



The Rights of Rivers

Summary

The Rights of Rivers approach aims to enshrine the river as a legal entity entitled to basic rights. Its rights might include the rights to exist and to thrive, as well as right to restoration. Besides creating rights for nature, such approach also creates obligations for humans as custodians of surrounding natural resources. This Tool discusses the origin of the Right of Rivers approach, outlines the six basic rights recognised in the Universal Declaration of River Rights, gives examples of how the Rights of Rivers vision has been implemented in practice around the world, mentions few practical challenges, including the difficulty to recognise the legal personhood of transboundary rivers.

Introducing the Rights to Rivers Approach

Historically a number of indigenous communities have attributed personhood to nature and its phenomena, recognising that it need protection rather than treating it as a commodity. In 1970s, Professor Christopher Stone coined the concept of “environmental personhood”, arguing that an environmental legal entity possesses three primary rights, similar to a corporation: to enter into contracts, to take legal action to protect itself and has legal standing in court (Stone, 1974). Such rights-based approach contests a traditional legal regime of natural resources being in property-based ownership, or simply speaking, belonging to whoever owns that physical space (government, a private individual or a company). It also introduces a framework where nature is a subject with personhood whose rights should be enforced by a court of law. Since then, river rights have gained significant attention both in political and academic settings, exploring what is the scope of their rights and what types of litigation they could entail.

Universal Declaration of River Rights

Some of the fundamental values that could be attributed to rivers have been incorporated in the Universal Declaration of River Rights (UDRR, 2020), first developed by Earth Law Center in 2017. The document builds on practical experiences of river rights worldwide and proposes six minimum rights that are possessed by rivers. Those include (1) right to flow, (2) to perform essential functions within its ecosystem, (3) to be free from pollution, (4) to feed and be fed by sustainable aquifers, (5) to native biodiversity, and (6) to regeneration and restoration (para.3, UDRR, 2020). The UDRR also suggests that these rights are possessed not only by a river itself but rather by the whole river basin, calling for guardians to act on behalf of river rights. Several governments have referred to UDRR in developing their own legislative acts promoting river rights, such as El Salvador (Lempa river), France (Tavignanu river), Mexico (Oaxaca rivers), Nigeria (Ethiope river), Pakistan (Indus river), UK (Frome

river), and Serbia.

Rights of Rivers in Practice

In 2017, this rights-based approach had a major breakthrough when four rivers across the world received recognition of their legal rights - in New Zealand, Colombia and India. These examples attest to rising importance of rights-based approach to environmental protection. Entitling rivers with same rights as corporations enables local communities to enforce those rights in court, however, these rights have been so far recognised only in national jurisdictions, not in international treaties (Earth Law Center, 2020). Whether incorporated in legislation or affirmed in a judicial process, nature rights are typically stipulated in several ways within national legal system, such as in form of constitutional rights, recognising nature's legal personhood or emerging from indigenous jurisprudence. Where a special legislation recognising nature rights has not been in place yet, courts have taken forward the legal doctrine to reflect importance of nature protection.

- **Ecuador:** In 2008, the country recognised the constitutional right of Mother Earth, including a new chapter in its Constitution. This chapter provides for rights for nature and acknowledges that nature in all its life forms has the rights to exist, persist, maintain and regenerate its life cycles (Berros, 2015). Similar pathway has been followed by Bolivia in 2010, when the government passed the Laws on the Rights of Mother Earth, recognising nature as a “legal person of public interest” and establishing an ombudsman to advocate for its rights (Earth Law Center, 2020). While in both countries the movement for nature rights has been driven by indigenous groups, in Ecuador the legislative process was conducted in a participatory manner where indigenous groups advised on a transition to an ecocentric legal regime.
- **New Zealand:** In 2017, New Zealand has passed nation-wide legislation which provides certain environmental areas with a legal personality. These areas (Te Urewera, covering Lake Waikaremoana, and Te Awa Tupua, including Whanganui River) correspond to historical settlements of indigenous Maori people and reaffirm their deeds of settlement and property rights (O'Donnell and Talbot-Jones, 2018). This comes since over a century of advocating for the colonial government to reduce its negative impacts on the river.
- **Colombia:** In 2017 the Constitutional Court of Colombia recognised the legal personality of the Atrato river, deciding that pollution of the river went beyond violation of indigenous rights of the communities that depend on such river and violated the river's rights itself. The decision highlighted a need to accord better protection to river's resources and remediate the pollution. Important to note that such a legal breakthrough was only possible due to efforts of a Colombian umbrella NGO which engaged representative of various indigenous organisations (Earth Law Center, 2017).
- **India:** Another instance of judicial recognition of river rights occurred same year in India when the High Court of Uttarakhand established the legal personhood of rivers Ganga and Yamuna, since they are sacred and central to existence of Indian population (O'Donnell and Talbot-Jones, 2018). Here we see again a clear link established between the biodiversity and local culture. In a neighbouring Bangladesh the Supreme Court has followed suit and in 2019 recognised all rivers as living entities with rights equal to those of humans.

Legal Personhood of Transboundary Rivers

International treaties concluded by riparians to manage their transboundary waters rarely provide for rights of local communities, instead ensuring principles of fair and equitable utilisation and no harm caused by one riparian's water use to others. However, if one country recognises or grants special

rights to a river which hasn't been done in its neighbours sharing the river basin, then it becomes almost impossible to effectively protect the river from environmental harm (Eckstein et al, 2019).

In a transboundary context the rights of rivers might come under the umbrella of public trust doctrine, where each nation is obliged to protect its natural resources for public interest and benefit of future generations. Transboundary rivers would come under such public trust protection, where the local communities appear both owning and benefiting from trust's interests (f.e. UN Trusteeship Council has been suggested to manage the Jordan River in 1998, (Fry and Chong, 2019)).

Implementation Challenges

Facilitating a legal transition from assessing only benefits which natural resources provide to humans to recognising interests and needs of natural entities could be challenging. But enforcement of river rights could prove more difficult than getting their legal recognition, especially in absence of strong governance frameworks and guardianship. Here are some examples of challenges faced in trying to implement the Rights to Rivers Approach:

- **Legal retribution:** For example, a case of Lake Erie in the United States (Pallotta, 2020) has been reversed by the community itself which was previously advocating for granting the lake special rights. After the legal recognition has been approved, the community feared legal retribution and challenged the municipal government for constitutionality of their decision.
- **Lack of enforcement mechanisms:** in Ecuador, where nature entities enjoy constitutional rights since 2008, a local NGO has won the legal action against a construction project over Vilcabamba river but has been unable to enforce the decision (Wheeler v. Director de la Procuraduria General del Estado en Loja, 2011; Whittemore, 2011). Leveraging compliance from a private developer company requires significant lobbying and financial resources which activist groups usually lack.
- **Transboundary jurisdictions overlaps:** enforcement of transboundary river rights is even more challenging. In case of India, the High Court decision has been appealed and reversed by its Supreme Court, saying that government's responsibilities as guardians of Ganga and Yamuna rivers are unclear since those rivers extend beyond the state borders (Salim v State of Uttarakhand & others, 2017; O'Donell, 2017). This creates an issue of jurisdiction and concerns for who is accountable for river's actions, in particular when those rivers are flooding. Such controversy resulted in the Court denying both rivers their former rights.



Thematic Tagging

Transboundary

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