

Legal Personality of Ganga and Ecocentrism: A Critical Review

PALASH SRIVASTAV*

I. INTRODUCTION

The river Ganga drains a vast expanse of Indian territory, originating from the Gangotri Glacier in the Himalayas and flowing through five Indian states. Running for a total distance of 2,525 kilometres, Ganga carries the distinction of being the longest river in India. Due to its religious and commercial importance, moreover, Ganga has been an important subject of law and policy. Ganga is therefore of considerable political importance to the current regime. The Prime Minister of India, Narendra Modi, contested the 2014 Lok Sabha election from Varanasi, a city of religious importance situated on the banks of Ganga, by claiming that he had come there on “Maa Ganga’s call” and accordingly promised to have Ganga cleaned up within four years of being elected.¹ Once his government was sworn in, one of its first executive decisions was to rename the Ministry of Water Resources as the Ministry of Water Resources, River Development and Ganga Rejuvenation, asserting that rejuvenation of Ganga was a top priority of the government.² Ganga

* Fourth year student at the National Law School of Indian University. I would like to thank Professor Abhayraj Naik for carefully reading and suggesting changes to the initial drafts of this paper, and for guiding my research on ecocentrism in the Indian context.

¹ Rajiv Srivastava, ‘Modi files nomination, says ‘Ma Ganga has called me to Varanasi’ *The Times of India* (Mumbai, 24 April 2014) <<https://timesofindia.indiatimes.com/news/Modi-files-nomination-says-Ma-Ganga-has-called-me-to-Varanasi/articleshow/34161157.cms>> accessed 20 March 2019.

² Sanjib Kr Baruah, ‘Modi govt to change names of several key ministries’ *Hindustan Times* (New Delhi, 7 August 2014) <<https://www.hindustantimes.com/india/modi-govt-to-change-names-of-several-key-ministries/story-cfmUpxgiG9nETRWOY2igGP.html>> accessed 20 March 2019.

has also been declared to be the National River of India,³ and a draft National River Ganga Bill 2018 (Ganga Bill) has been floated by the Ministry to introduce strong protective measures for the river, including an armed investigative force and a statutory authority to carry out environmental impact assessments for proposed projects.⁴

For years, however, Ganga's condition has been constantly deteriorating. The highly dammed and polluted river is slipping into a state of advanced degradation, despite the billions of rupees being spent by the Indian government toward its rejuvenation.⁵ Moreover, the state maintains a repressive or apathetic approach to activists fighting for Ganga's rights. With the recent demise of professor and environmental activist Guru das Agarwal, who died while fasting to draw the government's attention to the plight of Ganga, burning questions pertaining to the river have yet again come to the fore, such as how it can best be protected and what can be done to halt pollution. Legal solutions to these questions are imperative to ensure continued sustenance and ecological flow of the river.

In March 2017, two successive judgments of the Uttarakhand High Court (High Court) conferred legal personhood on Ganga, another major river Narmada, and their ecosystems.⁶ To have legal personhood is to be recognised by law as a holder of rights and duties. Legal personality for natural entities and ecosystems gives them enforceable rights in law, and the ability to have standing in their own name or through proxies to enforce their rights in court. To the extent that recognition of claims is a key facet of justice, personality in law of a natural entity or of an ecosystem is a crucial step for the legitimation of its claims and needs.

This paper focuses on the High Court's rulings and observations pertaining to Ganga. The first section discusses the High Court's ruling in each case, and the material bases on which the High Court granted legal personality to Ganga.

³ Know India, 'National River' <https://archive.india.gov.in/knowindia/national_symbols.php?id=7> accessed 28 November 2018; Ministry of Water Resources, 'Draft National River Ganga Bill, 2018' (*Press Information Bureau*, 4 February 2019) <<http://pib.nic.in/newsite/PrintRelease.aspx?relid=188011>> accessed 31 March 2019 (Draft Ganga Bill).

⁴ Jayashree Nandi, 'River Ganga may get armed guards with powers to arrest polluters' *Hindustan Times* (New Delhi, 1 November 2018) <<https://www.hindustantimes.com/india-news/draft-bill-on-ganga-proposes-armed-corps-for-protection-of-river/story-aaoha7O5uNSZmrIzbzYyzJ.html>> accessed 28 December 2018.

⁵ Susil Sahoo, 'Project-wise Amount Sanctioned and Amount Spent under National Mission for Clean Ganga as on 30-06-2017' (*Government of India*, 21 August 2018) <<https://community.data.gov.in/project-wise-amount-sanctioned-and-amount-spent-under-national-mission-for-clean-ganga-as-on-30-06-2017/>> accessed 20 March 2019.

⁶ *Salim v State of Uttarakhand* WP (PIL) No. 126/2014 (Uttarakhand High Court); and *Miglani v State of Uttarakhand* WP (PIL) 140/2015 (Uttarakhand High Court).

This is followed in the second section by a thorough examination of the reasoning employed in the judgments to argue that no effective personhood has been conferred on Ganga. The final section explores ways in which the shortcomings of the judgments may be rectified to confer meaningful legal personality on Ganga. To that end, this paper proposes to read the High Court judgments in light of the Supreme Court judgments that have recognised ecocentrism as a principle of Indian law, and attempts to locate the judgments within the broader context of a discursive change happening in environmental jurisprudence. Such a reading would allow for some of Ganga's rights, like the right to life, to be recognised as being enforceable in a court of law. Christopher Stone's framework is employed in this paper to unpack the implications of Ganga's legal identity. Stone's seminal work arguing for legal recognition of natural entities remains relevant to this day and has been used to examine the substance of legal personality of natural entities in other jurisdictions.⁷

The Ganga Bill, the text of which is still not publicly available, must take these developments on the rights of Ganga into account and incorporate the ecocentric gains that have been made in the jurisprudence on rights of natural entities. At the time of writing, what little is known of the Ganga Bill from the written reply to Parliament by the Minister for Water Resources does not inspire confidence that the Bill will be a pioneer in recognising rights of natural entities from an ecocentric perspective, despite the rise of the ecocentrism as a legal discourse in India.⁸ This paper hopes to draw together jurisprudential developments and thereby provide meaningful guidance to legislative efforts toward effective legal personhood for Ganga.

II. OVERVIEW OF THE UTTARAKHAND HIGH COURT JUDGMENTS

The two judgments of the High Court in *Salim v State of Uttarakhand* and *Miglani v State of Uttarakhand*, delivered respectively on 20 and 30 March 2017, granted legal personality to Ganga.⁹ While in the case of *Salim* a division bench of the High Court had conferred the status of a legal person on Ganga river,¹⁰ in the case of *Miglani* the same division bench conferred legal personality not just on

⁷ See for example James DK Morris and Jacinta Ruru, 'Giving Voice to Rivers – Legal Personality as a Vehicle for Recognising Indigenous Peoples' Relationships to Water?' (2010) 14(2) AILR 43.

⁸ Draft Ganga Bill (n 4).

⁹ *Salim* (n 6); and *Miglani* (n 6).

¹⁰ *Salim* (n 6) [19].

the river but on its entire ecosystem, including mountains, glaciers, and streams.¹¹ Even though the former judgment has been stayed by an order of the Supreme Court of India,¹² the latter remains binding law in the State of Uttarakhand.¹³ While the judgments are certainly laudable in their ambition, the legal sources cited by the Judges to confer legal personhood on Ganga leave much to be desired in terms of fashioning substantive legal personhood for the river.

In *Salim*, the High Court invoked its *parens patriae* jurisdiction to make Ganga a legal person.¹⁴ *Parens patriae* is a doctrine, meaning “parent of the nation”, usually invoked by a court on application of the executive government to protect persons whom it thinks cannot advance their own interests, such as minors and legally incompetent persons. The High Court cited Ganga’s religious importance as a major reason for conferring personality on it,¹⁵ drawing on a long history of courts doing so in respect of Hindu deities.¹⁶ The High Court further observed that the “socio-political-scientific” development of the country was a key driver in extending legal personality to Ganga.¹⁷ Finally, the High Court drew upon the constitutional duties of the state and every citizen ‘to protect and improve the environment’ to justify the extension of personhood to the river.¹⁸ The High Court accordingly appointed the Director of Namami Gange,¹⁹ the Chief Secretary of the State of Uttarakhand, and the Advocate General of the State of Uttarakhand as “*persons in loco parentis*”, or guardians of Ganga, making them the “human face” of Ganga to protect, conserve and preserve the river, and to uphold its status and to promote its health and well-being.²⁰

In *Miglani*, the same division of the High Court heard another petition to declare the “Himalayas, Glaciers, Streams, Water Bodies etc.” of Ganga, along with the Gangotri Glacier that feeds Ganga, as legal persons.²¹ In its judgment,

¹¹ *Miglani* (n 6) [62].

¹² *State of Uttarakhand v Salim* 2017 SCC Online SC 903.

¹³ The Uttarakhand High Court has power of supervision over all subordinate courts located in the territory over which it has jurisdiction, giving it the power to enforce its ruling across this territory: Constitution of India 1950, art 227.

¹⁴ *Salim* (n 6) [11].

¹⁵ *ibid* [17].

¹⁶ *ibid* [12]–[15], citing *Naskar v Commissioner of Income Tax, Calcutta* 1969 (1) SCC 555 (Supreme Court of India), *Ran Jankjee Deities v State of Bihar* 1999 (5) SCC 50 (Supreme Court of India), *Shiromani Gurudwara Prabandhak Committee, Amritsar v Dass* AIR 2000 SC 1421 (Supreme Court of India), and *Behari Ji v Dass* AIR 1972 Allahabad 287 (Allahabad High Court).

¹⁷ *Salim* (n 6) [16].

¹⁸ *ibid* [18], citing Constitution of India (n 13) arts 48A and 51A(g).

¹⁹ Namami Gange, or the National Mission for Clean Ganga, is a flagship programme of the central government for the abatement of pollution and rejuvenation of Ganga.

²⁰ *Salim* (n 6) [19] (emphasis in original).

²¹ *Miglani* (n 6).

the High Court reaffirmed the status of Ganga as a legal entity. The reasoning employed by the High Court shares broadly common grounds with *Salim*. First, the High Court saw such a conferral of legal personality on Ganga as attuned with the constitutional, legal and moral duty of citizens to preserve and protect nature.²² Secondly, the High Court asserted that under the “New Environment Justice Jurisprudence” and the principles of *parens patriae*, it is the courts’ duty to protect nature.²³ Thirdly, the High Court saw bestowal of legal personality on Ganga as symbolic recognition of the “Constitutional legal rights” of “Mother Earth”.²⁴ Fourthly, intergenerational equity weighed with the High Court as a factor necessitating grant of legal personality on Ganga for its continued existence.²⁵ Finally, the High Court again cited “socio-political-scientific” development as the backdrop to evolving conceptions of legal personality.²⁶ Building upon *Salim*, the judgment in *Miglani* appointed additional authorities as guardians of the river and its ecosystem.²⁷

While both judgments declared Ganga to be a legal person for broadly the same reasons, the High Court did not take its declarations to their logical conclusion by fleshing out the content of Ganga’s legal personality. The next section adopts the perspective of environmental justice to highlight pitfalls in the reasoning of the High Court and attempts to show how no meaningful legal personhood has yet been conferred on Ganga.

III. CRITIQUE OF THE JUDGMENTS FROM AN ENVIRONMENTAL JUSTICE PERSPECTIVE

An examination of the reasoning of the judgments shows that the legal personhood of Ganga, as crafted by the High Court, is fraught with problems. This paper adopts an environmental justice approach to critique the judgments in order to place the affected ecosystems and dependent people and animals at the centre of its analysis.²⁸ The purpose of this section is to bring environmental

²² *ibid* [39].

²³ *ibid* [39].

²⁴ *ibid* [55].

²⁵ *ibid* [59].

²⁶ *ibid* [60].

²⁷ Additional appointees included Director of National Mission for Clean Ganga, the Legal Advisor to Namami Gange Project, the Director (Academics) of the Chandigarh Judicial Academy, and noted environmental lawyer Senior Advocate MC Mehta were appointed as guardians of the Ganga: *ibid* [62.3].

²⁸ David Harvey, *Justice, Nature and the Geography of Difference* (Wiley-Blackwell, 1997) 385–387.

perspectives to bear on the reasoning adopted by the High Court to examine the content of Ganga's newfound legal personhood.

The judgments are problematic for many reasons, but five stand out. First, the High Court invoked the doctrine of *parens patriae* erroneously to confer personality on Ganga even when it does not have the unilateral authority to invoke it. Secondly, Ganga has effectively been cast by the High Court as a perpetual minor who lacks full-fledged legal personhood, as opposed to the developed personhood of other legal entities. Thirdly, although it is apparent from the language of the judgments that the High Court was aware of international developments in the rights-of-nature movement, it did not meaningfully engage with these developments and thus deprived itself of the opportunity to flesh out a legally coherent conception of personhood for Ganga. Fourthly, the guardians appointed by the High Court lacked independence, accountability and substantive powers to ensure Ganga's protection. Finally, the High Court judgments fall foul of secular values enshrined in the Indian Constitution. This section elaborates on each of these heads of criticism.

A. *PARENS PATRIAE* HAS BEEN WRONGLY INVOKED BY THE HIGH COURT

As discussed, the High Court invoked the doctrine of *parens patriae* to grant personhood to Ganga. While the doctrine was mentioned only in passing in *Salim*, the Court in *Miglani* dealt with it extensively, quoting vastly from judgments and academic texts in the United States. Even in the cited judgments, however, the doctrine is not invoked by courts to confer authority to act on behalf of either natural or legal persons without an application by the state. The courts, while discharging their judicial function, are not considered part of the "State" under the Indian Constitution.²⁹ Indeed, *parens patriae* is exercised conventionally on the application of the executive branch. While the doctrine has been relied upon by the executive in cases involving environmental questions,³⁰ its unilateral invocation

²⁹ Constitution of India (n 13) art 12.

³⁰ Outside of litigation, the doctrine of *parens patriae* was most famously invoked by the central government in the aftermath of the Bhopal Gas disaster as a justification for passing the Bhopal Gas Leak Disaster (Processing of Claims) Act 1985 (India). The effect of this Act was that the executive became the only authority that could legitimately seek compensation on behalf of the victims, depriving them of the right to litigate on their own behalf.

by a court in conferring authority over and responsibility for a natural entity on government personnel departs starkly from precedent.

B. GANGA HAS BEEN CAST AS A PERPETUAL MINOR WITHOUT SUFFICIENT AUTONOMY

The kind of guardianship that has been fashioned for Ganga by the High Court in exercise of its *parens patriae* jurisdiction casts Ganga as a perpetual minor with a curtailed personhood as opposed to personhood of other legal entities such as companies.³¹ In a company, the board of directors is accountable to the shareholders who may remove directors on their own volition.³² No parallel power for removal of Ganga’s guardians has been reposed in any person or group; the guardians cannot be removed at all, save by the authority of the High Court or the Supreme Court of India. The judgments are completely silent on the accountability of the guardians, and what action would make them liable for being stripped of their designation. For removal of a guardian under Guardians and Wards Act 1890 (GAWA), a person must first apply to the court and show that the conduct of the guardian falls under one of the ten heads which makes the guardian liable for removal.³³ While the process for removal of a director tends to remain an internal matter of the company which does not involve the court, the necessary involvement of courts in removal of guardians has the potential for tiresome litigation. The High Court’s reliance on the *parens patriae* doctrine has fashioned Ganga as a perpetual minor, bereft of the rights, protections and functional autonomy that a full-fledged legal person, such as that which a company enjoys.

C. ABSENCE OF SUSTAINED ENGAGEMENT WITH MAJOR DEVELOPMENTS IN THE RIGHTS OF NATURE MOVEMENT

While the High Court in *Miglani* cites the “New Environment Justice Jurisprudence” as a major reason for conferring legal personality on river Ganga,³⁴ it does not shed any light on what it means by this phrase. Both of these judgments are delivered close to the time when Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 (NZ Act) was enacted in New Zealand.³⁵ The New Zealand

³¹ Erin L O’Donnell and Julia Talbot-Jones, ‘Legal rights for rivers: what does this actually mean?’ (2017) 32(6) *Australian Environment Review* 159, 161.

³² Companies Act 2013 (India), s 169.

³³ Guardians and Wards Act 1890 (India), s 39.

³⁴ *Miglani* (n 6) [39].

³⁵ Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 (NZ Act) received royal assent on the same date as the High Court delivered its *Salim* judgment.

Parliament, through this Act, conferred legal personhood on the entirety of the Whanganui River and appointed a representative guardian body — Te Pou Tupua — for the protection of the river’s rights. The guardian body consists of two representatives, one appointed by the Crown and the other appointed by the Whanganui Iwi (tribe) and has strong powers to pursue its protective functions.³⁶

With a dedicated fund of \$30 million, an advisory group and a strategy group for the implementation of the catchment management strategy,³⁷ the NZ Act ensures independence and institutional support for the guardian body to act in the best interest of the Whanganui River. This form of independence is missing from the framework for personhood created by the High Court to protect Ganga. While the High Court in *Miglani* borrowed language from the NZ Act,³⁸ it does not seem to take inspiration from the spirit of autonomy it embodies. The judgments also do not mention other international legal developments that have protected nature and natural entities by conferring legal personality on them, such as the changes made to the Ecuadorean and Bolivian laws to recognise rights of nature.³⁹ The High Court recognised the need to confer constitutional rights on “Mother Earth”⁴⁰ much along the lines of the Bolivian “Law of Mother Earth”,⁴¹ and the Universal Declaration of Rights of Mother Earth adopted by the World People’s Conference on Climate Change and the Rights of Mother Earth in Bolivia in 2010,⁴² making it likely that the High Court was aware of these developments.

While the language and the mechanisms created under these laws cannot be identically transplanted to India, given the Ganga’s uniqueness, a sustained discussion of these developments abroad would have certainly contributed to the substance of legal personality in terms of its implications, the nature of rights that can be held by Ganga and mechanisms for their enforcement. The Ecuadorean and Bolivian laws could have provided rich source material for the development

³⁶ Erin L O’Donnell and Julia Talbot-Jones, ‘Creating legal rights for rivers: lessons from Australia, New Zealand, and India’ (2018) 23(1) *Ecology and Society* 7, 10.

³⁷ O’Donnell and Talbot-Jones, ‘Legal rights for rivers’ (n 41) 160. See generally NZ Act (n 45) ss 18–19.

³⁸ The formulae “human face”, for instance, is lifted verbatim from s 18 of the NZ Act (n 45).

³⁹ Ecuador recognised the rights of nature in its Constitution through a 2008 amendment and by 2010 legislation in Bolivia: Lidia Cano Pecharroman, ‘Rights of Nature: Rivers That Can Stand in Court’ (2018) 7(1) *Resources* 13, 16–17.

⁴⁰ *Miglani* (n 6) [55].

⁴¹ Ley de Derechos de la Madre Tierra (071) (Bolivia).

⁴² Universal Declaration of Rights of Mother Earth (22 April 2010) <<http://therightsofnature.org/universal-declaration/>> accessed 8 March 2019.

of Ganga's legal personality.⁴³ By not accounting for the juridical machinery underpinning the borrowed phraseology, the High Court deprived itself of the opportunity to elaborate Ganga's legal personhood in a more effective manner.

D. LACK OF INDEPENDENCE AND NON-SUITABILITY OF GANGA'S GUARDIANS

The High Court's designation of seven persons, of which five were government officials,⁴⁴ as the guardians of Ganga should be looked at with circumspection. The state is often complicit in defiling Ganga, as demonstrated by the number of dams approved by the central government and the unanswered letters from Professor Agarwal to Prime Minister Modi.⁴⁵ In a comparable context, GAWA declares that a fiduciary relationship exists between the guardian and the ward,⁴⁶ and the existence of any interest that is adverse to their duties as the guardian makes them liable for removal.⁴⁷ Ganga's bureaucrat guardians, such as the Chief Secretary and the Advocate General of the State of Uttarakhand, may find themselves in positions of conflict with their fiduciary duty to Ganga due to the nature of their offices. These conflicts of interest are likely to occur when, for example, the Chief Secretary must ensure the implementation of a decision of the Uttarakhand government pertaining to Ganga which might not be in the river's best interest, or when the Advocate General must appear in court to defend the government's actions pertaining to Ganga, whatever their nature may be.

⁴³ The Ecuadorean Constitution specifically recognises nature as a holder of rights that are designed for it (art 10). It also empowers "all persons, communities, peoples and nations" to move governmental authorities whenever Constitutional rights of nature are violated (art 71). The Bolivian law seeks to recognise the earth and its living systems as living entities entitled to equal protection as humans under the law (art 5). The Bolivian law also recognises the right to life of earth and of its living systems, and fastens certain duties on the "Plurinational State" (art 8) as well as "natural persons and public or private legal entities" (art 9) for the protection of Mother Earth and of its components. The Universal Declaration of Rights of Mother Earth, adopted at the World People's Conference on Climate Change and the Rights of Mother Earth, also recognises "Mother Earth" as a living being (art 1), with certain rights of its own (art 2), and duties that human owe to it (art 3).

⁴⁴ *Migliani* (n 6) [62.3].

⁴⁵ 'Read: G.D. Agarwal's Third and Final Letter to PM Modi on Saving the Ganga' *The Wire* (11 October 2018) <<https://thewire.in/rights/read-gd-agarwal-final-letter-narendra-modi-saving-ganga>> accessed December 9, 2018.

⁴⁶ Guardians and Wards Act (n 43) s 20.

⁴⁷ *ibid*, s 39(g).

These potential conflicts make such officials unsuitable for a dual role as Ganga's guardians.

Although Stone envisaged a model of guardianship to confer rights on natural entities,⁴⁸ his was distinct from the kind formulated by the High Court. In his model, a "friend" of the relevant natural entity had to make an application to be appointed as its guardian.⁴⁹ Stone was wary of state functionaries being appointed as guardians of natural entities, given their existing functions under law and their vulnerability to political diktat.⁵⁰ In New Zealand, however, the first two appointees as guardians of the Whanganui River were not presently serving as government officials and had sufficient experience in dealing with complex environmental and cultural issues.⁵¹ The High Court may well have chosen persons or organisations with sufficient experience in handling environmental issues as guardians of Ganga, and its decision to appoint incumbent government actors as the guardians of Ganga without any consideration for their knowledge of or experience in handling environmental issues may not be the best model of guardianship to rejuvenate the river.

There is another significant defect from which the judgments suffer: the guardians have not been granted any real powers to review the decisions of the government of the State of Uttarakhand pertaining to Ganga. The authority of Ganga's guardians is further compromised by their lack of financial autonomy to act in Ganga's best interest. To address the damage caused to a natural entity, Stone proposed setting up a trust fund to be administered by the guardian of the entity.⁵² As mentioned earlier, the guardian body in New Zealand has a dedicated fund at its disposal to act in best interest of the Whanganui River. In *Miglani*, the High Court records the disbursement of ₹2 billion by the central government for the rejuvenation of Ganga.⁵³ That expenditure, however, is *ex gratia* and the government has not yet committed a definite sum of money for the rejuvenation of Ganga, making the guardian body financially dependent on the central government to undertake activities in the best interest of the river.

The High Court could have directed the Uttarakhand government to commit a certain sum of money to the cause of protection of Ganga in the form

⁴⁸ Christopher Stone, 'Should Trees Have Standing? – Towards Legal Rights for Natural Objects' (1972) 45 Southern California Law Review 450, 464.

⁴⁹ *ibid.*

⁵⁰ *ibid.*, 473.

⁵¹ New Zealand Government, 'First Te Pou Tupua appointed [4/9/17]' *Scoop* (12 September 2017) <<http://www.scoop.co.nz/stories/PA1709/S00132/first-te-pou-tupua-appointed-4917.htm>> accessed 8 March 2019.

⁵² Stone (n 58) 480.

⁵³ *Miglani* (n 6) [48].

of a trust fund. Indeed, such directions have been given by the High Court in other environmental matters. The Madras High Court recently directed the Tamil Nadu State Legal Services Authority to establish an “Environmental Fund” for the planting of trees and the maintenance of water bodies in the State of Tamil Nadu.⁵⁴ The Uttarakhand High Court therefore had jurisdiction to order the creation of a comparable fund.

The High Court in *Miglani* recognised the need to allow people living on the banks of Ganga to have their voices heard.⁵⁵ To that end, it allowed the Chief Secretary of the State of Uttarakhand to co-opt up to seven persons to represent local communities.⁵⁶ Certainly, allowing for such participation in matters concerning human livelihoods is a key facet of procedural justice,⁵⁷ and the High Court’s effort must be lauded on that count. The community’s right to representation, however, is exposed as inadequate when probing questions are posed. First, the High Court conferred on the Chief Secretary an unfettered discretion to pick these seven representatives at his whim without any principles controlling such selection. Under the principles of administrative law in India, such uncontrolled discretion cannot be exercised by any State official and any action taken in exercise of such discretion is liable to be struck down.⁵⁸ Secondly, the nature of community representation — that is, whether community views are binding on the guardian body — remains unclear. If community voice was binding then the High Court or the Supreme Court may be moved for issuance of a writ of mandamus for the guardian body to implement the recommendation of the seven local representatives.⁵⁹

E. GANGA’S LEGAL PERSONALITY AND ITS CONFLICT WITH THE SECULAR VALUES OF THE INDIAN CONSTITUTION

The preamble of the Constitution declares India to be a “sovereign, socialist, *secular*, democratic republic”.⁶⁰ Secularism has been held to be a part of the basic structure of the Indian Constitution,⁶¹ meaning that the commitment to this value

⁵⁴ “In a first, Madras High Court sets up “Environmental Fund”” *DownToEarth* (29 June 2018) <<https://www.downtoearth.org.in/news/environment/in-a-first-madras-high-court-sets-up-environmental-fund--60976>> accessed 20 March 20, 2019.

⁵⁵ *Miglani* (n 6) [53].

⁵⁶ *ibid* [62.4].

⁵⁷ Andre Silveira, “The multiple meanings of justice in the context of the transition to a low carbon economy” (2016) University of Cambridge Institute for Sustainability Leadership 2/2016, 6 <<https://www.cisl.cam.ac.uk/resources/publication-pdfs/the-multiple-meanings-of-justice-in-the-context-of-pdf>> accessed 8 March 2019.

⁵⁸ *In re Delhi Laws Act, 1912* AIR 1951 SC 332 (Supreme Court of India).

⁵⁹ Constitution of India (n 13) arts 32 and 226.

⁶⁰ *ibid*, preamble (emphasis added).

⁶¹ *Bharati v State of Kerala* (1973) 4 SCC 225 (Supreme Court of India).

cannot be altered or abrogated even by Parliament through law. The judicial system is bound to uphold secular values and ensure that its actions are not tainted with religious overtones. A major factor that has weighed disproportionately in the High Court's reasons for granting legal personality to Ganga is the "religious importance"⁶² and the "piety"⁶³ of Ganga. While the river is highly venerated among the followers of the Hindu religion, the focus of the Court on its religious significance may be vulnerable to misuse by parochial, communal interests.⁶⁴

This is a cause for special concern given the rise of Hindu nationalism has placed the Bharatiya Janata Party (BJP) in central government and that of the State of Uttar Pradesh, which enjoys the longest course of the Ganga flowing through its territory. The High Court should have been cognisant that excessive reliance on Ganga's religious importance had the potential to marginalise its non-religious ecological importance. Indeed, there have been instances in the history of Indian struggles in which environmental rhetoric has been co-opted by religious or nationalist organisations to serve their own agendas and interests.⁶⁵ A germane example is when the Vishwa Hindu Parishad, a Hindu nationalist organisation, made appeals for the demolition of Tehri Dam on Ganga by drawing justificatory analogies with the 1992 demolition of the Babri Mosque in Ayodhya, which had triggered riots and deaths across India.⁶⁶ Muslims were openly shunned from the organisation's protests against the Tehri Dam, as the Vishwa Hindu Parishad claimed that Muslims were the "unworthy, bad sons" of Ganga.⁶⁷ Given the susceptibility of Ganga's iconography for misuse, the High Court would have been

⁶² *Salim* (n 6) [17].

⁶³ *Migliani* (n 6) [4].

⁶⁴ Erin L O'Donnell, 'At the Intersection of the Sacred and the Legal: Rights for Nature in Uttarakhand, India' (2017) 30(1) *Journal of Environmental Law* 135, 140–141.

⁶⁵ See generally Mukul Sharma, *Green and Saffron: Hindu Nationalism and Indian Environmental Politics* (Permanent Black, 2011).

⁶⁶ Mukul Sharma, 'Nature and nationalism' *Frontline* (3 February 2001) <<https://frontline.thehindu.com/static/html/fl1803/18030940.htm>> accessed 20 March 2019. A similar Hindu-nationalist brand of environmentalism can be seen with respect to the Vrindavan Forests located in Mathura district. The Vrindavan Forest Revival Project, later rechristened as the Vrindavan Conservation Project, identified the main causes of the degradation of the Vrindavan forests as the abandonment of Hindu values and the centuries of "Muslim and British Rule": Mukul Sharma, 'Saffronising green' (2002) <<http://www.india-seminar.com/2002/516/516%20mukul%20sharma.htm>> accessed 20 March 2019.

⁶⁷ Sharma, 'Nature and nationalism' (n 76).

wise not to rely disproportionately on Ganga's religious piety as a reason to confer legal personality.

F. CONCLUSION

When we stack these factors, it becomes apparent that the judgments of the High Court do not add sufficient substance to Ganga's legal personality, despite paying lip service to the intrinsic value of its life. The personality crafted by the High Court relies heavily on the grace of government officials to act in Ganga's best interest, which might not always be the case due to the likelihood of conflicted interests. Indeed, Ganga's guardians lack financial and executive autonomy from the governmental apparatus, severely curtailing their ability to take positions the government does not approve of. The rich international jurisprudence on the protection of rights of nature and legal personhood has also not been engaged with in any seriousness despite the High Court's awareness of the same, further doing a disservice to Ganga's protection. The religious overtones present in the High Court's reasoning to confer personality on Ganga can be easily co-opted by fanatical forces to turn an environmental struggle into a parochial, communal struggle on sectarian grounds. The High Court's declaration of Ganga's legal personality rings hollow in face of these limitations in its reasoning. Nonetheless, a combined reading of these judgments with those of the Supreme Court of India, which recognise ecocentrism as a principle of law, allows for a substantive elaboration of Ganga's legal status.

IV. ECOCENTRISM AND THE FUTURE OF GANGA

While the judgments of the Uttarakhand High Court are flawed from an environmental perspective for the reasons given above, they nonetheless indicate a discursive shift in the emerging jurisprudence on environmental law in India, which has previously focused on human interests in the environment of a decidedly anthropocentric nature.⁶⁸ The Indian courts are beginning to acknowledge the intrinsic value of nature, however, and the idea of ecocentrism as a principle of law is emerging in the Indian legal system. Ecocentrism is a principle of environmental ethics that recognises the intrinsic value of life of all beings and ecosystems that inhabit and function on earth.⁶⁹ An ecocentric approach is starkly opposed to the anthropocentric approach, which recognises only the intrinsic value in human

⁶⁸ Zafar Mahfooz Nomani, 'The Human Right to Environment in India: Legal Precepts and Judicial Doctrines in Critical Perspectives' (2000) 5 *Asia Pacific Journal of Environmental Law* 113, 128.

⁶⁹ Andrew Brennan and Yeuk-Sze Lo, 'Environmental Ethics' *The Stanford Encyclopedia of Philosophy* (Winter Edition, 2016) <<https://plato.stanford.edu/entries/ethics-environmental/>> accessed 20 March 2019.

beings and sees nature and natural entities merely as means to serve human ends.⁷⁰ Indeed, the High Court in *Miglani* recognised the intrinsic value of Ganga and its ecosystem as a major reason for why legal personality should be conferred.⁷¹

This mere mention of Ganga's intrinsic value, and its recognition as a living entity,⁷² may be rendered conceptually coherent and legally enforceable if the High Court judgments are read alongside recent Supreme Court judgments in the Gir lions case and the Jallikattu case.⁷³ This section argues that the question of Ganga's rights, especially its right to life, may be firmly rooted in juridical discourse that allows for meaningful protection by creatively reading the High Court judgments in light of the ecocentric jurisprudence that has been laid down by the Supreme Court.

ECOCENTRISM AND GANGA'S RIGHT TO LIFE

The judgment in the Gir lions case began with the Supreme Court declaring that the issue of translocation of Asiatic lions from a wildlife sanctuary in Gujarat to another in Madhya Pradesh must be decided in line with ecocentric principles.⁷⁴ The Supreme Court applied the "species best interest standard" to come to the conclusion that a pride of lions must be translocated to protect the population of the lions from epidemic breakouts and other threats to their survival.⁷⁵ That standard was also applied to ban the bull-taming sport of Jallikattu, as it was considered to be against the well-being of the bulls that were made to participate and because the sport caused infliction of unnecessary pain and suffering.⁷⁶ The crux of the judgment in the Jallikattu case is its acknowledgement of the intrinsic value of the lives of bulls and its critique of the anthropocentric bias in law and in human practices that refuse to acknowledge animals' right to be treated with dignity and respect.

The Jallikattu case has fascinating legal implications bearing directly on the rights of Ganga. One paragraph from the judgment implies that the right to life extends to living non-human entities in light of its expansive interpretation of "life" under Article 21 of the Indian Constitution.⁷⁷ A combined reading of

⁷⁰ *Ibid.*

⁷¹ *Miglani* (n 6) [50].

⁷² *ibid* [62.2].

⁷³ *Centre for Environment Law v Union of India* WP (Civil) No. 337/1995 (Supreme Court of India) (Gir lions case); and *Animal Welfare Board of India v Nagaraja* Civil Appeal No. 5387/2014 (Supreme Court of India).

⁷⁴ Gir lions case (n 83) [1].

⁷⁵ *ibid* [40].

⁷⁶ Jallikattu case (n 83) [46].

⁷⁷ *ibid* [62].

the Jallikattu case with the *Miglani* judgment, which recognised Ganga as a living entity, implies that Ganga has a constitutional right to life. Notwithstanding the legal logic of this result, it remains a daunting task to determine what precisely a right to life might mean for Ganga in practice. Moreover, understanding and enforcing Ganga's right to life presupposes an understanding of what it means for Ganga to have life, a deeply complex question unto itself. To effectively enforce Ganga's right to life, it is imperative that a standard be adopted against which Ganga's life may be measured.

Perhaps a workable albeit imprecise metric of Ganga's life could be its ecological flow. Ecological flow connotes the minimum quantity and quality of water that must flow through a river at any given point of time for the continued sustenance of the river and its ecosystem and of the human life that it supports.⁷⁸ The central government has recently notified the ecological flow that ought to be maintained in different stretches of Ganga in different seasons, with Namami Gange having the power to revise the quantum of these ecological flows.⁷⁹ There is a duty on the designated authorities to ensure that the ecological flow does not fall below the prescribed limits to maintain the "ecological integrity" of the river.⁸⁰ Violation of this threshold might be a suitable proxy for the right to life of Ganga; it has been argued that this recent notification may be used to protect the health, and thereby the life, of the Gangetic river system.⁸¹

Another way Ganga's right to life might be protected is by protecting the right to life of the fauna that lives in, or is dependent on, the river's waters. The Supreme Court in the Jallikattu case extended the protection of the right to life for non-human animals.⁸² Given that the Ganges River dolphin, for instance, has been classified as an endangered species by the International Union for Conservation of Nature, it may be argued that its right to a clean environment⁸³ and to live with

⁷⁸ Ben Gillespie, 'What are environmental flows?' (*The River Management Blog*, 28 April 2014) <<https://therivermanagementblog.wordpress.com/2014/04/28/what-are-environmental-flows/>> accessed 20 March 2019.

⁷⁹ Jacob Koshy, 'Centre sets 'minimum river flows' for the Ganga' *The Hindu* (Chennai, 10 October 2018) <<https://www.thehindu.com/sci-tech/energy-and-environment/centre-sets-minimum-river-flows-for-the-ganga/article25184144.ece>> accessed 20 March 2019.

⁸⁰ River Ganga (Rejuvenation, Protection and Management) Authorities Order 2016, para 5.

⁸¹ Ritwick Dutta, 'A notification to ensure ecological flow of rivers' *India Water Portal* (12 December 2016) <<https://www.indiawaterportal.org/articles/notification-ensure-ecological-flow-rivers>> accessed 20 March 2019.

⁸² Jallikattu case (n 83) [62].

⁸³ *Mehra v Union of India* WP (Civil) No. 13029/1985 (Supreme Court of India).

dignity⁸⁴ under Article 21 of the Indian Constitution is violated by the polluting industries, dams and other agents that cause damage to the river.

On a broader level, the Supreme Court in the Jallikattu case based the duty to protect bulls and all other living entities on Article 51A(h) of the Constitution — “the duty of every citizen of India to develop the scientific temper, humanism, and the spirit of inquiry and reform” — by giving the term “humanism” an expansive definition encompassing “inclusive sensibility for our species”.⁸⁵ Given that Ganga has been recognised as a living entity by the High Court, the inclusive sensibility posited by the Supreme Court might be broad enough to cover not just living organisms like animals but also living systems like Ganga and its ecosystem.

It thus becomes clear that, while the High Court judgments make only a hollow declaration of Ganga’s legal personality, richer meaning may be added to those judgments within the broader context of the ecocentric jurisprudence that has been laid down by the Supreme Court. A direct implication of reading the High Court judgments in light of the Supreme Court judgments is that Ganga’s right to life under Article 21 of the Indian Constitution can be effectively protected and enforced through the courts. With the adoption of a reasonable metric to gauge Ganga’s life — namely ecological flow — and punishing any violations of the notified threshold, or instituting suits in the name of members of the animal kingdom which inhabit Ganga whenever any step is taken that leads to pollution, Ganga’s right to life may be guarded against actors contributing to its pollution. On a more metaphysical level, it may be inferred from the above discussion that the duty of Indian citizens to instil humanism within themselves also requires that they recognise the right to life and personality of living systems such as the Ganga, although the justiciable status of that duty falls beyond the bounds of this paper.

V. CONCLUSION

Given the ongoing degradation of Ganga, despite the death of Professor Agarwal while fasting for its protection, it is imperative that a robust protective mechanism is developed expeditiously. Legal personality is one such mechanism, but there are various problems with the reasoning of the *Salim* and *Miglani* judgments of the Uttarakhand High Court. The judgments do not lay down any framework of enforceable rights for the river Ganga, which renders the declaration of its personhood deficient in substance. The High Court invokes the doctrine of *parens patriae* to confer personhood on Ganga despite its lack of competence to do so. The High Court thereby casts Ganga as a perpetual minor and denies it full-fledged personhood. It does not engage with other international developments

⁸⁴ *Gandhi v Union of India* AIR 1978 SC 597 (Supreme Court of India).

⁸⁵ Jallikattu case (n 83) [58].

in the rights-of-nature movement, despite being aware of the same. Ganga's guardians lack the financial autonomy and the powers to review governmental action to act in Ganga's best interest. The disproportionate importance given by the High Court to Ganga's religious piety, moreover, lends itself to the agenda of Hindu-nationalist organisations that may pervert it for their own purposes.

In sum, the judgments of the High Court each make an empty declaration of Ganga's legal personality without fleshing out the particulars for effective enforcement. These declarations may be augmented, however, if the judgments are read creatively in light of judgments of the Supreme Court that have recognised ecocentrism as a principle of law. Such a reading would allow us to identify and protect Ganga's right to life through the courts. With the Ganga Bill now being circulated in select circles, it is imperative for the basis of Ganga's legal personality to be anchored in principles of ecocentrism. This idea of an ecocentric personality for Ganga must be taken to its logical conclusion in the Ganga Bill through statutory recognition of Ganga's right to life and continued existence, tracing it from the provisions of the Indian Constitution, and institutionalise a mechanism targeted at combating the systemic reasons for and source of Ganga's pollution.

While certainly a legislation response to the protection of Ganga would be of much help, the non-availability of the text of the Bill for public discussion is lamented. There is a pressing need to debate and discuss the Ganga Bill and allow for adequate public participation in its formulation, so that a democratic and environmentally and socially just framework may be developed to protect Ganga and its rights. The scant detail known of the Ganga Bill seems only to consolidate under one Act what already exists under other laws; there is little reason to believe that it will lead to a radically different outcome for the alarmingly deteriorating health of the river. It is only when Ganga is properly managed, however, and is endowed with the ability to enforce its own rights through independent agents that it may be said that meaningful legal personhood has been conferred on Ganga. Principally, it must be ensured that the governance mechanism designed to protect Ganga is immune from political interference and rooted in a scientific, ecocentric ethos with protection of Ganga as its primary goal. To provide for anything more than this without a rigorous study of Ganga's ecosystems would be to ignore its varied relationships with communities and geographies, and a disservice to the cause of its preservation and rejuvenation. But if the Ganga Bill considers Ganga's interests rather than those of humans in Ganga and puts in place a robust machinery to defend the ecosystem's interests, then it may be able to do what

programmes and policies of successive governments have repeatedly failed at: turning the clock back on Ganga's rapid degradation.