

Strategic Analysis Paper

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Entering Uncharted Waters: Awarding Legal Rights to Rivers

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Key Points

- In 2017, three of the world's major rivers were granted legal rights. New Zealand's Whanganui River and the Ganges and Yamuna rivers in India.
- A legal "person" does not have to be a human being. Granting these rights to rivers may enable greater protection and enhance water security. Corporations are awarded legal status in a similar way.
- There are a number of challenges to be considered when evaluating how effective this tool may be, however, including issues with enforcement, how the rights are created and consideration of potential, unintended, consequences.

Summary

The need to ensure greater water security may be met with the creation of legal rights for rivers. In 2017, three major rivers were granted legal rights: New Zealand's Whanganui River, and the Ganges and Yamuna rivers in India. Importantly, such rights enable a river's legal guardian to bring an action in court if the river is damaged. While the idea of legal rights may seem like an innovative way to protect against the pollution or degradation of a river, there are a number of challenges that need to be considered when assessing how valuable this tool may be.

Analysis

In 2017, three of the world's major rivers were granted legal rights. New Zealand's Whanganui River and the Ganges and Yamuna rivers in India. The granting of legal rights to these rivers raises an important question, which is yet to be answered: how effective will rights-centred environmental protection be at ensuring greater water security?

Awarding environmental legal rights does not give natural resources the same status as human rights, but a legal "person" does not have to be a human being. The legal rights granted to rivers are similar to the rights that are granted to corporations in many jurisdictions. Corporations can often sue and be sued; they also have the ability to aggregate wealth. In the case of the rights that have so far been granted to rivers, the rivers have become legal entities that can have their rights legally enforced by local communities and individuals.

Granting legal status to a river enables the river's legal guardian to: bring an action in court if the river is damaged; enter into contracts on behalf of the river; and own property. In New Zealand's case, the Whanganui River's rights allow its representatives to participate in policy making and river management. While it has seldom been used before, the rights-based framework of river governance offers the potential to ensure that river systems are protected. For the communities whose livelihoods depend on them, the decision may help to ensure greater water security in the years to come. As this paper will explore, however, awarding legal rights to nature brings with it several challenges.

The New Zealand and Indian Examples

In March 2017, New Zealand's Whanganui River was granted legal rights, with the passing of the Te Awa Tupua Bill. The granting of the river's legal status followed 140 years of negotiation between the local Māori tribe in Whanganui on New Zealand's North Island. The river now has the right to be represented by its guardians in legal proceedings against any threats to its wellbeing.

The main effect of the legal protection awarded to the Whanganui River is to ensure that the river is represented in the process of making decisions on policy and river management, rather than necessarily going to court to seek a remedy. The New Zealand legislation does not set out specific remedies for actions that damage the river, which means that, in the future, any potential relief may be sought under a common law action for negligence, nuisance or breach of contract.

One week after New Zealand's Whanganui River was given legal status, an Indian court declared the Ganges and Yamuna rivers to be living entities. The Ganges is one of the world's most polluted rivers, with tonnes of raw sewage and industrial waste polluting the river; a river that is also highly valued by Indians for its healing powers. In an attempt to reduce pollution levels in the two rivers, India's Uttarakhand High Court ruled that the Ganges and Yamuna Rivers have the same rights as a legal person.

The original ruling from the High Court in Uttarakhand held that the Ganges and Yamuna rivers were legal persons, but that their legal personhood was a combination of three types

of legal persons: legal persons, living persons and moral persons. The effect of this was that the rivers were granted human rights. The Indian Supreme Court suspended the ruling, but before that took effect an Indian citizen filed a police report claiming that the Ganges had been murdered, because the pollution was so bad in some parts of the river.

In March 2017, the Indian Supreme Court overturned the decision recognising the Ganges and Yamuna rivers as legal persons. That decision came following a petition by the Uttarakhand Government that the legal status of the rivers was unsustainable at law. The state argued that their legal status created uncertainty about who the custodians are and who would be liable to pay damages to the families of those who drown in the two rivers.

The Challenges of Granting Rivers Legal Rights

The benefit of providing a river with legal status is that its legal guardian can bring an action in court against anyone who pollutes or damages the river. The idea of using legal remedies to promote greater protection of water sources is innovative. It may be an avenue that more riparians begin to consider in the future. While the development of this legal tool is only just beginning, there are a number of challenges that environmental advocates and government (both the judiciary and legislature) ought to consider when seeking to enforce the legal rights of rivers, especially when it comes to ensuring greater water security.

Enforcement

One of the biggest questions surrounding this form of environmental protection is how the legal mechanism will actually affect a river's quality and quantity of water. Problems may arise if the condition of a river cannot actually be improved or protected. If the legal mechanism cannot be enforced, fighting for the river's protection may be a futile task.

In some jurisdictions, awarding legal rights to a river first requires the appointment of a person to act on its behalf. Once the right is granted, both the "guardian" and the users of the river must recognise and respect their joint duties and responsibilities in maintaining the river. In both the New Zealand and Indian cases, a number of questions remain about how the guardians will carry out their duties and responsibilities. For example: how the guardians will decide which rights to enforce; when will action be initiated; and who will have oversight of the guardians?

Furthermore, the challenge in some jurisdictions lies in changing the behaviour of the citizens, to ensure that the river is genuinely protected. In India, many follow an intrinsic part of the Hindu religion and scatter cremated ashes in the Ganges. Varying legal definitions of pollution will affect what actions can and cannot be awarded relief. If the cultural practices of surrounding communities have an adverse effect on the river, it may be difficult to have any effect on water quality if the river's legal rights cannot be enforced. If the surrounding community is to act as the gatekeeper, or trustee, of a river region, but its members are also the ones who are polluting it, then there may be conflicting interests and questions surrounding who will have the necessary standing to bring an action on behalf of the river.

If upholding a right has to be adjudicated by a court, the process will often require not only legal standing to bring the action, but also significant funding and access to legal expertise. As will be highlighted further in this paper, the community consultation process that led to New Zealand's Whanganui River gaining legal rights meant that both government and the community were prepared for the statutory enactment when it happened. Compared to India's sudden implementation of its similar judgement (albeit short-lived), New Zealand was significantly better placed to meet the financial requirements involved in maintaining a river's legal status.

Jurisdictional limitations also present a challenge to the enforceability of a river's legal rights. While cross-border considerations are not as relevant to a river's legal personhood in New Zealand, other rivers like India's Ganges and Yamuna rivers stretch across multiple borders, including other Indian states, as well as into Bangladesh. International conventions, such as the Convention on the Law of Non-Navigational Uses of International Watercourses, currently allow participating states to address water management issues without the need for a determination on the legal status of a river. Without an institutional framework that is supported by all riparians of a river, however, it is unlikely that the legal rights of a river will be enforced in an area where its status is not recognised.

How the Right is Created

The success of this policy of granting legal rights to rivers will also depend on how those rights come to be granted. For New Zealand's Whanganui River, creating legal status involved an eight-year process that incorporated the Māori wishes into legislation. The creation of the river's legal rights was a result of ownership issues between the Crown and the Whanganui people. Both parties were economically and socially interested in arriving at an agreed outcome and the inclusion of the local Māori group allowed for an inclusive approach to river management. In India, the legal rights were granted by the judiciary; a decision that did not involve community consultation, let alone any thought-out process that would determine how the legal status would operate.

In New Zealand, a NZ\$30 million (\$27.3 million) contestable fund was created for the purpose of ensuring the Whanganui's health and well-being, as well as for litigation purposes. In the case of the Ganges and Yamuna rivers, the legitimacy and power of their rights were limited, because the court's finding did not guarantee that financial support would also be ensured. The reactionary nature of the court's decision means that the move to protect natural resources via legal mechanisms has not come from the parliament. Such a change forced upon citizens without their democratic input may create issues with compliance. It seems that to have a greater chance at maintaining a river's legal rights, a legislative process that involves community consultation may be more successful than using a judicial ruling to create those rights.

Unintended Consequences

[One argument](#) against this form of environmental legal protection is that it could set a precedent for rights to be awarded to other natural resources, including forests, mountains, deserts and, in the extreme case, stones and pebbles. If the effect of granting legal entity

status is to protect the ecosystems that human life relies on, however, then this critique does not hold much weight.

What is more persuasive is the uncertainty of how the competing rights between natural objects and humans will play out. Natural objects may compete with humans for resources like air and water, resulting in a competitive relationship between the two, which could undermine human efforts to protect the environment. It may be that granting legal status to rivers to protect their health and ensure greater water security, may never eventuate if awarding rights will only result in a legal competition between all of the resources required to sustain human life.

Conclusion

Granting legal rights to river systems seems like an effective tool to ensure that a country's water sources are protected. The problem lies, however, in ensuring that protecting the quality of the river is actually enforceable. It may be the case that in some jurisdictions, awarding legal rights to rivers will do much to ensure that the river's status as a protected and precious resource is upheld and respected. In the case of the Ganges River, 1.5 billion litres a year of untreated sewage enter the river system and it is unclear whether the river's legal status will provide any improvement in this situation.

The effect of granting rivers legal rights to ensure water security is likely to depend on the operation of the broader framework of the legal mechanism. Rights that are awarded through a long process of community consultation and that are backed by sufficient funds to be able to protect the river's status, may be more successful at improving or maintaining water security than those that are not. Nonetheless, given the need to protect water supplies for the future, governments and communities may continue to enter into the uncharted waters of granting rivers legal rights.

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