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Rights of Nature: Realizable or A Rhetoric?

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ABSTRACT

The discussions on rights and duties and their links with moral considerability have been in academic discourse since a very long time. The qualities of a human being, the most important one being his sentience i.e his ability to feel frustration, pain, anger, and satisfaction among others, make him worthy of moral respect and further endows upon him certain rights and obligations. Apart from sentience, his interests and his functionality also give rise to his worthiness. Such an understanding of rights which is humancentric in nature raises a question on the justification of the eco-centric approach to rights of living beings other than humans and natural objects which have an intrinsic value of their own. Further, when it comes to the conferment and implementation of such rights of nature, Environmentalism which operates in a particular nation plays a very crucial role as it determines through its laws and judicial precedents whether at all there is a requirement for the implementation of such rights or if implementation needed, then what should be its content and its significance for wildlife and biodiversity conservation. This paper shall critically examine the emerging jurisprudence on the rights of nature and whether any moral considerability can be associated to such rights to justify its standing in the larger discourse on human-centric environmental rights. Further, it shall evaluate the kind of environmentalism that exists in India and how is it different from that of the United States and Europe. Lastly, it shall discuss the status of such rights in India and the challenges of their implementation in the light of the conferment of such rights by nations like Ecuador which constitutionally recognized it in 2008 and also some other nations like New Zealand and Bolivia among others.

***Keywords**: Rights of Nature, Human-centric, Eco-centric, Environmentalism, Moral Considerability.*

I. INTRODUCTION

Earth Jurisprudence is a philosophy which was founded by Thomas Berry(2001) that deals with law and governance devised by a particular human culture or community to provide a philosophical basis for the development and implementation of a system of human governance that seeks to guide humans to contribute to the integrity, healthy functioning, beauty and on-

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 [ISSN 2581-5369]

going evolution of the Earth Community.[2] The United Nations Harmony with Nature Program came into existence through General Assembly Resolution (2009)[3] which is primarily keeping track of initiatives taken by the countries to include the rights of nature within their governance system. The key milestones include the adoption in Ecuador in September 2008 of a new Constitution that expressly recognized the rights of nature; and the adoption in Bolivia in April 2010 by a World People's Conference of approximately 35,000 people of a Universal Declaration of the Rights of Mother Earth(UDRME).[4] Since then legislators and judges in several countries have enacted laws that recognized rivers, forests and mountains (among other ecological beings) as legal subjects, and courts have done the same in many countries such as Bangladesh, Colombia, Ecuador, and India. [5] To understand this discourse of rights of nature, it is important to engage in the jurisprudential discussion on rights and duties and a very crucial question as to why someone or something is worthy of having rights and duties and above that, moral considerability.

The notion of moral considerability has been for a long time attached to humans as it is the only man who possesses the ability of intellectual inquiry and reasoning. This belief goes back to the ancient era of natural law where the Greeks, primarily Plato and Aristotle and, the Stoics and the Roman Orators like Cicero strongly asserted that human reasoning is a distinguishable factor which puts them above all living creatures. This indicates that man is the centre of everything. Aristotle further goes on to argue that nature has made everything for humans and that non-humans are mere instruments that serve humans.[6] Richard Sorabji in his book "Animal Minds and Human Morals: The Origins of the Western Debate"[7] has confirmed that it was primarily the stoics who had quite an unappealing view of the animals and denied that they possessed the capability of intelligent reaction. Among the social contractarians, Emanual Kant, suggests that all the duties of the animals are kind of indirect duties to the humans. He believed that creatures who do not have self-consciousness cannot possess any dignity and hence no rights or duties.

It is pertinent to note that on certain occasions in the past and in recent times, a whole set of new jurisprudence has emerged where jurists have shown their concern regarding the well-being

[2] Cormac Cullinan, Wild Law: Governing People for Earth, (SiberInk 2002).
[3] 'Harmony with Nature, United Nations (n.d.). See Http://Www.Harmonywithnatureun.Org Accessed 7 Nov 2021.' <http://www.harmonywithnatureun.org>.
[4] Nathanael Wallenhorst, Handbook of the Anthropocene: Humans between Heritage and Future (Springer 2023).
[5] ibid.
[6] Aristotle, Politics, (Oxford: Clarendon Press, 1885).
[7]Richard Sorabji, Animal Minds and Human Morals: The Origins of the Western Debate' (Cornell University Press 1993).

 [ISSN 2581-5369]

of animals. Recognizing that animals are sentient beings, Bentham suggested that "the species to which a creature belongs is as irrelevant, for ethical purposes, as race: It does not supply a valid reason to deprive a sentient being a decent life." [8] Peter Singer also made a courageous attempt and argued that the right question to ask, when we think about our conduct towards animals, is, what choice will maximize the satisfaction of the preferences of all sentient beings?[9] His work on animal suffering follows the utilitarian paradigm. These instances indicate that moral considerability or moral respect is not something which operates only in the human-centric world. Rather, such discussions have opened a pathway for extending the notions of morality also to not sentient living beings and natural objects like mountains, river valleys, and rocks among others. Taking clues from the already existing literature, this paper shall first critically evaluate the jurisprudence which gives way to the realization of rights of nature and then critically examine whether there is any scope for moral considerability within this rights domain which will strengthen our claims for such rights. Secondly, it shall evaluate how environmentalism has grown and evolved in India in contrast to the UK, the United States and particularly Ecuador which in 2008 incorporated the rights of nature within its Constitution. Lastly, it shall focus on the challenges of implementation of such rights in India.

II. THE SCOPE OF MORALITY WITHIN ECO-CENTRIC RIGHTS

The ambit of rights and duties has with time expanded. The conferment of rights and duties on children, women, senile, foetuses, human corpses and corporations which at one point in time seemed like an alien concept, have now not only been accepted but the content of such rights and their effective implementation is no more a distant reality. The credit to such an understanding that expansion in the domain of law primarily to fill the gap within the laws is possible, goes back to the Roman and Greek Empire, where they effectively used the tool of legal fiction to fill the gap. Freidrich Waismann in recent times, is also one of the prominent names in linguistic philosophy whose idea of the "open texture" of language was borrowed by HLA Hart who discussed in his "Concept of Law" about the "open texture" of law.[10] This flexible idea of open texture has helped in extending the language of rights, duties and respect not only for children, women or corporations, but it also has the capability of extending these rights to nature which is constitutive not only of sentient living beings who possess certain similarities to human beings, but also consists of non-sentient livings beings like trees, plants and other natural objects like mountains and rivers.

[8] Ibid at 2.
[9] Ibid.
[10] Brian Bix, *H. L. A. Hart and the "Open Texture" of Language*, 10 Law and Philosophy 51 (1991) .

 [ISSN 2581-5369]

Now that we are aware of the source from where the expansion of rights becomes possible, it is important to understand that this expansion needs to be considered in the light of moral considerations because at the core of the possession of rights, exists the idea that humans are worthy of moral respect owing to their mental cognition and their ability of understanding and reasoning. Then the question that flows from this statement is whether animals, trees, plants, mountains and rivers have any moral standing. Addressing this question is crucial as it will support our claim for the extension of rights and duties on these natural objects. It is also important to keep in mind before moving forward with the idea suggested in this paper, that giving rights does not mean that we are not supposed to cut any tree or kill any animal. Rather, it will throw some light on whether there is any intrinsic value which can be attached to natural objects, both living and non-living. For evaluation of moral considerability, primarily four groups of things shall be considered, (1) sentient beings whose psychological states are models of our own; (2) sentient beings of any kind; (3) living things; and (4) natural objects of any sort.[11] Such a categorization has been borrowed from Andrew Brennan's work and the arguments concerning the fourth group has been taken from Christopher D. Stone's work on the moral standing of trees.[12] Though their writings are not recent but the arguments which they have proposed in their work still hold authority in certain aspects, especially when the moral standing is in question.

A. What gives rise to Intrinsic or Inherent value?

To engage with this question, it is important to first differentiate between intrinsic and instrumental value. To possess instrumental value is to serve as means to an end. On the other hand, intrinsic value implies that a thing has a value of its own and which is not used to serve some other end. For instance, scholars like Passmore and Feinberg have argued in favour of common interests and mutual obligations. These interests are in favour of homocentric rights as human is considered to be superior. This indicates that there is some sort of a hierarchy where there is co-existence between humans and other natural objects but humans lie in the upper rung of the strata and the objects and creatures below them are their only to fulfil their needs and satisfy them. Such an instrumental value of sentient beings who are below humans and the non-living has long been in the popular discourse since the stoics in Greece. This can be suggested as there has been a transition from having no value to having instrumental value attached to serve the interests of humans. And if this is true, do these animals and objects have intrinsic

[11] Andrew Brennan, 'The Moral Standing of Natural Objects' (1984) 6 Environmental Ethics 35.
[12] Christopher D. Stone, 'SHOULD TREES HAVE STANDING?- TOWARD LEGAL RIGHTS FOR NATURAL OBJECTS' S. Cal. L. Rev. 450 (1972).

 [ISSN 2581-5369]

value? What is required to have an intrinsic value? The commonality of qualities between human beings and other sentient beings gives rise to the aspect of interest for such sentient beings and further supports their existence of morality. The best example of this is that there is a certain level of psychological unity in the animal kingdom. When a cow parts ways from their calves, they do feel the pain of separation. Or when dogs become protective of their owners due to the attachment that they develop with them. When it comes to formulating plans and carrying out those plans, cooperations are required. This way of pursuing their plan is also reflected in the actions of lionesses when they hunt their prey. Apart from these, there are various other psychological states that animals share with human beings. Therefore, for group 1, it is easier to argue that sentient beings sharing common psychological states have a moral standing.

For group 2,3 and 4 consisting of sentient beings of any kind and any other living beings, the case becomes a bit difficult to prove but not impossible. What one needs to understand is that moral significance is something which is beyond sentience and such an idea has been borrowed by various supporters of eco-centric rights from different religions and cultures like Buddhism, Jainism and Hinduism among others.[13] The emerging earth jurisprudence which was first established by Thomas Berry (as already mentioned above) who was quite influenced by the ideas of Christopher D. Stone, commented that things of the universe are not a collection of objects but a communion of subjects.[14] These are some of the examples which show that such objects can also have rights. The respect for rights shall only stand when some moral significance can be proved. This moral significance will give rise to intrinsic value and hence, support the case of eco-centric rights. Therefore Earth Jurisprudence needs to be understood through the lens of the idea given by Stone and Brennan.

Stone, in the year 1972 published an article which influenced American Supreme Court Judge Douglas to give a dissenting opinion in *Sierra Club* case. Justice Douglas believed that it was high time that a rule was made to litigate in the name of inanimate objects. He further justified his stand by giving the club standing by mentioning that ships and corporations have been considered as legal persons.[15] Stone's argument in his article in reference to interest is that someone or something can have interest if it can be a holder of legal rights. And in order to have legal rights, three conditions need to be satisfied; firstly, the power to initiate legal action at its behest; secondly, while determining legal relief, the court should take into consideration the injury to it; and lastly, the relief should be for its benefit. [16] He applied these three criteria to

[13] Brennan (n 10).
[14] Thomas Berry, "The Great Work: Our Way into the Future", Harmony/Bell Tower (1999), pg 16.
[15] Sierra Club v. Morton, 405 U.S. 727 (1972).
[16] Christopher D. Stone (n 11).

 [ISSN 2581-5369]

develop a legal rights framework for natural objects. To argue in favour of the first criteria, he relied on *In Re Bryn* Judgment wherein the court allowed a professor to act as a guardian and initiate a class action suit on behalf of all foetuses that were planned to be aborted.[17] In order to support the second criterion of expansion of legal standing, stone cited cases like the Scenic Hudson Case[18] the Volpe case[19] and the Boyd case[20]. He further argues that the environment as a whole should be made the beneficiaries of their own rights and that there should be consensus and compromise between man and the environment. He puts across that courts should make findings as regards the harms caused and should detail it as well. [21] The compensation that will be awarded should be used in ecological restoration which is directly for the benefit of the environment. There are certain issues with this idea which Stone himself recognized. One of the objections that he addressed was concerning the guardianship approach wherein it was argued that a guardian can't possibly judge the needs of natural objects. For instance, it cannot be ascertained whether a river wants to be dammed or not. Stone sidestepped these objections by contending that objects are capable of communicating what they wish to communicate to people who understand them. Hence, the guardianship approach is the best-suited one for natural objects. Based on the concept propounded by Stone, it is plausible to suggest that the environment has legal standing directly, owing to its intrinsic or inherent value.

Now let us try and understand the idea suggested by Andrew Brannan, who is an Emeritus Professor of Philosophy at La Trobe University, Malbourne, Australia. He gives a very interesting viewpoint towards construing the intrinsic value of natural objects, both living and non-living. He states that the intrinsic function lessness of someone or something gives rise to moral significance, which ultimately gives rise to intrinsic values. First of all, he differentiates between intrinsic and non-intrinsic functions and puts across that an intrinsic function is something which becomes the identity condition for the component of nature. The pumping of blood by heart is its intrinsic function as it has become its identity condition. But the decomposition of the compost heap by cotoneasters is not part of their identity condition. He states that "*It follows that I can know that a certain bush screens my compost heap without knowing what kind of bush it is; and a grasp of what a cotoneaster is involves no reference to such overlaid(non-intrinsic) function as that of screening other things*".[22] Now that it is understood what forms part of intrinsic function, Brennan gives a very unsettling but a brave

[17] Civ. 13113/71 (Sup. Ct. Queens Co.), January 1972.
[18] Scenic Hudson Preservation Conference v. Federal Power Commission, 354 F.2d 608 (2d Cir. 1965)
[19] Citizens to Preserve Overton Park v. Volpe, 1971 U.S. LEXIS 96.
[20] Road Review League v. Boyd, 270 F. Supp. 650 (SDNY. 1967).
[21] Christopher D. Stone (n 11).
[22] Brennan (n 10).

 [ISSN 2581-5369]

argument that individual components (and not the whole system) of the environment are intrinsically functionless. Intrinsic functionlessness implies that every individual component of the environment doesn't have a fixed function to perform. Each of them have a capability to perform many functions , as and when required by the circumstances, or as different situations unfold. Hence, there are no prefixed functions or any design which determines the functions of the components. Such an idea moves away from the teleological approach which focuses on designs and purposes and advocates for the philosophy of accidentalism according to which the flow of events is unpredictable. To support his stand, he gives an example of predator who maintains the stability in the ecosystem by controlling the population of voles. In his example, the predators are eagles who are maintaining the population. Let us suppose that all the eagles die, and their place as a predator is assumed by Hawks. Now, a similar kind of function is being performed by Hawks. The fact of eagles or hawks being predators is true for the animal as a group but not for an individual eagle or a hawk. If it is considered true at an individual level as well, then it shall give rise to the risk of division fallacy. To quote him:

"*As we have seen, this intrinsic functionlessness is coupled with a capacity to take on multifarious functions in different contexts. But what makes a factory worker more than a machine operator also makes an elm tree more than a windbreak: in each case we have an assigned function coupled with the potential for taking on many other functions-voluntarily or not-overlaid that is designed specifically neither for this nor for that, since the individual was not designed at all. And if we are to look for a quality by virtue of which all natural things may claim moral considerability, I tentatively suggest that we have come up with a candidate: their lack of intrinsic function*."[23]

The above paragraph also explains that these individual components have fundamental autonomy due to their lack of intrinsic function. To understand this autonomy in a better manner, he differentiates between the functionality of an artefact designed by humans (as scholars like Hegel and Savile have ascribed higher value to art than nature) and natural objects. He contends that:

"*Subtract the expressive power and the fitness for its purposes from a painting and you are left with an artefact of no particular value: the canvas, the wood for the frame, even the frame itself and the pigments in the oils, might all have been put to better use. But subtract the functions assigned by people and animals to a valley and its river, take away the ski lifts, the beaver dams, and the scenic views and you are left with an object containing within it hundreds of self-*

[23] ibid.

 [ISSN 2581-5369]

regulating systems living in a kind of natural anarchy, an object that partly determines its own climate, serving no one's purpose, but still worthy of respect purely in its own right."[24]

As the root for moral consideration of all living and non living beings of nature has been built, we are now in a better position to appreciate the core principles of earth jurisprudence which would typically "recognize that by virtue of their existence, all members of the Earth Community (i.e. all beings) have the fundamental right to exist and to be free to play their unique role within that community; regard these inherent, fundamental rights as inalienable and recognise that human have a duty to respect the rights of other-than-human beings, and to seek to coexist harmoniously with them; regard as illegitimate and "unlawful" any human acts or laws that infringe upon these rights because they violate the fundamental relationships and principles that constitute the Earth Community; provide effective legal remedies to protect these fundamental rights if they are violated by human acts; advocate restorative justice (which focuses on restoring damaged relationships and ecological health) rather than punishment (retribution); and seek to resolve competing rights on the basis of what is best for the Earth Community as a whole and thereby contribute to maintaining a dynamic balance between the rights of humans and those of other members of that community."[25]

It is imperative to note at this juncture that though the idea put forward by Brennan seem a bit sketchy and unsettling, they create a reasonable doubt on the well-settled idea that it is only humans who are worthy of moral consideration. Also, one should be cautious while applying his analogy to a whole ecosystem as he suggests that the idea of intrinsic functionlessness best supports the moral claim of individual components of nature and not of the whole system. What may be in the interest of the individual component may not be in the interest of the community as a whole but may be true that the welfare of the community or a group is also the welfare of the individual member. This similarly applies to components of nature. Nevertheless, his claim for moral consideration of individual components based on the quality of intrinsic functionlessness cannot be easily refuted. The main reason for pointing out the gap in Brennan's work is while applying these principles through laws and policies, the governments will face challenges while determining how to best serve the interests of the ecological community when there will be a conflict between the welfare of an individual component or a group and the welfare of the system as whole. This aspect shall be covered in detail in the fourth part of the paper.

[24] ibid.
[25] Wallenhorst (n 3).

 [ISSN 2581-5369]

III. THE GROWTH OF ENVIRONMENTALISM

The above paragraph proves that natural objects certainly hold some intrinsic value basing on which they can be considered as having moral significance. But is moral standing enough for legal standing? Or whether there is a possibility that something or someone may have a moral standing but not necessarily a legal standing? Stone, as mentioned above has come up with certain criteria to determine the legal standing of natural objects. But how practicable are these rights when it comes to its implementation? To answer these questions one needs to sort of trace the development of environmentalism in a particular country as this has an impact on how the laws related to environmental protection are viewed. Environmentalism also throws light on what kind of relationship a human being share with the environment. Either he might consider himself on an equal footing with the other natural objects, whether living or non-living or he might see himself as a superior being who views the rest of the natural objects as resources which he can use to satisfy his needs.

Ramchandra Guha in his book "Environmentalism: A Global History" has understood environmentalism as something which is beyond appreciation of landscape and scientific analysis of species. According to him, environmentalism should be viewed as a social program, a charter of action which seeks to protect cherished habitats, protest against their degradation and prescribe less destructive technologies and lifestyles. [26] He divides it into two phases wherein phase one consists of three different viewpoints towards environmentalism, one insists upon going back to the land, i.e. the countryside instead of living in modern urban cities to conserve the environment. The other viewpoint was concerning the ideology of scientific conservation which is based on sustainable yields. The third viewpoint relates to the idea of wilderness which talks about the inherent significance of the wild including the mountains and the rivers which are equally important as a human beings is because all of these components live in a state of harmony with each other. These approaches to environmentalism were visible in Europe, the United States and India as well. The great poets and romantic environmentalists like William Wordsworth, John Ruskin, and Edward Carpenter among others have through their work, strongly supported the idea of going back to the villages and settling there to save the environment from the adverse impact of industrialization. Edward Carpenter went to the extent of resigning a prestigious Cambridge Scholarship and setting up a commune on a hill above a factory town of Sheffield, offering a union of manual labour and clean air as an alternative to industrial civilization. [27] Mahatma Gandhi, in India, was pretty much influenced by the work of

[26] Ramchandra Guha, *Environmentalism: A Global History* (Penguin Random House India 2016).
[27] ibid.

John Ruskin and Edward Carpenter as he mentioned in his first book "Hind Swaraj". For Gandhi, as for Ruskin, the growth of cities and factories was possible only through a one-sided exploitation of the countryside. [28] The blood of the villages, he wrote in July 1946, is the cement with which the edifice of the cities is built and he wished to see that the blood that is today inflating the arteries of the cities runs once again in the blood vessels of the villages. [29]

The ideology of scientific conservation was primarily based on sustained yields which are yields **that a forest can produce continuously at a given intensity of management without impairing the productivity of the land**. In India, Dietrich Brandis (German Botanist), who was the first Inspector General of Forests (head of the Forest Department established in 1864) in India was influenced by the idea of scientific conservation and drew his inspiration from the work of G.P. Marsh's work " Man and Nature: Or, Physical Geography as Modified by Human Action"[30] who was America's first environmentalist who recognized the irreversible impact of man's action on earth. There have been other environmental scientists as well like Alexander von Humboldt who is a pioneering analyst of global deforestation or Ferdinand Muller who adheres to this ideology and has worked intensively on scientific forestry and conservation. But particularly talking in the Indian context, Brandis made a profound impact on scientific forestry in India. He was sceptical about not only the practices of the forest-dwelling tribes which would adversely impact the forest but also condemned the action of the British officials of unmindful cutting of trees for either war, railway or military purposes. However, it was the state that had the sole authority to protect and conserve the forests and this was to be done through the Forest Department under the guidance of Brandis. Lastly, the Wilderness idea in the first phase was strongly propagated by John Muir who was a Scottish naturalist and a conservationist (who later lived in California and founded Sierra Club which is an environmental organization of the United States) and Aldo Leopold who was an American forester and conservationist. How Muir construed the wilderness idea is visible in his essay that was published in the *Atlantic Monthly*. [31] Being a Christian by faith, surprisingly he has written evocatively on landscapes and individual species of America and was in ardent support of species conservation and protection. He wanted to protect nature for its own sake and stated that nature had a right to be protected and cared for regardless of any benefit that it has for humans. Such an ideology was prevalent in America in the 17th and 18th centuries on the other hand, had a shift in his ideology from

[28] ibid.
[29] ibid.
[30] GP Marsh, *Man and Nature: Or, Physical Geography as Modified by Human Action* (Harvard University Press 1965).
[31] John Muir, 'John Muir's 1897 Case for Saving America's Forests' [1897] *The Atlantic* <https://www.theatlantic.com/magazine/archive/1897/08/the-american-forests/305017/> accessed 19 April 2024.

being a scientific conservator to a wilderness thinker. Therefore, he has moved from the tradition of Gifford Pinchot to the tradition of John Muir. However, there was a difference in how Muir and Leopold took the wilderness idea. Muir focused more on the conservation of species within protected areas like national parks and wildlife sanctuaries, Leopold additionally viewed and considered human behaviour outside national parks which need to be checked to protect nature. Now particularly in the Indian context, the idea of wilderness is reflected in most religions like Hinduism, Buddhism and Jainism among others where these religions have given sacred value to rivers, mountains, trees and animals. Conservation of forests through a declaration of certain trees forming part of sacred groves is the best example is depicting the inherent and sacred value of trees which is exclusive of the functionality which these trees have for humans.

The second phase of environmentalism can be primarily divided into the environmentalism of affluence and the environmentalism of the poor. Environmentalism in the first-world nations of Europe and America has been significantly influenced by Rachel Carson's *Silent Spring* which which is a pathbreaking work on how pesticides have had an impact on animals and humans. One of the chapters in her book revealed how the population of robins decreased due to the consumption of worms that were contaminated by insecticide sprays. The poisoning through insecticides and pesticides also has an impact on human health. As an irony, Carson died of Cancer. But her eye-opening work influenced not only scientists but also industrialists and the common people. It is interesting to note that throughout her work she doesn't mention the Marsh, Muir and Leopold which is a trio that every environmentalist or a conservationist would follow before starting their own work. This indicates that environmentalism in the United States as an ethic was internalized and formed part of their sub-conscience even without realizing that there is a whole set of legacy behind it.

Motivated by Carson's work, many people turned to saving the environment. It became part of a social programme where environmentalism remained no longer an exclusivity of the scientists but also gained social significance. The fight for the cause of conservation of nature was carried out by radicalists and well as deep ecologists in the United States. As pointed out earlier in the paper, environmentalism must be viewed as a social program, its social significance was different in the first-world and the third-world nations like India. In Europe and America, people influenced by the wilderness idea and the adverse impact of chemicals of nature, through social movements tried to protect the environment even though they were not directly affected by that impact. On the other hand, for India, the social movement was more of a social struggle, a struggle for livelihood and to preserve its nature due to the sense of belongingness. The

 [ISSN 2581-5369]

environmentalism of the poor can be best explained through instances like Chipko Movement or the Narmada Bachao Andolan. Moreover, the scientific conservation approach of Brandis and the sole authority of the Forest Department to govern the forests became a huge problem for the forest-dwelling communities. Even after the enactment of the Forest Rights Act, 2006 and the subsequent its subsequent rules, the recognition and vesting of rights for the scheduled tribe and other forest-dwelling communities is still a distant reality in some states in India. This is a classical example of conflict between two forms of environmentalism.

A major takeaway from the above discussion is that for India, people opted for environmentalism not because they had the resources to do so or because they were developed enough to first think of the environment and then development, rather it was a matter of survival for the poor. If for any country, saving the environment to sustain the vulnerable sections of society becomes the main cause, even though it has a legacy of considering the inherent and intrinsic value of nature through religion, it is very difficult if not impossible to think of environmentalism through the lens of the idea of wilderness or deep ecology and even implementing earth justice through rights of nature approach for that matter.

IV. CHALLENGES OF IMPLEMENTATION OF RIGHTS OF NATURE IN INDIA

Before critically engaging with legal challenges, it is important to keep in mind that when an entity is endowed with a legal status, it shall have both rights and duties and this position regarding the legal standing of the natural objects has already been established internationally. For these rights to be enforceable, as Christopher Stone (mentioned earlier in the paper), such an entity should have a legal standing before the court which implies that it should firstly, have the capability to initiate a legal action, secondly, while determining the relief the injury to that entity should be considered and lastly, the relief granted should be for the benefit of that entity. Similarly, the implementation of Earth jurisprudence by ways of providing rights of nature has somewhat comparable elements; (a) expanding the class of legal/ juridical persons to include other ecological beings (i.e. members of the Earth Community); (b) recognizing that those ecological beings have inherent and inalienable fundamental rights like human rights; (c) imposing legal duties on human beings and human institutions (including artificial juristic persons such as corporations and governments) to refrain from infringing upon the rights of those ecologicalcal beings without adequate justification; and (d) establishing legal mechanisms for enforcing compliance with those duties.[32]

Now looking at the Indian scenario, the Uttarakhand High Court in 2017 passed a set of very

[32] Wallenhorst (n 3).

interesting rulings wherein the river Ganga, Yamuna and their tributaries were identified as juristic persons having rights, duties and liabilities. [33] It was stated that both rivers should be given legal status giving due consideration to Articles 48-A and 51A(g), Constitution of India. Later, in the Order dated 30-03-2017, a whole host of other natural geographical features were given the status of personhood apart from river Ganga and Yamuna. [34]Again in 2018 and 2019 both Uttarakhand and Punjab and Haryana High Court gave legal status to the animals in that state.[35] And recently in 2020, Hon'ble Justice Shrimathy in one of the judgments of Madras High Court exercised her parens patriae jurisdiction and quoted that Mother Earth has certain rights which should be protected and that both the state and the central government should certain steps to protect it. She further stated that currently, the polluter pays principle, the precautionary principle and sustainable development are not adequate and hence there is a need for the conferrment of the rights of nature.[36] These judgments by the Indian High Courts raise some interesting questions which need to be dealt with; firstly, what are the rights of nature and how will they be implemented, secondly, what will be the impact on human beings if such rights are given to nature and lastly but most importantly, whether conferment of such rights can be misused? But in order to answer these questions, the three orders of the Uttarakhand High Court of 2017 are more important as the Supreme Court itself in 2017 passed a stay order on the position given by the 3rd Order dated 30-03-2017. The observations made the by Supreme Court are critical to our understanding of the legal challenges of implementation of such rights of nature.

So it all started with the Lalit Miglani 1st Order dated 02-12-2017 where a PIL was filed concerning prevention of pollution of river Ganga. The court directed (i) to establish an Inter-State Council under Article 263 of the Constitution of India for all the riparian states of the Ganga within three months to make recommendations for the rejuvenation of the river; (ii) various directions towards the establishment of Sewage Treatment Plants, (iii) directions for taking actions against/ closure of polluting industries, and (iv) directions to take actions against Ashrams and other establishments that let out untreated sewage into the river, etc.[37] Despite such an elaborate order, the directions were not being followed by the authorities. Later, in the Mohd. Salim order dated 20-03-2017, the Uttarakhand High Court for the first time, and in fact

[33] *Mohd. Salim v. State of Uttarakhand and Others* (2017) Writ Petition No. 126 (20 March 2014)
[34] Guest, 'The Personhood of Nature' (*Law and Other Things*, 5 April 2017) <https://lawandotherthings.com/the-personhood-of-nature/> accessed 19 April 2024.
[35] Katelyn Weisbrod, 'Indian Court Rules That Nature Has Legal Status on Par With Humans—and That Humans Are Required to Protect It' (*Inside Climate News*, 4 May 2022) <https://insideclimatenews.org/news/04052022/india-rights-of-nature/> accessed 19 April 2024.
[36] ibid.
[37] Guest (n 33).

 [ISSN 2581-5369]

it was the first court in India to evolve a legal personhood principle for rivers Ganga, Yamuna and their tributaries. The legal guardians for the rivers appointed by the court were the Director of Namami Gange, the Chief Secretary of the State of Uttarakhand and the Advocate General of the State of Uttarakhand. This order seems inadequate primarily on the following grounds: (i) what will be the content of these rights, (ii) why only these two rivers should be given personhood and not others, (iii) the argument about the physical and spiritual significance of the rivers to give them personhood is not an efficiently reasoned argument, (iv) As Ganga and Yamuna flow from various states, then why only guardians from the state of Uttarakhand have been appointed and (v) how the compensation will be decided. The order also gives rise to an impracticable situation like, it is the duty of the river not to flood and if it does, it will have the liability to compensate. Now, it is important to note that some of the defects of this order were cured by the 2nd Lalit Miglani Order dated 30-03-2017, where legal personhood was extended to other entities like the Himalayas , Glaciers , Streams, Water Bodies etc. The aspect of legal guardianship was also relaxed and now people from other riparian states could also appointed as guardians. Still, this order could not do away with some of the older defects of Mohd. Salim order primarily concerns the content of rights, decisions regarding compensation and the community-based approach to be used while appointing the guardian. It was the Supreme Court of India which raised most of the questions above, concerning the orders and hence in 2017, both the Mohd. Salim and 2nd Lalit Miglani Order. No appeal has yet been filed to reverse this order of the Supreme Court. However, a petition is currently pending before the Supreme Court for conferring legal personhood to animals.[38]

The abovementioned discussion is primarily for rivers and the arguments and questions raised can be maximum extended to mountains. If the legislators and the judiciary try to work out the issues which have been pointed out in the Uttarakhand HC orders, there is a possibility that a method may be devised to confer such rights to rivers or even mountains. One can take clues from the parallel, New Zealand who at the very same time in 2017 through a parliamentary bill, conferred legal person to Wanganui River and the eco-system nearby it and appointed the people of the Maori Tribe as their legal guardians. This community-based guardianship has the potential to better take care of the river as compared to solely giving stewardship to the governmental authorities. While appointing the guardian, the New Zealand Parliament also took note of the fact that how historically this tribe has been protecting the river and the nearby area. Our Indian courts should also take note of the historical perspective while appointing the guardian. Another fact that is important to consider is that even though personhood may be

[38] Weisbrod (n 34).

 [ISSN 2581-5369]

conferred, determining the content of the rights is going to be a very challenging task for India as before articulating the content, there is a requirement to first have a taxonomy of rights for different natural objects giving due consideration to nature of the object. It is time that now the legal fraternity should be working with environmental scientists, naturalists, conservationists and most importantly the indigenous people to deeply understand the significance of the considerablity of these natural objects to come up with the content. Once the determination of content seems achievable, one can think of Constitutionally protecting these rights like what has been done by Ecuador under its new Constitution which came into effect in 2008. Right of nature are protected by Article 10 and Article 71-74 respectively. There also have been instances where the people have approached the courts in Ecuador to enforce these rights.[39]

Now, when we move forward with the implementation of these rights, one hidden and unpopular aspect is important to highlight, and that is the issue of prospectivity of the judgments related to environmental law. There are many judgments relating to environmental law including the judgment of Mohd. Salim and Lalit Miglani which are applicable prospectively. The effect of this is that the earlier projects which have had an adverse impact on the environment before the passing of the judgment, do not face any scrutiny and continue to affect the environment and the eco-system of a particular place. Sometimes, a developmental project is executed in a phased manner and some installations in a particular place might face a legal challenge and some won't. So, collectively the objective of protecting and preserving the natural objects and the environment as a whole becomes futile. Therefore, the Supreme Court of India and also the High Court while passing such judgments should be cautious and aware of the bigger picture that is involved, and wherever possible should try to give a retrospective ruling.

Lastly, one should view this rights of nature approach through the lens of Environmentalism that has evolved in India which has mostly been about the struggle for survivorship of the people rather than primary talks on the wilderness idea. For a country where many times it becomes difficult for the courts to enforce the fundamental rights of the people, enforcing fundamental or legal rights of nature seems a distant reality. Nevertheless, I would like to argue that this rights of nature approach has the tendency not only to transform the notion of social struggle that is attached to the environmentalism of the poor but also has the capacity for the effective implementation of the plethora of environmental law that exist in India, including the process of Environment Impact Assessment under Environment Protection Act, 1986 and also the

[39] Katelyn Weisbrod, 'Ecuador's High Court Rules That Wild Animals Have Legal Rights' (*Inside Climate News*, 29 March 2022) <https://insideclimatenews.org/news/29032022/ecuadors-high-court-rules-that-wild-animals-have-legal-rights/> accessed 19 April 2024.

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Social Impact Assessment under the Land Acquisition Act, 2013. This approach will make people take the environment seriously and even though its sounds rhetorical at this point of time, they will certainly be realization in the near future.

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 [ISSN 2581-5369]