possibly result in the extinction of at least three endemic amphibian species and one reptilian species found there. The Court held that the public interest in developmental activities would always be allowed to prevail over the constitutionally guaranteed rights of nature.

Therefore, it becomes all the more important to delineate the scope of rights that nature possesses such that we are able to clearly identify the range of human activities that are allowed, in circumstances where the interests of nature also need to be considered. The interest theory of rights needs to be adopted, such that the grant of rights to nature stem from duties owed by humans. Thus, the rights of nature need to be located in the duties that humans owe to nature instead of ascribing rights to nature in the abstract. As such, having a defined set of duties that humans must perform, from which emanate the rights of nature, will help the implementation and protection of these rights. This will lead to a better balancing of interests, as we shall understand clearly, the scope of nature’s rights and their relationship with the duties and obligations that humans have towards nature.

The benefits of such an approach are twofold. Nature does not remain a mere an object of protection, (although humans still owe obligations and duties to nature), as an eco-centric ethic emerges from the recognition of nature’s rights, based on these duties. Humans thus become the trustees of nature and now have the duty to preserve and protect it.

Moreover, it is not our argument that granting nature rights shall prove to be a redundant effort, and thus, we argue that the second benefit of such an approach of locating the rights of nature in human duties shall be the generation of discourse. Rights generate discourse, and at this juncture, it may be observed that any effort towards the preservation of nature is going to be slow in reaping benefits, in light of the anthropocentric discourse which dominates. Rights when granted will be weak, and sometimes human interests will be given precedence, but the recognition of nature’s rights, as a result of the need to protect valuable interests of these natural objects will help develop an eco-centric ethic in environmental law, thereby giving

236 Giagnocavo & Goldstien, supra note 230, 371.
237 Id., 370 (They argue that even after giving nature rights, “the bulldozers of "progress" will plow under all the aesthetic wonders of this beautiful land”).
238 Jayatilaka, supra note 125, 34.
239 Id.
240 Id., 35.
241 Borràs, supra note 165, 114.
momentum to preservation efforts. Recognition of rights will lead to growing normalcy and care for these rights.242

However, care must be taken to ensure to prevent the ‘otherisation’ of nature. Nature’s interests should not be seen as competing interests, and thus, it is important to recognise mankind’s duties towards nature. From these duties, we can identify different rights that nature possesses. As part of this approach, based on the interest theory of rights, it also must be understood that ‘interests’ are to be interpreted objectively and not subjectively.

The rights of nature movement argue that natural entities have interests and preferences that if recognised by way of some legal fiction can be politically expressed and legally enforced.243 Thus, applying the interest theory of rights, we in turn argue that since natural entities have interests requiring protection, they qualify as holders of rights. While this approach may seem to be a dilution of the rights of nature theory, which concentrates more on the intrinsic value of nature than on the duties owed by humans to nature,244 it is really not an erosion of the tenets of the theory. Recognition of duties is important for the success of the rights of nature movement, as the problems of merely ascribing nature rights in the abstract, may counteract any move towards the development of an eco-centric approach to protection of the environment. The interest theory of rights is not a compromise, as even though we shall locate nature’s rights in the duties owed by human beings, we will also be recognising nature as a holder of rights on the basis that it has interests worthy of being furthered through the recognition of these rights. Acknowledgement of nature’s rights because of its intrinsic value which requires protection is distinct from protecting nature solely for human welfare.

Furthermore, the grant of rights to rivers in India by means of humanisation is problematic in itself. If we are to assume that the rights granted to nature are now the same as those of a living person as both of the judgements claim, the situation becomes counterproductive and the interests of nature are viewed as competing interests, besides giving rise to several practical anomalies. The humanisation of nature is not similar to the recognition of nature as a living entity, in consonance with the beliefs of indigenous groups, such as in Bolivia, Ecuador and New Zealand. The Court has gone beyond and treated the rivers as natural persons, and granted them equivalent rights and imposed equivalent duties.

The judgements confuse the two concepts of legal person and natural/moral person.245 Being a legal person does not mean being equivalent to a natural/human person, or having the same entitlements as a natural person.246 The judgements blur the line between legal rights and human rights,247 when they declare

242 Gordon, supra note 31, 88.
244 Emmenegger, supra note 151, 572.
246 Id.
that rivers, glaciers, etc., “[have] the status of a legal person with all corresponding rights, duties and liabilities of a living person”. This essentially means that natural objects can impinge upon rights of other rights-holding entities, including other legal or natural persons, and thus, have the duty to avoid doing so similar to a legal person who has the duty to respect the rights of other legal persons. Such humanisation of the environment is unnecessary and comes with its own practical difficulties.

It is pertinent to note that the Court also states that the rights of these legal entities “shall be equivalent to the rights of human beings and the injury/harm caused to these bodies shall betreated as harm/injury caused to the human beings”. Proponents of the rights of nature movement do not purport to grant nature the kind of rights humans possess against other humans. However, the Court seems to have, probably unwittingly, accorded rivers, and other natural objects, human rights and not legal rights, relying on a more human construction of legal personhood rather than a more legalistic construction, such as in the case of corporations.

In addition, by virtue of being given the status of legal persons, these natural objects now also have certain duties. These duties include the duty to not contravene the rights of others, namely, those of living persons, as well as those of other rights-bearing natural objects. The ‘rights of nature’ movement does not envisage a situation where elements of nature can be considered to be aggrieved by activities of other elements. It does not envisage a situation in which a tree may have a cause of action against say an insect for eating its leaves.

Nature cannot possibly recognise the rights of others. In the eyes of law, if nature is a legal person bearing rights as well as corresponding duties towards others, it means that nature cannot only sue but also be sued in a court of law. The question then is – can this be considered to be practically feasible?

The rights of nature in Ecuador, Bolivia and New Zealand, have not been made dependent on the reciprocal relation between rights and duties. Moreover, we have also argued that nature’s capacity to hold rights should not be contingent upon the ability to owe duties and respect the rights of others, but should be based upon the protection of its interests through the ascription of duties to humans.

Thus, there was no need to impute correlative duties to the Ganga and Yamuna. Even if we are to assume that legal persons bear both duties and rights, the simple solution is to not adopt the approach of granting nature rights through the attribution of legal personality. A simple recognition of rights of nature as has been done Ecuador and Bolivia, would have sufficed. Nature has been granted rights, although it is not in a position to owe duties to other legal or natural persons, in

(The mixing up of legal rights and human rights significantly expands the rights possessed by the Ganges and Yamuna Rivers beyond legal rights. This confusion has already taken effect. An environmental activist reported the ‘murder’ of the Ganges and Yamuna Rivers to the police). See also, Michael Safi, Murder most foul: polluted Indian river reported dead despite 'living entity' status, July 8, 2017, https://www.theguardian.com/world/2017/jul/07/indian-yamuna-river-living-entity-ganges (Last visited on June 10, 2018).

249 Id.
250 CENTRE FOR RESOURCES, ENERGY AND ENVIRONMENT LAW, supra note 250.
251 Supra note 248.
Ecuador, Bolivia, New Zealand, Columbia and the United States. Therefore, the Court could just as well have avoided making the rivers the subjects of duties akin to those borne by a living person.

2. The question of guardianship and representation

Giving natural objects rights necessarily means that a legal guardian needs to be appointed to speak on behalf of these natural objects and enforce these rights.254 In India, the guardians of the river as appointed by the Court are the Director of the Namami Gange Programme, the Chief Secretary and the Advocate General of Uttarakhand.255 This has been criticised on the ground that the guardians/representatives of the rivers are effectively Government appointees.256 On the other hand, the custodians of the river in New Zealand represent the interests of the Government and the Iwi equally.257

This appointment of the Advocate General, as the representative of the river in all legal proceedings is inherently problematic. The Advocate General of the State is appointed by the Government and he/she is the chief legal advisor to the Government.258 The Advocate General holds office during the pleasure of the Governor,259 and recent trends show that the appointment of the Advocate General involves political considerations.260 As such, it will not be wrong for us to say that the allegiance of the Advocate general shall lie with the Government, which itself is one of the polluters of the rivers.261 It is also reasonable for us to say that the other two guardians also being Government appointees, shall be biased towards the Government and its interests. The guardians of the rivers shall thus not act independently, considering the fact that the Government’s interests in development and resource exploitation, may conflict with the rights and interests of the rivers.262 In such a scenario, several cases of pollution and degradation of the rivers will tend to go unchallenged, for the Government’s activities will not be objected to by its appointees themselves.

While the custodianship of the rivers was expanded in Lalit Miglani, the numbers are still heavily tilted in favour of the Government.263 In the said case, the court also talks about giving representation to the people living in proximity to the

254 Steven Tudor, *Some Implications for Legal Personhood of Extending Legal Rights to Non-Human Animals*, 35 Australian Journal of Legal Philosophy 136 (2010) (Although here the author talks about giving rights to non-human animals, the arguments are also relevant for our purpose).
256 Ashish Kothari & Shrishtee Bajpai, *Rivers and Human Rights: We are the River, the River is Us?*, August 31, 2017, available at https://www.epw.in/engage/article/we-are-river-river-us?0=ip_login_no_cache%3D704fdba60ef77665e88cde7c258fe948 (Last visited on June 10, 2018); Kothari, *supra* note 199.
257 Id.
259 Id., Art. 165(3).
261 Kothari, *supra* note 199.
262 Id.
263 Id.
rivers and glaciers. However, the Chief Secretary has been given the charge of selecting these local representatives. This therefore makes us question whether the conflicting interests of the rivers, against those of the State, shall be protected.

While in New Zealand, the process seems to be participatory and consultative, it appears that in India, we may not be able to challenge the status quo, for the guardians of the rivers maybe more interested in furthering the developmental agenda of the State, even if they involve violation of the rights of the rivers. This model is far removed from that which was suggested by Professor Stone, wherein those groups which had shown environmental bona fides or could be referred to as the ‘friends’ of nature, were to be appointed as guardians of the natural objects, or even the model which exists in Ecuador or Bolivia, where anyone can represent the natural objects in Court. While the approach adopted by Ecuador and Bolivia may have certain issues such as the fact that the Courts may be flooded with non-meritorious claims, it appears that New Zealand has struck the correct balance whereby representatives of the Government, traditional, commercial and recreational users of the river, the indigenous population living along the banks of the river, relevant local authorities, departments of State, and environmental groups have been allowed to involve themselves in the process of protecting the interests of the river.

Furthermore, it seems unnecessary to appoint representatives of the rivers considering the availability of the option of filing a PIL. A PIL can be filed even in environmental matters and when this avenue is adopted, the rules of locus standi stand relaxed. Public-spirited individuals can move the High Courts and Supreme Court under Articles 226 and 32 respectively, to secure public interest on behalf of those whose rights have been violated but who are unable to approach the courts for judicial redress.

Article 21 of the Constitution of India has been expanded to include the right to a wholesome environment, and the right to enjoy pollution-free water and air. To file a PIL, violation of rights of a section of the public has to be alleged.

264 Lalit Miglani v. State of Uttarakhand, Writ Petition (PIL) No.140 of 2015, 65 (“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”).

265 Id.

266 Kothari, supra note 199.

267 The Act provides for equal representation in Te Pou Tupua, the Te Karewao, an advisory group, a strategy group called the Te Kōpuka, as well as a Ngā Tāngata Tiaki o Whanganui Trust, to jointly look after the well-being of the river, all of which have considerable if not equal representation from the tribe.


269 See, e.g., M.C. Mehta v. Union of India & Ors, 1988 AIR 1115 (The PIL sought the shutting down of Kanpur tanneries which were discharging effluents beyond the permissible limits. The court observed that although the petitioner was not a riparian who had suffered injury, he was still entitled to maintain the petition, in public interest, as he was interested in protecting the rights of the people who made use of the water flowing in the river Ganga); Subhash Kumar v. State of Bihar, (1991) 1 SCC 598, ¶7 (“A petition under Article 32 for the prevention of pollution is maintainable at the instance of affected persons or even by a group of social workers or journalists. But recourse to proceedings under Article 32 of the Constitution should be taken by a person genuinely interested in the protection of society on behalf of the community. Public interest litigation cannot be invoked by a person or body or person to satisfy his or its personal grudge and enmity”).

270 Charan Lal Sahu v. Union of India, 1990 AIR 1480, ¶41.

The only relaxation, to the rules of standing that is needed so as to allow the avenue of PILs to be utilised in order for the implementation of the rights of nature theory is to allow only injury to the environment to be alleged, instead of injury to the rights of citizens, as a consequence of harm to the environment. Thus, NGOs, journalists, and other public-spirited individuals will be able to file writ petitions on behalf of the rivers, to seek orders and directives that enforce the rights of nature, if only the rules of standing in environmental PILs are expanded slightly. Thus, the guardianship model as laid down by the Uttarakhand High Court, seems to be unnecessary considering that, in India, PILs can be utilised to enforce the rights of nature.

In this way, proceedings in the nature of suits or petitions on behalf of the rivers (instead of PILs in environmental matters, where the protection of the environment is achieved indirectly by alleging injury on behalf of citizens), can have been introduced, instead of appointing guardians of the rivers. Like in the Ecuador and Bolivia, any citizen can then represent the rivers in the courts, and seek redress for the infringements of their rights.

Furthermore, common citizens can in any case register complaints against and prosecute polluters or violators of statutory provisions which are aimed at the protection of the environment. Under §19 of the Environment (Protection) Act, 1986, §43 of the Air (Prevention and Control of Pollution) Act, 1981 and under §49 of the Water Act, 1974, allow any citizen to prosecute polluters. These provisions were specifically introduced by amendments, to alter the situation which existed previously, which was that only governmental agencies had the power to prosecute, and citizens had no statutory remedy when it came to environmental claims.\(^{272}\)

Thus, the appointment of representatives or guardians of the rivers, who are primarily government employees, is in fact a step backwards since the Uttarakhand High Court effectively held that the Advocate General would be the one to represent the Ganga and Yamuna in all proceedings.\(^{273}\)

India already has very flexible rules regarding *locus standi* in environmental litigation which can very simply be made to align with the rights of nature framework. There was no need to appoint these guardians of the rivers whose jurisdiction beyond the Uttarakhand as representatives of the rivers is also, in any case, questionable. While the Government must be directed to act in furtherance of the welfare of the rivers, it cannot be the sole representative or mouthpiece of the rivers, especially considering the fact that guardianship of the rivers in India can easily be made to rest with individual citizens.

3. The problems of the rights of nature paradigm in India: Lessons from other jurisdictions

While the judgement of the Uttarakhand High Court seems to have heavily drawn inspiration from New Zealand, there are several differences between the two cases of ascription of personhood status to rivers. Similarly, while the recognition of the legal personality of river Atrato, in Columbia was also by means of a judicial pronouncement like in Uttarakhand, there are considerable differences between the grant of personhood to river Atrato and that to Ganges and Yamuna. These differences have been addressed below.

\(^{272}\) C.M. ABRAHAM, ENVIRONMENTAL JURISPRUDENCE IN INDIA 71 (1999).
At the outset, it may be pointed out that the declaration of the Whanganui as a legal person came as a solution to a long-standing dispute between the Whanganui Iwi and the Government of New Zealand.\textsuperscript{274} Furthermore, the declaration of legal personhood by New Zealand came about as a result of a settlement between the Iwi and the Crown; which was later turned into a legislation by the Parliament of New Zealand.\textsuperscript{275} The Act passed by the parliament of New Zealand was an attempt by the Government to recognise the special relationship between the indigenous population and the river.\textsuperscript{276} The grant of the status of a legal person to the Whanganui was essentially a settlement aimed at reaching a middle ground with respect to power distribution in terms of the management and control of the river and its ecosystem.\textsuperscript{277} As has been discussed previously, the Whanganui Iwi had certain customary claims with regard to the management and ownership of the river, and the Crown had repeatedly acted in contravention of their customary rights, over the years.\textsuperscript{278} These claims stemmed from the tribe’s belief in the fact that the river had a life force of its own, and was the ancestor of the Iwi.\textsuperscript{279} However, even while acknowledging the river as a living entity, having a force of its own, the rights and duties ascribed to the river by the Te Awa Tupua Act, are akin to that of a “legal person” and not a living or natural person.

On the other hand, the Ganges and Yamuna were declared to be persons in substantially different circumstances. The grant of personhood was by a High Court of the State of Uttarakhand, as opposed to through a legislation, as was the case in New Zealand.\textsuperscript{280} The Court went much beyond the relief prayed for in the PIL filed against illegal construction along the river bed, which sought appropriate directions to the Central and State governments in matters relating to management and preservation of the river Ganges, by granting legal personhood to the rivers Ganga and Yamuna.\textsuperscript{281} While the situation in New Zealand required the State to relinquish absolute ownership and control of the natural resources, in order to come to a settlement with the indigenous population, no such situation prevailed in India, warranting such attribution of legal personhood by the High Court of Uttarakhand.

However, it is to be noted that like in New Zealand’s case, the grant of personhood to the Whanganui was heavily premised on the spiritual significance of the river, the same scenario played out in India.\textsuperscript{282} Thus, while it is true that the

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\item\textsuperscript{274} Ahmad, supra note 200.
\item\textsuperscript{275} See Jayatilaka, supra note 125, 13-14.
\item\textsuperscript{276} The Conversation, Three rivers are now legally people – but that’s just the start of looking after them, March 24, 2017, available at https://theconversation.com/three-rivers-are-now-legally-people-but-thats-just-the-start-of-looking-after-them-74983 (Last visited on June 12, 2018).
\item\textsuperscript{277} Id.
\item\textsuperscript{278} Supra Part IV-A.
\item\textsuperscript{279} Supra note 248.
\item\textsuperscript{280} Id.
\item\textsuperscript{281} Ahmad, supra note 200.
\item\textsuperscript{282} In the Te Awa Tupua (Whanganui River Claims Settlement) Act, the Te Awa Tupua is described as “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, hapu, and other communities of the River.” Similarly, the Uttarakhand High Court in its judgement, highlighted that, “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...[T]hey support and assist both the life and natural resources and health and well-being of
Ganges and Yamuna are deeply significant – both spiritually and culturally, the primary reason for the recognition of the rivers as legal persons is not their holy character but the need to protect and preserve the rivers. The issues before the court were concerned with only the preservation of the rivers, in light of the illegal constructions along the embankments.

It must be noted in this regard, that there are “risks associated with the imposition of non-Indigenous ontological and epistemological frameworks in the designation/articulation of ‘rights’ for rivers”. Merely privileging or prioritising nature can have its own problems, such as that of otherisation. As such, in a non-indigenous context, a framework which grants rights through legal personhood may become unsustainable.

As such, in New Zealand, the guiding principle behind the legislation was the need to recognise indigenous rights and philosophies, since the legislation was enacted as a means to give the Whanganui Iwi their rights in respect of the river, which they had been claiming for over a century. The grant of personhood to the Whanganui River allowed the river to own itself. This was achieved as a sort of middle ground, so as to avoid political conflict, by vesting the riverbed in the Iwi, while also ensuring that the Crown did not retain ownership of the riverbed.

In light of this, it becomes important to note that New Zealand’s grant of personhood to the Whanganui River is heavily premised on the Maori worldview, which regards the river to be personified. The legislation was recognition of the relationship between the Maori tribe and the river as that of kaitiakitanga (guardianship or stewardship). In India, there was no such claim or demand from any community or tribe, to recognise the rivers as legal entities. Thus, there was no need for recognising the Ganga and Yamuna as persons, in addition to granting rights. While we admit that the problems of pollution and neglect of natural water bodies need to be addressed, the grant of rights by giving the rivers the status of legal persons was not appropriate in the matter that was before the Court. The issues before the Court strictly pertained to the non-cooperation of the States of U.P. and Uttaranchal in respect of the removal of illegal constructions on the banks of a canal in Dehradun, and the division of water resources between Uttar Pradesh and Uttarakhand. In such a case, the attribution of legal personality was a typical instance of judicial overreach.

Moreover, while the legislation in New Zealand was formulated, debated and discussed for over eight years, the judgements delivered by Uttarakhand
High Court were sudden and not well rationalised. As such, the Te Awa Tupua Act is much more detailed and comprehensive than the judgements. The judgements are vague and have not established a sufficiently robust legal mechanism or framework. If the Court felt that such a mechanism was necessary, the Court should have directed the State to come up with a comprehensive legislation. In that case, the judgement would have been an effective stop-gap measure if the Court had issued necessary directions pertaining to the removal and banning of illegal constructions, as well as the settlement on the division of water resources, in addition to indicating the need for the State to adopt a guardianship-based model for recognition and protection of the rights of the rivers. However, the Court need not have created such a loose framework, in which it appointed government employees, as guardians of the rivers, and declared the rivers to be legal persons, having standing to sue for breach of their rights, the scope of which it failed to clarify. Moreover, it was not within the capacity of the Court to do such a thing in any case, because even if we assume that the Court had the capacity to appoint guardians of the rivers, it must be noted that Ganga and Yamuna are not located within the State of Uttarakhand alone, and thus, the State of Uttarakhand does not have the power to provide or allocate funding to the guardians of the river.

Hence, this judgement in the PIL was not the appropriate way to apply the theory of environmental personhood to natural objects. Nevertheless, the Court went ahead and did so, and thus, we seek to analyse the differences in the grants of personhood to rivers, in India and in New Zealand, irrespective of the means of such a grant. Moreover, it also becomes important to analyse the grant of personhood to the Ganga and Yamuna in light of the grant of personhood to the Atrato River, in Colombia. This is because, the Constitutional Court in Colombia, through a judicial pronouncement, recognised the Atrato River as a ‘legal entity’.

In Colombia, however, while the grant of personhood was through a judgment, it was done in a matter where like New Zealand, the rights of indigenous tribes were involved. Moreover, the Court clarified that the rights of the river were that of protection, conservation, maintenance and restoration by the state and ethnic communities, and that these rights were distinct from the human rights claimed by the indigenous and peasant communities. The Court also appointed guardians but these guardians were one representative from the Government and one representative of the claimant communities. Therefore, although the recognition of the rights of Atrato River was through a judicial opinion, the judgment was clear, and did not confuse between human rights and legal rights. It did not attempt to humanise the river, nor did it leave the scope of the river’s rights unclarified. It also appointed guardians that could represent all sorts of interests in terms of the well-being of the river, without giving the Government an upper-hand. Thus, we note that despite being a stop-gap measure, the judgement was not legally problematic and impractical. However, the same cannot be said about the judgment of the Uttarakhand High Court, the drawbacks and inconsistencies of which have been discussed above.

290 Supra note 248.
291 Kothari, supra note 199.
292 CENTRE FOR RESOURCES, ENERGY AND ENVIRONMENT LAW, supra note 250.
293 Id., 12.
294 Id.
295 Id.
296 Id.
The differences between the Uttarakhand High Court’s judgment and the New Zealand legislation are also to be noted. While the Te Awa Tupua where the Whanganui River is located is a protected area, the Ganga is “one of the most engineered rivers in the world”.297 Despite this, the Court failed to delineate or even hint at whether building of dams, canals etc., would violate the rights of the rivers.298

While the Te Awa Tupua Act in New Zealand established a framework whereby activities on the river could be regulated or even rejected when harmful, the Uttarakhand High Court judgement fails to provide any amount of clarity regarding the content of the rights of the rivers. While certain rights have been mentioned in passing, such as the rivers’ right not to polluted, and the rights of “rivers, forests, lakes, water bodies, air, glaciers and springs ... to exist, persist, maintain, sustain and regenerate their own vital ecology system”, there is hardly any clarity as to whether these are the only rights to be enjoyed by the rivers, glaciers etc.

This is especially because the Court, later in the judgement, accords these natural objects all rights of a living person.299 On the other hand, the Te Awa Tupua Act, while recognising the river as a living entity does not declare it to be a holder of all the rights of a living person, but of only those that exercisable by legal/juristic persons.300

V. FALLACIES ASSOCIATED WITH THE GRANT OF PERSONHOOD

In this part, we seek to bring to light various fallacies associated with the concept of ‘personhood’ and its arbitrary attribution. We propose the idea of endowment of rights without such attribution. In addition to that, we propose a rights-based approach, wherein the rights of nature that already exist are recognised by Courts through the imposition of duties on the humans as corollaries to these rights.

A. PERSONHOOD SHOULD NOT BE A CRITERION FOR ATTRIBUTION OF RIGHTS

The most basic reason for the deprivation of basic rights to slaves, blacks or women, was that they were excluded from the category of ‘legal persons’.301 Later, the reason for granting them requisite rights hinged on them being granted the status of a ‘person’, so that they could be brought to the same level as other humans.302 Slowly, their voices gained power and were heard in Parliaments, which decided to abolish slavery or grant universal adult franchise to women.303 In other words, they were recognised as equals with other human beings, capable of holding

298 Id.
300 See Te Awa Tupua (Whanganui River Claims Settlement) Act, 2017, §§ 12, 14.
302 Eisgrube, supra note 80.
303 Id.
rights and performing duties. Kramer’s rights and duties approach to the theory of personhood highlights the same. Further, the advocates for the rights of chimpanzees, monkeys and fetuses base their arguments on their human-like behaviour and other similarities between humans and these ‘non-human things’. Moreover, the proponents of environmental personhood, for instance, also treat trees as ‘living beings’ that are capable of exercising senses, of growth and of displaying other ‘humanly traits’. Lastly, the justifications that advocates advance, for granting any kind of rights to Artificial Intelligence (‘AI’) are also based on their human-like conduct and similar behaviour.

From the above, it may be noted that ‘human-hood’ or ‘human-like traits’ have been, and are considered essential for the grant of personhood. Additionally, personhood, in turn, has been considered essential for attribution of rights to any sort of entity.

In this paper, an alternative method of attribution is being proposed, which is not based on ‘humanisation’ of different ‘things’ in order to grant them rights. However, before this alternative approach is further elaborated upon, the reason why we reject the approach adopted by the Uttarakhand High Court, must be taken note of.

Another fallacy associated with the reasoning based on which the Uttarakhand High Court granted legal personality to the rivers is the arbitrary nature of the decision. While it is understandable that the Hindu community worships these rivers, the basis on which these rivers are differentiated from all the other rivers in the country is not clear. There are other rivers that have deep rooted religious connotations and immense natural values, for example, Mahanadi, Kshipra, Brahmaputra, Krishna and Cauvery among others. While Ganga is the longest river in the country, there is no element of substantial divide between the same and other mentioned rivers in terms of the value they add to their catchment areas. This judgment could lead to a floodgate of litigation wherein all the rivers are claimed to be ‘persons’ and accorded similar rights as it will be hard to differentiate between these rivers merely on the basis of devotion. Thus, if the rights to the Ganges were granted merely by emphasising on its importance as a natural resource and its intrinsic value, it would have been a more secular and logical way of doing so.

304 Jayatilaka, supra note, 125.
305 Id. (Kramer’s rights and duties approach to environmental personhood states that the entities which can hold rights and execute their duties should be regarded as persons. In other words, in order to regard something as a person, it should be tested whether that entity is capable of holding rights and performing any duties).
306 See Part I.
307 Gordon, supra note 31, 1.
309 Id.
310 Id.
The reasoning of the court can also not be objectively followed as a valid precedent. For deities in temples, a uniform standard is applicable and understandable, when granting them legal personality. However, for everything else the Hindu community worships, the standard should either be uniform or not applicable at all. It would come out to be a bit strange if the Court tomorrow rules that ‘fire’ is being granted personhood because it is considered to be a deity by a religious community. Therefore, simply because something is worshipped and can be likened to a deity, it cannot qualify as a legal person.

Moreover, even if the Ganges is to be considered a deity, it is still unclear why legal personality has been granted to all streams, ponds, waterfalls, glaciers that are “associated with the river”. It is unclear whether the Court is implying that all of them are to be considered as deities. The basis for this attribution is not clear at all. Additionally, this line of reasoning also precludes the grant of rights to other water bodies, which might need them, but cannot receive them, since they are not worshipped by humans, and thus, cannot be humanised.

Another criticism of the theory of attribution of personhood is the selfish nature of the same. We argue that human beings have always attributed personhood to ‘things’ in a manner that have suited their best interests. For instance, grant of personhood to deities and corporations has taken place for the legal ease to humans in terms of seeking representation from or looking after the property holdings by them. Personhood has only been granted to these entities to suit the human needs of legal and financial organisations, thereby making the entire process of attribution inherently selfish and arbitrary.

For instance, in the case of the Ganges, the judgment nowhere acknowledges the contribution of the river to the Indian geography, economy or polity. However, now when it has become too hard for the state to fulfill its responsibility of keeping the river clean, it has granted the status of a legal person to it. Further, the grant of legal personality, historically being a way to generate ease for mankind, may not be entirely appropriate, considering that the recognition of the rights of nature mainly seeks to inculcate an eco-centric approach in environmental law and theory.

Thus, the grant of personhood to these rivers seems to be a hollow attempt or something of an eye-wash to sideline the failures of the State in protecting the rivers, by merely adopting an innovative approach which may not be any better than the status quo. The Court has not reasoned why the approach it has taken shall have exclusive benefits, and since the judgements are so poorly reasoned, it begs the question whether the approach taken by the court is a mere political façade or an actually viable protection measure.

B. THE ALTERNATIVE APPROACH

In light of the serious problems with the approach of the Uttarakhand High Court, we propose an alternative basis of applying the rights of nature theory to environmental conservation in the Indian context. Our approach is a combination of the ‘objective’ interest theory and the rights of nature theory, as has been adopted and applied in various jurisdictions.

313 Id.
Through the application of interest theory, rights of nature must be located in the duties that humans owe to nature, instead of ascribing rights to nature in the abstract. As such, having a defined set of duties that humans must perform, from which emanate the certain general rights of nature, will help the implementation and protection of these rights. This shall also allow better balancing of interests, as the scope of nature’s rights and their relationship with the duties and obligations that humans have towards nature, shall be understood better, if duties are recognised first. In this way, the conflict between human goals and agendas and nature’s rights can be minimised as the scope of human activities which are proscribed, in the interest of protecting the rights of nature, can be ascertained with reference to the duties that are imposed by the legislature or the courts of law.

Rights, under this alternative approach, should be granted to these entities as a matter of recognition of their inherent value, in consonance with the rights of nature theory. It needs to be understood that apart from human beings, other entities are capable holding rights by the virtue of their very existence, their intrinsic values and secondarily, on account of the importance they hold for the human community. These entities do not need to be compared with humans or be humanised, in order to be granted any rights. There should be no single formal requirement for being a holder of rights, as a ‘rights’ are legal and moral instruments of protection. In our framework, the rights of nature shall be instrumental in developing a discourse where nature is sought to be protected and preserved on the basis of an eco-centric ethic.

This method of recognition of the rights and interests of non-human entities relies greatly on the interest theory of personhood which introduces a divide between ‘legal rights holders’ and ‘legal personhood holders’. Specifically, this theory proposes a way for the attribution of rights to entities without the need to grant them legal personality. It is conceded that natural entities or objects cannot have or be said to have characteristics that are required to qualify as legal persons, based on the deeply flawed ‘human-like’ conceptions of legal personality. It is thus, argued that while nature does not need to be attributed all the rights and duties that come along with a grant of legal personality, it can be granted certain rights essential for its preservation, despite not being attributed legal personality.

Natural entities should therefore, be granted certain rights that are necessary for their protection. While rights are general and open-ended, they may be distilled from duties which are more specific and of limited scope. Duties in themselves are not enough, as they do not help to change the existing anthropocentric discourse, since they are not seen as entitlements that natural entities can claim through representatives, but as favours that humans, as greater, sentient beings have ‘chosen’ to bestow upon these natural entities. Thus, a simple duty-based approach will not work for the purpose of effectively protecting the natural environment.

314 Emmenegger, supra note 148, 574.
315 Id.
316 Id.
317 (In fact, duties, in the nature of statutory rules as well as the constitutional duty under Article 51-A(g), have existed for years and still the environment is sought to be protection on the basis that the right to a clean environment is part of the right to life. Mere imposition or acknowledgement of duties has not led sufficed. We need a paradigm shift in the way environmental litigation works).
Moreover, the protection of the environment is viewed simply as protection of the human right to a clean and healthy environment. More often than not, this right is deemed to be less important than developmental goals. Hence, it is important to adopt a non-anthropocentric approach, concentrating on the duties that humans owe to nature. Thereafter, nature’s rights should be acknowledged as a reflex of those duties. Nature should have rights because it deserves protection, and because such protection can be achieved through the imposition of duties towards nature. So under this paradigm, it is recognised that not only do humans have the moral duty and responsibility to protect and preserve nature, but also that nature as a corollary has the right to exist and be protected.

Therefore, rights should not be granted to the Ganga because it can be likened to a deity that is worshipped by millions in the subcontinent, but because of its intrinsic value which deserves protection. As such, we propose a model in which the rights are not granted to the rivers in abstract but are recognised on the basis that the interests of nature need to be protected. There is no need for the grant of personhood or the appointment of representatives of the rivers. As has been argued previously, citizens can be allowed to litigate on behalf of the rivers by merely expanding the already relaxed rules of locus standi in environmental PILs. Thus, the State also need not be the sole authority that can bring claims on behalf of natural objects.

Keeping this in mind, in the following points we propose a duty-based approach that ought to be followed by the state, in accordance with the principles of public trust doctrine for the preservation of the river. These steps are based on the global experience in management of large water bodies and the specific suggestions made by the World Bank in this regard.

a. The first step involves creating a basin plan that guides investment and choices. There should be a clear focus on the critically polluted stretch from Kanpur to Varanasi, and prioritisation of the pollution hotspots. Cleaning is expensive and no country has attempted clean-up at India’s level of Gross Domestic Product per capita. For instance, from 1970 to 1990, the five countries that share the Rhine spent about $50 billion on communal and industrial waste-water treatment plants. Similarly, in 2007, China vowed to spend more than $14 billion on Lake Tai, its third-largest freshwater lake. The government of India has already taken the important first step of adopting a river-basin approach. A consortium of seven IITs submitted a draft Ganga River Basin Management Plan which contains background papers on which the plan is based.

318 See generally Borràs, supra note 165 (for the development of the human right to a clean environment).
320 See Part IV, B(ii).
322 Jim Yardley, China to spend $14 billion to clean up Lake Tai, THE NEW YORK TIMES, ASIA PACIFIC, October 28, 2017.
324 Id.
b. Second, analysis and measurement of water quality of the river at short intervals will be crucial for the regularisation of the action plan. The experience from foreign experiments shows that good data, including, for example, on the share of point source versus non-point source pollution and on the share of the pollution-load generated by cities versus industries is absolutely important for the protection of the river.\textsuperscript{325} The International Commission for the Protection of the Danube River, for example, has prioritised measurement and assessment, and constituted several expert groups to advise it in this regard.\textsuperscript{326} In the Ganga, real-time water quality monitoring would provide a baseline from which to measure improvements and inject transparency in reporting.

c. Third, the allocation of the duties to different institutions needs to be done because a single body can possibly not control the plan to preserve the longest river of the country. As an implementation task, river-cleaning should be de-linked from line ministries charged with policymaking and regulation and given to smaller, professionally managed river basin organisations. Cities need to be strengthened as ultimately they will be the custodians of the assets being created: sewage networks, treatment plants, riverfront development schemes, and solid waste management systems.\textsuperscript{327} Many cities in the Ganga basin are particularly weak, with limited financial powers, weak revenue generation, and poorly managed utilities and this hinders the ability to give effect to the plans sent by the centre. For instance, Mr. Trivendra Singh Rawat, the current Chief Minister of Uttarakhand, has publicly stated the lack of funds received by the state for Ganga preservation.\textsuperscript{328} Such instances highlight the importance of the division of duties and allocation of proper funds to them in order to fulfill the plans made by the centre.

d. Another duty of the state is including and mobilising all stakeholders in this venture as the state alone cannot be successful in this venture without their active support. The Ganga’s constituents are its inhabitants, its champions, its religious leaders, its elected representatives, and all the people who value it as a cleaner river. People must be part of the development and every successful clean-up program has tapped this crucial resource. For instance, in Australia, the Murray Darling Basin Authority estimates that almost 20% of its annual resources have been committed to this kind of work.\textsuperscript{329}

Regular reporting on goals and on progress, reaching out to youth and schools, encouraging participation in water quality testing and social audits, and promoting


\textsuperscript{328} Anupam Trivedi, \textit{Ganga will be clean by 2020 till Haridwar, says Uttarakhand CM}, THE HINDUSTAN TIMES, April 1, 2018.

behaviour change, are all examples of how far reaching this can be. Riverfront development — including *ghats*, parks, and other public spaces — is also critical, bringing people closer to water and increasing their affiliation and respect for its cleanliness and flow.

e. Lastly, it has been observed that releasing additional water from the barrages during festivals lead to the dilution of pollution in the water and its quality improves. In 2013, the visible improvement in water quality in Allahabad during the *Maha Kumbh Mela* was, in part, the result of additional releases from the barrage upstream. This begs a basin-scale plan in which inter-sectoral trade-offs are analysed and water is allocated according to greatest need and societal values.

We understand that the judiciary cannot take complete charge of protecting the river and needs cooperation from the legislature and executive. However, it can take the first step by providing rough guidelines, similar to the ones above, and by directing the legislature to formulate a more detailed statute. The executive should oversee the patrolling on the banks. The Court can also define the scope of a river to include its streams, canals, distributaries and tributaries, along with the mainstream for the sake of clarity in enforcement.

In a nutshell, a concrete and micro approach, which is both practical and jurisprudentially sound, needs to be taken by the judiciary for the protection of two very important rivers of the country.

VI. CONCLUSION

In the course of this paper, we have critically analysed the grant of personhood to rivers, specifically the Ganga and the Yamuna. We have begun our discussion with a brief overview of the jurisprudential literature that exists on the attribution of personhood. Subsequently, we have examined the different theories of personhood and have also highlighted the shortcomings associated with each of these theories. Through this part of the paper, we have attempted to communicate the incongruity between the legal theories of personhood and the various examples of actual attribution of legal personality to objects and entities. We have also delved into how the attribution of personhood is in itself problematic, especially in the manner adopted by the Uttarakhand High Court. Here, we have critically analysed the issues associated with legal personhood in general and the declaration of Ganga and Yamuna as legal persons, in particular. We feel that such attribution of personhood to the said rivers will lead to the State government shrugging off any responsibilities towards protection of these rivers, and the rivers will also not find adequate redress, considering the fact that the guardians of the river are officials of the State, which is probably the largest polluter.

Our analysis of the Uttarakhand High Court decision against the backdrop of the grant of legal personality to rivers in New Zealand, Ecuador, Columbia, further strengthens our conclusion as to the impracticality and futility of the decision of the High Court. Notably, the differences between the circumstances of attribution of legal personality to rivers, in these countries and their method of such attribution rivers, have informed the said conclusion. In this regard, while highlighting the most apparent departures from the situation in New Zealand, we have gone into the question of why the rights

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of nature paradigm is more suited to work successfully other jurisdictions, which have attributed legal personality to rivers, than in India. Furthermore, the various ambiguities in the Uttarakhand High Court judgment go on to show, how ill-informed the decision is.

However, we do realise 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 recognised 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 recognised at a micro level, through a duty-based approach, fulfilling the purposes of both, the interest theory 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.