

**IS WATER SIMPLY A FLOW?
EXPLORING AN ALTERNATIVE MINDSET FOR
RECOGNIZING WATER AS A LEGAL PERSON**

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INTRODUCTION

*Ko au te awa, ko te awa ko au*¹

Our modern societies deal with severe water issues daily. These contemporary problems, although acknowledged by scientists, remain a “headache” for human and social sciences as the instruments and mechanisms of water law often lack effectiveness.² To compensate for this flaw, a recent movement argues it is necessary to rethink the way we handle water-related issues by reformulating the relationship between this resource and humans beings.³ Indeed, it is becoming increasingly common to perceive water as “a flow that transcends the human-nature binary”⁴ and, as a result, to develop innovative instruments that account for this perception. However, it remains a challenging exercise to consider water in this way; thus, legal tools struggle to catch up.

Current environmental and water law is influenced by a rights-based approach, which has evolved over time.⁵ Put differently, this perspective “is the most recent of various analytical constructs that have been utilized in law to protect the natural world and ecological processes on which life depends.”⁶ In this regard, employing the concept of legal personality to protect and preserve nature and its components is one of the latest evolutions in environmental law. The origins of this proposition lie within Christopher Stone’s contributions.⁷

1. In English, this translates to “I am the river, and the river is me.” It is a Whanganui Tribe saying that “refers to the river as a whole, its spiritual and physical dimensions and [the Whanganui Tribe] unity and connection with the river.” *Tutohu Whakatupua Explained Questions and Answers*, WANGANUI CHRONICLE (Sept. 3, 2012, 4:29 PM), http://www.nzherald.co.nz/wanganui-chronicle/news/article.cfm?c_id=1503426&objectid=11073833 [https://perma.cc/4UQ4-SRRS].

2. Charles Duhigg, *Clean Water Laws Are Neglected, at a Cost in Suffering*, N.Y. TIMES (Sept. 12, 2009), <http://www.nytimes.com/2009/09/13/us/13water.html> [https://perma.cc/2D9V-JZ9T].

3. See, e.g., Alice Cohen, *Water as a Governance Opportunity*, in WATER AS A SOCIAL OPPORTUNITY 63, 72 (Seanna L. Davidson et al. eds., 2016) (describing the opportunities to redefine water in governance by “integrating questions of water, human health, and ecosystem health in innovative and holistic ways”).

4. *Id.*

5. See, e.g., Jamie Benidickson, *The Evolution of Canadian Water Law and Policy: Securing Safe and Sustainable Abundance*, 13 MCGILL J. SUSTAINABLE DEV. L. 61, 61–62 (2017) (Can.) (discussing the evolution of water policy and law); Alexandre Lillo, *La gouvernance de l'eau au Canada: Un regard juridique et épistémologique sur l'éminente complexité de sa mise œuvre*, 30 J. ENVTL. L. & PRAC. 123, 126–28 (2017) (Can.) (discussing the origins of water governance).

6. Dinah Shelton, *Nature As a Legal Person*, VERTIGO, Sept. 2015, at para. 2.

7. Christopher D. Stone, *Should Trees Have Standing—Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450, 467, 472, 489 (1972) [hereinafter Stone (1972)].

In 1972, Professor Stone made a groundbreaking proposal by suggesting the natural environment should be given legal personhood.⁸ In his paper, and in its later updates,⁹ he argued that if one could speak for nature—plants, animals, water, or air—judges might be more sensitive to its degradation and disappearance.¹⁰ Despite criticism,¹¹ Stone’s perspective still prevails as a reference when exploring links between nature and legal personality.

Granting legal personality to a non-human entity implies that the law shall treat it as a subject rather than an object. This legal or juridical person “refers generally to an entity . . . which society has decided to confer specific rights and obligations.”¹² When a society recognizes nature as a subject of law, its status shifts from being considered as a private good, common resource or a resource in the public trust to a specific person under the law, with all the consequences that entails.

Therefore, nature could be afforded legal rights and duties or represented by a guardian. In short, nature could have a voice heard by society. From a legal perspective, the real interest of this approach, in addition to creating a form of acknowledgment and a different discourse around nature, arises from the possibility of constructing unique legal mechanisms.

8. See James D. K. Morris & Jacinta Ruru, *Giving Voice to Rivers: Legal Personality As a Vehicle for Recognising Indigenous Peoples’ Relationships to Water?*, 14 AUSTL. INDIGENOUS L. REV. 49, 50 (2010) (restating Stone’s argument for the benefits of applying legal personality to nature as: (1) “the issue of standing for third parties would be less problematic;” (2) “emphasis would be on the actual impact on that resource as opposed to assessing an affected party’s economic loss;” and (3) “remedies would apply to the natural resource directly . . .”).

9. CHRISTOPHER D. STONE, *SHOULD TREES HAVE STANDING? TOWARD LEGAL RIGHTS FOR NATURAL OBJECTS* (1974); CHRISTOPHER D. STONE, *SHOULD TREES HAVE STANDING? TOWARD LEGAL RIGHTS FOR NATURAL OBJECTS* (rev. ed., Avon Books 1975); Christopher D. Stone, *Should Trees Have Standing? Revisited: How Far Will Law and Morals Reach? A Pluralist Perspective*, 59 S. CAL. L. REV. 1, 8 (1985); CHRISTOPHER D. STONE, *SHOULD TREES HAVE STANDING? TOWARD LEGAL RIGHTS FOR NATURAL OBJECTS* (Tioga Publ’g Co. 1988); CHRISTOPHER D. STONE, *SHOULD TREES HAVE STANDING? AND OTHER ESSAYS ON LAW, MORAL, AND THE ENVIRONMENT* (Oceana Publ’ns, Inc. 1996) [hereinafter STONE (1996)].

10. MARIE-ANGÈLE HERMITTE, *LA NATURE, SUJET DE DROIT?*, 2011/1 ANNALES HISTOIRE, SCIENCES SOCIALES 173, 173 (2011) (Fr.).

11. See, e.g., Joel Feinberg, *The Rights of Animals and Unborn Generations*, in 1 PHILOSOPHY & ENVIRONMENTAL CRISIS 43, 50 (William T. Blackstone ed., 1974) (“[M]ere things have no interests. *A fortiori*, they have no interests to be protected by legal or moral rules.”); Andrew Brennan & Yeuk-Sze Lo, *Environmental Ethics*, STAN. ENCYCLOPEDIA PHIL., <https://plato.stanford.edu/archives/win2016/entries/ethics-environmental/> [https://perma.cc/R8KC-V4RB] (last updated Dec. 2, 2016) (noting one criticism of Stone’s theory is that for things to have legal standing they must have interests).

12. Shelton, *supra* note 6, at para. 2.

In practice, granting nature legal personhood continues to be a marginal reality.¹³ However, a few examples inspire hope for a widespread movement.¹⁴ New Zealand exemplifies this approach and is a trailblazer in the field. In 2012, this Southern Hemisphere country recognized legal personhood for the Whanganui River through a series of settlement agreements and, later, a bill enacted in 2017.¹⁵ In 2014, it recognized legal personhood for the Te Urewera National Park.¹⁶ Even more recently, a record of understanding was signed between eight Māori representatives and the Government in order to grant Mount Taranaki legal personality.¹⁷ Additionally, in South America, Ecuador constitutionally acknowledged nature as a legal person in 2008¹⁸ and the Constitutional Court of Colombia granted the Atrato River legal rights in 2016.¹⁹ In India, the Ganga and Yamuna rivers were declared as living entities by a judge of the Uttarakhand High Court.²⁰ Even in the U.S., a lawsuit, filed on September

13. See Shelton, *supra* note 6, at paras. 24–50 (highlighting the relatively few examples of legal personhood for nature).

14. See, e.g., Clare Kendall, *A New Law of Nature*, GUARDIAN (Sept. 23, 2008, 7:01 PM), <https://www.theguardian.com/environment/2008/sep/24/ecuador.conservation> [<https://perma.cc/2BKC-D6PG>] (discussing giving legal rights to Ecuador’s “rivers, forests, and air”); Sandra Postel, *A River in New Zealand Gets a Legal Voice*, NAT’L GEOGRAPHIC (Sept. 4, 2012), <http://voices.nationalgeographic.org/2012/09/04/a-river-in-new-zealand-gets-a-legal-voice/> [<https://perma.cc/U37Y-UFMK>] (describing New Zealand’s agreement to recognize a river’s legal rights); Bryant Rousseau, *In New Zealand, Lands and Rivers Can Be People (Legally Speaking)*, N.Y. TIMES (July 13, 2016), <https://www.nytimes.com/2016/07/14/world/what-in-the-world/in-new-zealand-lands-and-rivers-can-be-people-legally-speaking.html> [<https://perma.cc/C3AB-X2VK>] (discussing a national parks legal personhood in New Zealand); *India Court Gives Sacred Ganges and Yamuna Rivers Human Status*, BBC NEWS (Mar. 21, 2017), <http://www.bbc.com/news/world-asia-india-39336284> [<https://perma.cc/4FTN-CS7Y>] (reporting on the court case that granted legal rights to the rivers).

15. Te Awa Tupua (Whanganui River Claims Settlement) Bill 2016 (129-2) (N.Z.); Tūtohu Whakaturua, Whanganui Iwi and the Crown [2012] (signed 30 Aug. 2012), art 2.1; see also Ruruku Whakatupua Te Mana O Te Awa Tupua, Whanganui Iwi and the Crown [2014] (signed 5 Aug. 2014), arts 2.2, 2.3, 2.7 (focusing on the establishment of a new legal framework for the Whanganui River and finalizing the agreement by adopting two additional documents, which stand as the Crown’s acknowledgement and apology); Ruruku Whakatupua Te Mana O Te Iwi O Whanganui, Whanganui Iwi and the Crown [2014] (signed 5 Aug. 2014), art 4 (concentrating the recognition of the Whanganui Iwi, as well as their interactions with the Whanganui River).

16. Te Urewera Act 2014, s 11 (N.Z.).

17. See, e.g., Eleanor Ainge Roy, *New Zealand Gives Mount Taranaki Same Legal Rights As a Person*, GUARDIAN (Dec. 22, 2017, 6:49 AM), <https://www.theguardian.com/world/2017/dec/22/new-zealand-gives-mount-taranaki-same-legal-rights-as-a-person> [<https://perma.cc/V75K-G64Y>]; Blanton Smith, *Mt Taranaki to Become Legal Personality Under Agreement Between Iwi and Government*, TARANAKI DAILY NEWS (Dec. 21, 2017, 3:51 PM), <https://www.stuff.co.nz/taranaki-daily-news/news/100085814/mt-taranaki-to-become-legal-personality-under-agreement-between-iwi-and-government> [<https://perma.cc/7F8U-VJ5P>].

18. Constitución de la República del Ecuador, [Constitution] Oct. 20, 2008, arts. 71–74 (Ecuador).

19. Colombia Constitutional Court Ruling T-622 of 2016, Expediente T-5.016.242. Available online: <https://justiciaambientalcolombia.org/2017/05/07/sentencia-rio-atrato/>.

20. Mohd. Salim v. State of Uttarakhand, 2017 PIL No. 126 of 2014, ¶ 16 (India) (granting rights to the rivers in a territorial court in the Indian judicial system).

25, 2017, asked the district court in Denver to recognize the Colorado River as a legal person.²¹

These doctrinal and practical examples show that a legal framework dedicated to nature as a legal person is under construction. Although, it will certainly take time, experimentation, attempts, and failures to make it an acceptable legal tool, one way to contribute to this movement is to explore the applicability of this doctrine to water as a whole.

The consequences of recognizing water as a legal person would be notable: it would be a subject rather than an object of law with individual and subjective rights; it would be bound by liabilities and obligations; and it would be entitled to damages if harmed. However, this approach raises a set of questions: as a component of nature, can water be granted legal personality or an equivalent status in law? If yes, what form would it take? What conditions would be applicable? Can we get past the “common resources” status?

Most of all, envisioning water as a subject of law will inevitably lead to a theoretical and legal reconceptualization of the Human–Nature binary. As a result, the purpose of this article is to investigate the early stages of this idea from both a theoretical and legal perspective. It explores the foundation of water’s legal personality and its promising capacity to respond to contemporary environmental issues by recycling a traditional legal tool.²² First, this article examines the theoretical origins of water as a legal person. Then, it analyzes the concept of legal personality in common and civil law. Finally, it explores the extent of its compatibility with water.

21. See, e.g., Elizabeth Lowman, *Environmental Group Asks Court to Recognize Colorado River As a Person*, JURIST (Sept. 26, 2017, 1:21 PM), <http://www.jurist.org/paperchase/2017/09/environmental-group-asks-court-to-recognize-colorado-river-as-a-person.php> [<https://perma.cc/L7L6-GXQZ>] (summarizing the press release announcing the case); Victoria Prieskop, *Environmentalists Seek Personhood for Colorado River Ecosystem*, COURTHOUSE NEWS SERV. (Sept. 27, 2017), <https://www.courthousenews.com/environmentalists-seek-personhood-colorado-river-ecosystem/> [<https://perma.cc/U9NX-CEPA>] (discussing the environmental group’s quest to seek legal personhood for the Colorado River).

22. Although this article does not address indigenous beliefs (but instead focuses on metaphysical and legal approaches), the roots of this idea lie in indigenous values where water and humans are intertwined. See, e.g., Morris & Ruru, *supra* note 8, at 49 (explaining that indigenous belief is another paradigm through which to address rights of nature and contemporary environmental issues and that indigenous societies, like those of New Zealand, have long believed that humans and nature are intertwined); see also Catherine J. Iorns Magallanes, *Nature As an Ancestor: Two Examples of Legal Personality for Nature in New Zealand*, VERTIGO, Sept. 2015, para. 5 (“Despite not stemming from the environmentalist rights of nature approach, these examples [of indigenous beliefs] were designed to better protect the natural environment and to better recognise an alternative relationship between humans and nature.”).

I. A POST-MODERN MINDSET FOR WATER

In the few instances where water has become a legal person, there has been a discussion regarding the spiritual and sacred dimension of this resource.²³ This section attempts to translate such beliefs into theoretical arguments. In order to consider water as a legal person, it is first essential to describe the philosophical grounds that support this idea and to answer a fundamental question: For what reasons could water be conceived as a person? This exercise based on environmental ethics reconceptualizes interactions between human beings and water, and how these interactions influence our understanding of water. From this theoretical perspective, water cannot only be perceived as an independent natural reality; it is first and foremost a hybrid object concurrently defined by social and natural interactions.²⁴

The theory of environmental ethics was created and developed in North America in the 1960s and 1970s.²⁵ Simultaneously with the movement of common resources,²⁶ a more philosophical school of thought emerged from the environmental crises unveiled in the second half of the 20th century. In this regard:

Although nature was the focus of much nineteenth and twentieth century philosophy, contemporary environmental ethics only emerged as an academic discipline in the 1970s. The questioning and rethinking of the relationship of human beings with the natural environment over the last thirty years reflected an already widespread perception in the 1960s that the late twentieth century faced a human population explosion as well as a serious environmental crisis.²⁷

23. See, e.g., Magallanes, *supra* note 22, at para. 14 (outlining New Zealand indigenous concepts of water in comparison with granting nature legal personhood).

24. From Bruno Latour's perspective, a hybrid (or quasi-object) is a thing that cannot belong solely to the social or the natural realm. BRUNO LATOUR, *NOUS N'AVONS JAMAIS ETE MODERNE* [WE WERE NEVER MODERN] (1991). In other words, a hybrid object is made from both nature and society and shall be considered as such. To this end, Latour aims to "cure" the modern process of continually distinguishing nature and society as two separate dimensions.

25. See generally Catherine Larrère, *Éthiques de L'environnement*, 24 *MULTITUDES* 75, 75 (2006) (discussing the history of the environmental ethics and thought in America) (Fr.); Brennan & Lo, *supra* note 11 (outlining the development of environmental ethics).

26. See generally ELINOR OSTROM, *GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION* 2–6 (1990) (compiling common resource doctrinal and theoretical models); Garrett Hardin, *The Tragedy of the Commons*, 162 *SCIENCE* 1243, 1244 (showing that open access to a common resource, for which there is a significant demand, indubitably leads to its overexploitation, and, potentially, to its extinction).

27. Brennan & Lo, *supra* note 11.

Environmental ethics responds to the harmful effects of human activities on natural ecosystems by advocating for a paradigm shift away from the traditional and predominant anthropocentrism.²⁸ Therefore, this theory examines the way in which we grasp contemporary environmental issues and questions, an approach that is frequently centered on humankind.²⁹ Environmental ethics challenges this interpretation of the Human–Nature binary³⁰ by confronting the assumed superiority and domination of humanity over nature. Thus:

When environmental ethics emerged as a new sub-discipline of philosophy in the early 1970s, it did so by posing a challenge to traditional anthropocentrism. In the first place, it questioned the assumed moral superiority of human beings to members of other species on earth. In the second place, it investigated the possibility of rational arguments for assigning intrinsic value to the natural environment and its non-human contents.³¹

In this regard, the purpose of environmental ethics is: to explore the influence of human values on the perception of the environment and its non-human components; to dissolve the polarity between nature and society;³² and to question the nature and the origins of environmental crises.³³ Therefore, this theory endeavors to conceive and justify a new relationship between humans and nature.³⁴ Based on this perspective, it becomes possible to propose alternative tools to comprehend current environmental problems. The benefit of this approach lies in its transversal ambition to consider not only the social *and* natural dimensions of contemporary environmental challenges, but also the interactions *between* the two.

28. *Id.*

29. *Id.*

30. Vinh-De Nguyen, *Qu'est-ce que L'éthique de L'environnement?* HORIZONS PHILOSOPHIQUES [PHIL. HORIZONS], Spring 2000, at 133, 140 (Can.).

31. Brennan & Lo, *supra* note 11.

32. See Cohen, *supra* note 3, at 66–67 (explaining that the application of environmental ethics aims to reframe the “nature-society binary” that is often described as a couple “wherein a barrier exists between the realms of the human and the non-human”).

33. Hicham-Stéphane Afeissa, *De L'éthique Environnementale au Principe Responsabilité et Retour* [From Environmental Ethics to the Principle of Responsibility and Return], 8 EDUCATION RELATIVE A L'ENVIRONNEMENT 22 (2009) (Fr.).

34. Nguyen, *supra* note 30, at 138.

By its nature, environmental ethics can be imposed on water.³⁵ Canadian scholar Jamie Linton has pursued this exercise by adapting relational dialectics to water.³⁶ Relational dialectics is an analysis that “considers how things that are often understood to be separate, independent, or self-sufficient, actually produce each other in mutually constitutive processes.”³⁷ In other words, relational dialectics considers the dependency that characterizes two things, moments, or concepts,³⁸ and it focuses on their internal relations.³⁹ Thus, a crucial question arises: What analyses of water does environmental ethics allow? To answer this question, the interactions between water and human beings must be explored.

The challenge associated with water law and management lies in the fact this resource is characterized by universal and transversal dimensions that are seemingly external to the human experience. This portrait of water as a strict natural reality creates a filter through which it becomes difficult to consider this substance from a legal perspective.⁴⁰ Also described as a meta-narration, this confined perception may be reconceptualized using environmental ethics.⁴¹ Water is not only defined by natural dimensions but also by socio-cultural aspects.⁴²

In fact, the social nature of water may be expressed through two observations. First, the concepts surrounding water are developed and popularized in a specific sociocultural context which intrinsically influences

35. See ROBERT W. SANDFORD & MERRELL-ANN S. PHARE, *ETHICAL WATER – LEARNING TO VALUE WHAT MATTERS MOST* 34 (2011) (illustrating that environmental ethics can be transposed in various models); Graham Mayeda, *L'espace Naturel et la Responsabilité Envers L'Environnement Eans la Philosophie de Nishida Kitarō et Watsuji Tetsurō*, in *MILIEUX MODERNES ET REFLETS JAPONAIS: CHEMINS PHILOSOPHIQUES* 129, 132–33 (2015) (providing a specific case of Japanese environmental ethics); see also CLARE PALMER, ET AL., *ENVIRONMENTAL ETHICS* 420 (2014) (giving a general description of the models and a detailed philosophical analysis).

36. JAMIE LINTON, *WHAT IS WATER? THE HISTORY OF A MODERN ABSTRACTION* 25 (2010).

37. *Id.* at 27.

38. *Id.* at 28.

39. See Jeremy J. Schmidt, *Water: An Ethical Opportunity for Canada*, in *WATER AS A SOCIAL OPPORTUNITY* 33–34 (Seanna L. Davidson et al. eds., 2015) (providing a deeper theoretical analysis of water ethics).

40. DANIEL PUECH, *L'EAU EN REPRÉSENTATIONS: GESTION DES MILIEUX AQUATIQUES ET REPRÉSENTATIONS SOCIALES* 73, 80 (Chantel Ape & Patrick Point eds., 1999) (providing an example of the universal and transversal characteristics of water and of the difficulties it creates for law).

41. See generally LINTON, *supra* note 36, at 8–11 (presenting an alternative description of water as a meta-narration, under the concept of modern water, in which considering water as a mere natural entity is abstracting its socio-natural constitution); Julie Trottier, *L'avènement de la Gestion Intégrée des Ressources en Eau*, in *GESTION DE L'EAU, APPROCHE TERRITORIALE ET INSTITUTIONNELLE* 179, 182 (Alexandre Brun & Frédéric Lasserre, eds., 2012) (defining modern water as an unterritorialized, objective, homogenous, ahistorical and outside of social interactions entity).

42. Lillo, *supra* note 5, at 134.

its construction and the way in which it is described.⁴³ Second, water-related challenges and issues result directly or indirectly from interactions with the human environment.⁴⁴ Therefore, the theoretical and conceptual description of water should consider these two realities. Essentially, water is concurrently bound by nature as well as society; thus, it should not be regarded merely as a social *or* natural entity. Instead, water can be conceived as a concomitant and consubstantial combination of the two;⁴⁵ it is a hybrid object⁴⁶ and a socio-natural entity.

Based on this epistemological mindset, water consists of both natural and social dimensions. On the one hand, the natural aspect of water pertains to nature as an independent being. A mind-independent reality existing without any human presence, conception, or description.⁴⁷ On the other hand, the social dimension of water appears within the social context and the surrounding cultural environment. The social context and environment define how water is perceived in a particular situation. As a result, water can be understood as a natural, external, and independent reality whose relations and reciprocal interactions with mankind, human culture, and social environment define its meaning and implications.⁴⁸ In fact, water freezes, evaporates, condenses, flows, and emerges regardless of any human influence.⁴⁹ However, every challenge and problem related to it only exists because of its relationship with human beings.⁵⁰ In other words, the identity of water arises from social interactions; its “process occurs *through* us,” and therefore, “water problems are never just water problems.”⁵¹ Instead, water problems are consequences of a “particular kind of engagement” that is both cultural and social.⁵²

As part of this article, the value of this theoretical approach is associated with the post-modern conception of water that it proposes.⁵³

43. See Trotter, *supra* note 41, at 180 (presenting an example through the case of integrated water resources management).

44. *Facts on Water Resources*, GREENFACTS, <http://www.greenfacts.org/en/water-resources/water-resources-foldout.pdf> [https://perma.cc/XL43-B8LC] (last visited Feb. 19, 2018).

45. See Erik Swyngedouw, *Modernity and Hybridity: Nature, Regeneracionismo, and the Production of the Spanish Waterscape*, 89 ANNALS ASS'N AM. GEOGRAPHERS 443, 443–45 (1999) (showing the dual condition between the social and natural status of water); see also LINTON, *supra* note 36, at 224 (explaining that water is “a process whose identity is formed in social relations”).

46. LATOUR, *supra* note 24.

47. Magallanes, *supra* note 22, at para. 14 (describing water’s naturalness as having “its own spirit and life force”).

48. Lillo, *supra* note 5, at 134.

49. LINTON, *supra* note 36, at 109.

50. *Id.*

51. *Id.* at 224.

52. *Id.*; see also LATOUR, *supra* note 24 at 47–48 (providing a more general approach).

53. Although not essential to this present paper, it would have been possible to extend this reasoning by introducing the relational ontology of water. Lillo, *supra* note 5, at 134–35 (explaining that

Water is an entity endowed with its own personality, its own health, and, arguably, its own spirit independent of human beings or their influence. Accordingly, water can be conceived as a specific being—a person. A quality allocated to “persons” is the capacity to interact with the components of their environment; therefore, it is defined by a set of connections arising from the agency of each actor involved.⁵⁴ Thus, granting water legal personhood begins to make sense as this entity would be recognized *per se*, and these social interactions could be considered mutually to its existence rather than separately.

II. THE CONCEPT OF LEGAL PERSONALITY AND ITS POTENTIAL COMPATIBILITY WITH WATER

Every theoretical approach requires empirical data to supplement it. As mentioned earlier, examples exist of nature being recognized as a legal person.⁵⁵ From the precedents set in New Zealand and India, this article examines the cases in which bodies of water have been granted legal personhood and attempts to identify criteria for treating water in this way. To complete these case studies, a positivist analysis of the current state of law with respect to legal personality is conducted. By targeting the dominant conceptions regarding legal personhood in common and civil law, this article answers the following question: Are there general standards upon which water could be considered a legal person?

A. The Precedents Set by New Zealand and India

There are only a few cases in which a body of water was granted legal personhood.⁵⁶ Amongst them are the noteworthy illustrations from New Zealand and India.⁵⁷ In both situations, a strong spiritual approach is at the root.⁵⁸ In New Zealand, the Māori beliefs influence the cultural grounds that

the ontological approach considers water as a hybrid reality, characterized by the reciprocity of its social and natural dimensions).

54. See BRUNO LATOUR, *FACE À GAÏA: HUIT CONFÉRENCES SUR LE NOUVEAU RÉGIME CLIMATIQUE* 67 (2015) (explaining how the concept of agency is employed in its philosophical aspect—it is the capacity (and the effectiveness associated with that capacity) to act in a given environment that has the power to influence a given situation).

55. See, e.g., *Te Awa Tupua, Whanganui Iwi and the Crown* [2014] (signed 5 Aug. 2014), art 9.13.48; *Mohd. Salim v. State of Uttarakhand*, 2017 PIL No. 126 of 2014, ¶ 16 (India).

56. Erin O'Donnell & Julia Talbot-Jones, *Three Rivers Are Now Legally People – But That's Just the Start of Looking After Them*, CONVERSATION (Mar. 23, 2017, 3:13 PM), <http://theconversation.com/three-rivers-are-now-legally-people-but-thats-just-the-start-of-looking-after-them-74983> [<https://perma.cc/6U2F-CEXX>].

57. *Id.*

58. *Id.*

led to legislatively granting the Whanganui River legal personality.⁵⁹ A similar recognition occurred in India, where the Ganga and Yamuna rivers were judicially declared living legal entities.⁶⁰

1. The Whanganui River and Te Awa Tupua

From the environmental ethics perspective, New Zealand stands out as a precursor. Indeed, this country recognized the Whanganui River as a legal person in a deed of settlement called *Tūtohu Whakatupua* and signed in 2012.⁶¹ This instrument was a full and final settlement between the Whanganui Iwi and the Crown.⁶² Additional measures later strengthened this initiative.⁶³ First, the *Tūtohu Whakatupua* was completed in 2014 by two documents: (1) the *Ruruku Whakatupua Te Mana o Te Awa Tupua*,⁶⁴ which established a new legal framework for the Whanganui River, and (2) the *Ruruku Whakatupua Te Mana o Te Iwi o Whanganui*,⁶⁵ which recognizes the Whanganui Iwi and their interactions with the Whanganui River. Second, a supplementary deed adopted in 2016 amended certain provisions of the previous *Ruruku Whakatupua Te Mana o Te Awa Tupua* and *Ruruku Whakatupua Te Mana o Te Iwi o Whanganui*.⁶⁶ Third, the entirety of this process was enacted in 2017 when the *Te Awa Tupua (Whanganui River Claims Settlement) Act* (Te Awa Tupua Act) was adopted.⁶⁷ Because this law derives from decades of negotiations and settlements between the Whanganui Iwi and the Crown, it compiles the essential contributions of the official documents mentioned above.⁶⁸ Thus, the following paragraphs will explore the noteworthy provisions included in this Act.

The main purpose and significance of this Act is the personification of the Whanganui River.⁶⁹ It recognizes that the River is “held by the

59. Rousseau, *supra* note 14.

60. Mohd. Salim v. State of Uttarakhand, 2017 PIL No. 126 of 2014, ¶ 16 (India).

61. *Tūtohu Whakatupua, Whanganui Iwi and the Crown* [2014] (signed 30 Aug. 2012), arts 2.1.2, 2.6-2.9.

62. Iwi is the Māori word for “tribe.” See *Ruruku Whakatupua Te Mana O Te Iwi O Whanganui*, *supra* note 15, at art 2.11 (translating iwi to tribe).

63. See *Te Urewera Act*, *supra* note 16 at s 11 (broadening the movement by the recognition of a national park as a legal person in 2014).

64. *Ruruku Whakatupua Te Mana O Te Awa Tupua*, *supra* note 15, at art 1.

65. *Ruruku Whakatupua Te Mana O Te Iwi O Whanganui*, *supra* note 15, at art 1.

66. *Ruruku Whakatupua – Te Tānekaha, Whanganui Iwi and the Crown* [2016] (signed 27 Apr. 2016), art 1.

67. See *Te Awa Tupua (Whanganui River Claims Settlement) Bill 2016* (129-2), pt 2, cl 14 (N.Z.) (legalizing the status of the Whanganui River as a legal person).

68. *Id.* at commentary.

69. *Id.*

indigenous tribes and upholds their spiritual relationship with it. . . . [I]t create[s] a new legal entity of the river itself, Te Awa Tupua.”⁷⁰ These words imply that the Māori expression “Te Awa Tupua” is not simply a designation that was given to the Whanganui River but that it has its own meaning and essence.⁷¹ “Te Awa Tupua” refers not only to the river from a hydrological perspective, but it provides “a description of the river system from the mountains to the sea including its tributaries and all its elements.”⁷² In other words, this conception “is not a geographical location, but rather a recognition of the river system as a whole with specific interests and intrinsic values of its own.”⁷³

The Te Awa Tupua Act also included and defined this expression. Clause 12 provides that “Te Awa Tupua is an indivisible and living whole, comprising the Whanganui River from the mountains to the sea, incorporating all its physical and metaphysical elements.”⁷⁴ Indirectly, this provision implies that the River is not limited to its traditional understanding as a stream of water following a definite course or channel.⁷⁵ Rather, the Act describes the River as “the body of water known as the Whanganui River that flows continuously or intermittently from its headwaters to the mouth of the Whanganui River on the Tasman Sea and is located within the Whanganui River catchment.”⁷⁶ This entity is composed of: (1) “all tributaries, streams, and other natural watercourses that flow continuously or intermittently into the body of water [previously] described”;⁷⁷ (2) “all lakes and wetlands connected continuously or intermittently with the bodies of water [previously] referred to”;⁷⁸ and (3) “the beds of the bodies of water” related to the Whanganui River.⁷⁹

Additionally, clause 13 of the Act describes Te Awa Tupua in depth.⁸⁰ It is understood as both a physical and spiritual entity, an indivisible and

70. Magallanes, *supra* note 22, at para. 17.

71. See Te Awa Tupua (Whanganui River Claims Settlement) Bill 2016 (129-2), pt 2, cl 12 (N.Z.) (explaining that this concept does not have an English translation).

72. *Tutohu Whakatupua Explained Questions and Answers*, *supra* note 1.

73. *Te Awa Tupua*, WHANGANUI RIVER RIGHTS IN NEW ZEALAND, <https://sites.google.com/site/whanganuiriverrights/the-river-as-a-legal-entity> [https://perma.cc/7DMR-XHC5] (last visited Feb. 19, 2018).

74. Te Awa Tupua (Whanganui River Claims Settlement) Bill 2016 (129-2), pt 2, cl 12 (N.Z.).

75. *River*, ENGLISH OXFORD LIVING DICTIONARIES, <https://en.oxforddictionaries.com/definition/river> [https://perma.cc/UNZ3-6YTA] (last visited Feb. 19, 2018).

76. Te Awa Tupua (Whanganui River Claims Settlement) Bill 2016 (129-2), pt 1, cl 7(a) (N.Z.).

77. *Id.* at pt 1, cl 7(b).

78. *Id.* at pt 1, cl 7(c).

79. *Id.* at pt 1, cl 7(d).

80. *Id.* at pt 2, cl 13.

living whole, as well as a singular entity comprised of many elements and communities.⁸¹ Therefore, Te Awa Tupua and the various communities linked to it, including the Iwi and Hapū of the Whanganui River, have inalienable connections and responsibilities regarding their respective health and well-being.⁸² The nature of this relationship was translated into law by declaring Te Awa Tupua as a legal person.⁸³ More precisely, clause 14(1) of the Act states that this entity has “all the rights, powers, duties, and liabilities of a legal person.”⁸⁴ Clause 14(2) supplemented this provision by indicating that “[t]he rights, powers, and duties of Te Awa Tupua must be exercised or performed, and responsibility for its liabilities must be taken, by Te Pou Tupua,”⁸⁵ which is a dedicated body established to be the “human face of Te Awa Tupua.”⁸⁶ Furthermore, it is established that Crown-owned parts of the riverbeds are transferred and vested in the name of Te Awa Tupua.⁸⁷ These provisions have a significant meaning; they have the effect of abolishing the traditional approach based on riparian rights, property rights, or public ownership.

In sum, by legally recognizing a metaphysical conception of water through multiple initiatives, New Zealand stimulated a positive momentum to the movement of environmental ethics. As the first developed country to implement and enact such a standard, this Nation contributed to an emergent doctrine. New Zealand acknowledged that a river is not only a physical unit having hydrological effects on fauna, flora, and mankind, but also a living entity having its own relationships, health, functions, and values.⁸⁸ In addition, this fundamental assertion was further recognized using legal personality, illustrating that a “Western” legal tool can be applied to a spiritual understanding of water. The Whanganui River case represents a promising paradigm shift in the protection and preservation of water. In the following section, we will see that this initiative recently had support from a judgment in India.

81. *Id.*

82. *Id.* at commentary.

83. *Id.* at pt 2, cl 14(1).

84. *Id.*

85. *Id.* at pt 2, cl 14(2).

86. *Id.* at pt 2, cl 18(2) (providing for an institutionalized representation of Te Awa Tupua; this body constitutes a tool similar to trusteeship or guardianship, as Te Awa Tupua would be, for instance, incapable of representing itself—law designed a specific mechanism so it can be done); *see also* Stone (1972), *supra* note 7, at 464–67 (showing how Christopher Stone envisioned and anticipated this type of instrument).

87. Te Awa Tupua (Whanganui River Claims Settlement) Bill 2016 (129-2), pt 2, cl 48 (N.Z.).

88. *See generally id.* (showing the Te Awa Tupua River has its own legal personality).

2. The Ganga and Yamuna Rivers Judgment

Following the example set by New Zealand, India was the scene of a recent judgment recognizing the Ganga and Yamuna rivers as legal living entities.⁸⁹ Contemporary to the Te Awa Tupua Act,⁹⁰ the verdict rendered by Justice Rajiv Sharma and Justice Alok Singh is the first of its kind in India.⁹¹ Although the India Supreme Court ultimately suspended the judgment, the decision still constitutes a landmark in the field of environmental law.⁹²

Similar to the Māori beliefs in New Zealand, communities in India, especially the Hindu community, have a strong spiritual attachment to their environment.⁹³ Even though regarded as a common-law country,⁹⁴ the Indian legal system can be defined as a hybrid model. It is influenced by civil and common law as well as customary practice and religious convictions. In this singular legal context, litigation arose from the “revelation that despite long correspondence, neither the State of U.P. [Uttar Pradesh] nor the State of Uttarakhand [was] cooperating with the Central Government “for the constitution of the Ganga Management Board.”⁹⁵ The purpose of this Board is to supervise disputes over

89. Mohd. Salim v. State of Uttarakhand, 2017 PIL No. 126 of 2014, ¶ 16 (India).

90. The *Te Awa Tupua Bill* was read on March 14, 2017, though it resulted from a much longer initiative of negotiations; the India High Court’s decision was released on March 20, 2017—only a few days after the bill was read. Compare *Te Awa Tupua (Whanganui River Claims Settlement) Bill*, N.Z. PARLIAMENT, https://www.parliament.nz/en/pb/bills-and-laws/bills-proposed-laws/document/00DBHOH_BILL68939_1/te-awa-tupua-whanganui-river-claims-settlement-bill [https://perma.cc/BHN9-8Q2G] (last visited Feb. 19, 2018) (noting the Bill’s progress), with Mohd. Salim v. State of Uttarakhand, 2017 PIL No. 126 of 2014, ¶ 19 (India) (issuing the decision on March 20, 2017).

91. *A First in India: Uttarakhand HC Declares Ganga, Yamuna Rivers As Living Legal Entities [Read Judgment]*, LIVELAW.IN (Mar. 20, 2017, 9:27 PM), <http://www.livelaw.in/first-india-uttarakhand-hc-declares-ganga-yamuna-rivers-living-legal-entities/> [https://perma.cc/9765-87NP].

92. See Bhadra Sinha, *SC Puts on Hold Uttarakhand HC Order Declaring River Ganga a Living Entity*, HINDUSTANTIMES, <http://www.hindustantimes.com/india-news/sc-puts-on-hold-uttarakhand-high-court-order-declaring-ganga-a-living-entity/story-IYqkaehoLhAyWfjAP8GYOO.html> [https://perma.cc/Y3Q8-ZL9L] (last updated Feb. 19, 2018) (discussing how the Supreme Court overturned the High Court judgment on July 7th, 2017. The Court ruled that territorial tribunal “erred in not considering Ganga an inter-state river. The high court went beyond its jurisdiction in passing the verdict, as no plea was made for declaring the rivers as a living entity.”); see also Agence France-Presse, *Rivers Do Not Have Same Rights As Humans: India’s Top Court*, YAHOO NEWS (July 7, 2017), <https://www.yahoo.com/news/rivers-not-same-rights-humans-indias-top-court-143813859.html> [https://perma.cc/V8AP-9GDJ] (explaining that despite the Supreme Court’s ruling that the High Court went beyond its jurisdiction, “[p]etitioner Mohammad Saleem [has] the opportunity to appeal the ruling by a bench headed” by Chief Justice J. S. Khehar).

93. Mohd. Salim v. State of Uttarakhand, 2017 PIL No. 126 of 2014, ¶ 11 (India).

94. N.Y. UNIV. OF LAW JOURNAL OF INT’L LAW & POLITICS, GUIDE TO FOREIGN AND INTERNATIONAL LEGAL CITATIONS 81 (1st ed. 2006).

95. Mohd. Salim v. State of Uttarakhand, 2017 PIL No. 126 of 2014, ¶ 3 (India).

“irrigation, rural and urban water supply, hydro power generation, navigation, [and] industries” in the Ganga River area.⁹⁶

Following this complaint, Mohammad Salim filed a Public Interest Litigation (PIL) petition in 2014.⁹⁷ To answer this matter, the High Court⁹⁸ analyzed the context and affirmed that an “extraordinary situation has arisen since Rivers Ganga and Yamuna are loosing [sic] their very existence.”⁹⁹ The judges added that “this situation requires extraordinary measures to be taken to preserve and conserve Rivers Ganga and Yamuna.”¹⁰⁰ Such a firm statement is justified through the relations that exist between these rivers and the Hindu community. Indeed, the judges mention both the “very sacred and revered” status of these rivers and the “deep spiritual connection” Hindus have with them.¹⁰¹

Justice Rajiv Sharma and Justice Alok Singh reached the “extraordinary measure” they suggested by exploring the various precedents where a non-human entity was recognized as a legal person.¹⁰² From the different cases they examined, they drew an extensive analysis of the concept of legal personality.¹⁰³ The judges mainly invoked one Supreme Court decision in order to define the limits and the nature of the legal personhood.¹⁰⁴ In that judgment, it was held that “legal personality refers to the particular device by which the law creates or recognizes units to which it ascribes certain powers and capacities.”¹⁰⁵ On this basis, the Supreme Court established a distinction between a natural person and a juristic person; this second concept “connote[s] recognition of an entity to be in law a person which otherwise it is not.”¹⁰⁶

Moreover, this Supreme Court judgment emphasized the utility associated with legal personhood.¹⁰⁷ The judges stated the following: “it is well settled and confirmed by the authorities on jurisprudence and Courts of various countries that for a bigger thrust of socio-political-scientific development evolution of a fictional personality to be a juristic person

96. *Id.* at ¶ 18.

97. *Id.* at ¶ 1.

98. *See* N.Y. UNIV. OF LAW JOURNAL OF INT’L LAW & POLITICS, *supra* note 94, at 81 (explaining that in India, the High Courts are institutions that head each state’s judicial administration).

99. Mohd. Salim v. State of Uttarakhand, 2017 PIL No. 126 of 2014, at ¶ 4 (India).

100. Mohd. Salim v. State of Uttarakhand, 2017 PIL No. 126 of 2014, ¶ 10 (India).

101. *Id.* at ¶ 11.

102. *Id.* at ¶ 10.

103. *Id.* at ¶ 14.

104. Shiromani Gurudwara Prabandhak Committee, Amritsar v. Shri Som Nath Dass, AIR 2000 SC 1421 (India).

105. *Id.*

106. *Id.*

107. *See* Mohd. Salim v. State of Uttarakhand, 2017 PIL No. 126 of 2014, ¶ 14–16 (India) (discussing the Supreme Court judgment).

became inevitable.”¹⁰⁸ In this regard, the Supreme Court defined a “legal person” as “any entity (not necessarily a human being) to which rights or duties may be attributed.”¹⁰⁹ Through this broad definition, a legal person is apprehended as a nomenclature rather than a concept.

By adopting this position, the High Court embraced a reasoning that elucidates who or what could be a juristic person and ultimately concluded that the Ganga and Yamuna rivers, as well as “all their tributaries, streams, every natural water flowing with flow continuously or intermittently of these rivers,” are juristic living entities “having the status of a legal person with all corresponding rights, duties and liabilities of a living person.”¹¹⁰ This conclusion is supported by the large and inclusive conception adopted for legal personhood as well as the spiritual relationship nurtured between the Hindu community and their environment. To that extent, the Court stated that:

[a]ll the Hindus have deep Astha [faith] in rivers Ganga and Yamuna and they collectively connect with these rivers. Rivers Ganga and Yamuna are central to the existence of half of [the] Indian population and their health and well-being. The rivers have provided both physical and spiritual sustenance to all of us from time immemorial. Rivers Ganga and Yamuna have spiritual and physical sustenance. They support and assist both the life and natural resources and health and well-being of the entire community. Rivers Ganga and Yamuna are breathing, living and sustaining the communities from mountains to sea.¹¹¹

The judgment’s last contribution lies in the mechanism used to support the new status of juristic person. In order to preserve and conserve the Ganga and Yamuna rivers as legal, living entities, Justice Rajiv Sharma and Justice Alok Singh adopted the *parens patrie* doctrine, which provides a human representative for the newly recognized legal person. This agent acts in the name of the juristic person as a “parent” or a “guardian,” where his actions “are imputed to the legal persona . . . and are not the juristic acts of

108. *Id.* ¶ 14.

109. *Id.*

110. *See id.* ¶ 19 (basing the decision on sections 48A and 51A(g) of the Constitution of India); *see also* INDIA CONST. arts 48A, 51A(g) (Section 48A provides that “[t]he State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country.” Section 51A(g) establishes that “[i]t shall be the duty of every citizen of India . . . to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures.”).

111. Mohd. Salim v. State of Uttarakhand, 2017 PIL No. 126 of 2014, ¶ 17 (India).

the human agents themselves.”¹¹² To satisfy this stewardship mechanism, the Court named “the Director NAMAMI Gange, the Chief Secretary of the State of Uttarakhand and the Advocate General of the State of Uttarakhand . . . persons in loco parentis as the human face to protect, conserve and preserve Rivers Ganga and Yamuna and their tributaries.”¹¹³ In addition, the Court ordered the Central Government to create the Ganga Management Board within three months,¹¹⁴ despite government opposition to the judgment.¹¹⁵

From the theoretical perspective discussed above, this judgment can be interpreted as a legitimate way of recognizing the hybrid dimension of water. More precisely, paragraph 17 of the decision exemplifies the relational interactions that exist between human beings and nature.¹¹⁶ The judges highlighted the connection between the rivers and the communities without insinuating any kind of prevalence of one on the other.¹¹⁷ They described the symbiosis among the two, how water and communities create only one whole, and, most importantly, how necessary and fundamental it is to consider such a statement from a legal perspective.¹¹⁸ In this regard, law becomes an instrument with a duty to recognize and facilitate this connection rather than an object that unilaterally dictates how this relation should be.

Incidentally, one could attribute the two case studies of New Zealand and India to an act of cultural preservation. *A priori*, such a perspective seems legitimate. However, it nurtures the modern dissolution between nature and society. Indeed, it is essential to bear in mind the contribution of environmental ethics: it provides a hybrid conception of water, a balanced mixture of nature and society. In other words, the meaning(s) of water as an independent natural entity is defined by the socio-cultural context around it. Hence, there is nothing wrong with granting legal personhood to water in order to safeguard a cultural dimension associated with it. In fact, it actually contributes to the socio-natural constitution of water.

112. Shiromani Gurudwara Prabandhak Committee, Amritsar v. Shri Som Nath Dass, AIR 2000 SC 1421 (India).

113. Mohd. Salim v. State of Uttarakhand, 2017 PIL No. 126 of 2014, ¶ 19 (India).

114. *Id.* ¶ 5

115. Kavita Upadhyay, *Uttarakhand Doesn't Want Living Person Status for Ganga, Yamuna*, INDIAN EXPRESS (June 27, 2017, 3:41 AM), <http://indianexpress.com/article/india/uttarakhand-doesnt-want-living-person-status-for-ganga-yamuna-4723578/> [https://perma.cc/6SLW-9BAN] (explaining how the Uttarakhand government is opposed to the judgment and filed a special petition with the Supreme Court to contest the decision from the High Court, arguing “the High Court has erred in not considering that the Ganga and Yamuna are inter-state rivers.”).

116. Mohd. Salim v. State of Uttarakhand, 2017 PIL No. 126 of 2014, ¶ 17 (India).

117. *See id.* (discussing how the rivers are important to the community).

118. *Id.*

These notable cases are genuine milestones. They mark the beginning of a transition to a new generation with a rights-based approach dedicated to nature, environment, and water in their interactions with mankind. Throughout these initiatives, legal tools traditionally restrained to humans are now being converted for use by non-human entities. However, one could ask if this process of translation can be generalized and eventually systematized. The following section suggests a basis to complete this enterprise by determining general criteria for legal personality.

B. General Criteria for Legal Personality: Lessons from Civil and Common Law

Modern legal systems widely implement the concept of legal personality. In addition to being recognized by various acts and judgments across the world, legal personality is also a topic of debate within the specialized doctrine. The construct of legal personality was used, adapted, and extended concomitantly to the various moral and cultural evolutions of our societies.¹¹⁹ Moreover, this notion varies in each country, where it is used and shaped by the legal regime, because of the history and the culture surrounding the notion.¹²⁰

Examining the ways in which water can be a legal person requires to explore if this notion has general standards, if it has commonalities across borders. By using the notion of legal person as an inclusive concept referring to any legal entities—human or non-human, this article examines the status of legal personality within common law and civil law systems to uncover the existence of such criteria.

At common law, legal persons are “capable of exercising rights or owing duties.”¹²¹ When it comes to the concept of legal person, common law distinguishes between natural person and juristic person.¹²² On the one hand, a natural person is a human being having “certain legal rights adhering automatically upon birth, rights which expand as the child becomes an adult [and vanish upon death].”¹²³ From this quasi-automatic status arises legal personality, which stands as the characteristics and the

119. See Stone (1972), *supra* note 7, at 450–57 (analyzing the transformations of legal rights for non-human entities).

120. See Alexis Dyschkan, *Legal Personhood: How We Are Getting It Wrong*, 2015 U. ILL. L. REV. 2075, 2079–80 (2015) (discussing that conceptualizing a legal person can be ambiguous and the doctrine refers to it in opposition to a natural person, as a synonym of a juristic person).

121. *Id.* at 2080.

122. See generally Shelton, *supra* note 6, at para. 22 (discussing the difference between “natural” and “juridical” persons).

123. *Id.*

qualities of human beings as well as their capacity of holding rights and obligations.¹²⁴ “[B]iological life, genetic humanness, brain development, ability to feel pain, consciousness/sentience, ability to communicate, ability to form relationships, higher reasoning ability, and rationality”¹²⁵ and, most importantly, interests, are bases of characteristics for legal personalities.¹²⁶ The notion of legal personality infers the concept of legal capacity, which is the lawful ability for a given entity to enter legal action in its own name.¹²⁷

On the other hand, the second aspect of legal personhood in common law is established through the concept of juristic person.¹²⁸ This notion (also called an artificial, juridical, or fictitious person) is an artificial creation that designates non-human entities as subjects of law—otherwise not recognized as such—by which they gain legal personality.¹²⁹ In other words, a juristic person can be “any subject-matter other than a human being to which the law attributes personality.”¹³⁰ Based on this broad definition, many entities could potentially be juristic persons, but the definition is mainly used to provide corporations with a distinct or separate legal status than the one attributed to the natural persons who belong to these structures.¹³¹ Hence, any given juristic person has a distinct identity, legal personality, duties, and rights. However, the legal advantage and disadvantage of a juristic person are variable. In fact, its rights and obligations differ from natural person as they are conferred for defined (and sometimes limited) legal purposes.¹³² This situation is justified because “juristic persons arose out of necessities in the human development,”¹³³ which creates the need of a divergent legal status.

124. *Legal Personality*, BLACK’S LAW DICTIONARY (2d ed. 1910) (“Sum total of an individual’s legal advantages and disadvantages. Defined as the lawful characteristics and qualities of an entity. An example of these are a person’s age or asset ownership. From this, an entity’s legal capacity and status in the jurisdiction or society’s legal order. An example is how a law is applicable if one is a home owner versus a renter.”); PATRICK J. FITZGERALD, SALMOND ON JURISPRUDENCE 349 (1966); see also STONE (1996), *supra* note 9, at 52 (conceptualizing this situation into two broad categories: holding rights as a legal advantage and holding duties as a legal disadvantage).

125. Shelton, *supra* note 6, at para. 23.

126. See *id.* (explaining that “if an entity does not have interests in the sense identified above, then legal personhood cannot be based on the protection of those interests for its own sake”); see also JOEL FEINBERG, HARM TO OTHERS 34 (1984) (discussing legal interests).

127. See *Legal Capacity*, BLACK’S LAW DICTIONARY (2d ed. 1910) (“Lawful capacity for an entity in its own name to enter into binding contracts, to sue and to be sued.”).

128. *Legal Personality*, BLACK’S LAW DICTIONARY (9th ed. 2009).

129. *Artificial Personality*, BLACK’S LAW DICTIONARY (9th ed. 2009).

130. FITZGERALD, *supra* note 124, at 305.

131. See, e.g., HERMITTE, *supra* note 10, at 202 (discussing how it is, under the current definition, complex to figure out which non-human could have a legal personality).

132. See Mohd. Salim v. State of Uttarakhnd, 2017 PIL No. 126 of 2014, ¶ 14 (India) (discussing various types of legal personhood).

133. *Id.* ¶ 14 (citing Shiromani Gurudwara Prabandhak Committee, Amritsar v. Shri Som Nath Dass, AIR 2000 SC 1421).

Civil law systems also adopt a dichotomy regarding subjects of law; they distinguish between physical and moral persons. Similar to common law, the concept of physical person describes every human being that acquires the enjoyment of civil rights upon its birth.¹³⁴ Even if physical persons essentially benefit from the same legal norms, the nature of the relationships between them requires identification and individualization. Therefore, civil-law systems usually establish four complementary elements to identify physical persons: name, gender, residence, and record of civil status.¹³⁵

The concept of moral person is comparable to that of juristic persons in common law. Moral persons are a group of persons considered as a collective subject of private or public law. Thus, by the use of this fictitious mechanism, such an entity can hold rights and obligations.¹³⁶ A moral person would, consequently, acquire legal capacity; although, the nature of its legal advantages and disadvantages would likely vary from that of a physical person.¹³⁷ It relates, for instance, to the ability to own material and immaterial goods or to the capacity to engage in legal proceedings. Moreover, the acquisition of the legal personality is not automatic for moral persons. It is the result of an administrative process that also includes identification through having a name, assets, and an established place of residence.¹³⁸ In this sense, both physical and moral persons possess legal personality and capacity, which means that they can become subjects of rights and obligations. Nevertheless, the attribution of the legal personality to either a physical or a moral person is traditionally based on different grounds.¹³⁹ The concept of physical personality relies on questions of ethics and morality as it aims at making an individual legally exist; whereas, the notion of moral personality provides a means of collective action.¹⁴⁰

134. Civil Code of Québec, S.Q. 1996, c 1, art 1 (Can.); *see also* CODE CIVIL [C. CIV.][CIVIL CODE] art. 16-1 (Fr.) (explaining a right to respect of the human body). *But see* Xavier Bioy, *The Right to Legal Personality*, REV. FUNDAMENTAL RTS. & FREEDOMS (2012), <http://www.revuedlf.com/droit-fondamentaux/le-droit-a-la-personnalite-juridique/> [<https://perma.cc/4DVF-WUAZ>] (explaining that section 16 of the French Civil Code does not refer nor define the concept of legal person, but scholars largely consider its implicit recognition under this section).

135. *See* ÉDITH DELEURY & DOMINIQUE GOUBAU, *LE DROIT DES PERSONNES PHYSIQUES* 231 (4th ed. 2008) (describing the elements in Quebec, Canada); *see also* BERNARD TEYSSIÉ, *DROIT CIVIL – LES PERSONNES* 183 (16th ed. 2014) (describing the elements in France).

136. FITZGERALD, *supra* note 124, at 305.

137. DELEURY & GOUBAU, *supra* note 135, at 2 (explaining that moral persons acquire different rights and obligations depending on their “consistence” as a legal being”).

138. *Id.* at 231.

139. HERMITTE, *supra* note 10, at 197.

140. Bioy, *supra* note 134.

Lastly, there is a paradox in the context of civil law. The concept of legal personality is either profoundly accepted, as stated by Marie-Angèle Hermitte,¹⁴¹ or deeply debated, as explained by Marie-Ève Arbour and Mariève Lacroix.¹⁴² One could hypothesize that a paradigm shift is ongoing over the use of legal personality. In fact, new purposes are being developed for this concept, particularly for animals or nature. Indeed, because of modern challenges that human beings are facing, an evolution of our understanding of what can be a subject of law is at stake.

After this brief overview of principles surrounding legal personality in common and civil law systems, this article may now attempt to provide general criteria for this concept. More precisely, the intent is to explore what could be common standards for considering water as a juristic person. Civil law provides that for an entity to be considered as a legal person it must essentially be identifiable, distinguishable, and, to some extent, singular. In order for a non-human entity to be identifiable, it requires definition by its own characteristics. Its identity is controlled by the aspects, attributes, components, conditions, or features “determining who or what a person or thing is.”¹⁴³ Hence, the capacity of identifying an entity is a consequence of its existence. In addition, an entity’s uniqueness and singularity distinguishes or individualizes it.¹⁴⁴ Therefore, individualization arises from an entity’s identity, as the characteristics it presents define its distinction from another entity.

The main contribution provided by common law, with respect to legal personality, is the conception of interest.¹⁴⁵ The fact that an entity has its own interests, concerns, advantages, and welfare is often a sufficient condition to confer legal personality.¹⁴⁶ In other words, an entity must have interests to have moral status,¹⁴⁷ which eventually leads to a recognition by law in order to protect those interests. However, one could argue that such a statement is typically centered on human beings as “things have (or ‘take’)

141. HERMITTE, *supra* note 10, at 174.

142. Marie-Ève Arbour & Mariève Lacroix, *Le Statut Juridique du Corps Humain ou L'Oscillation Entre L'Objet et le Sujet de Droit*, 40 REVUE DE DROIT DE L'UNIVERSITÉ DE SHERBROOKE [U. SHERBROOKE L. REV.] 231, 233–34 (2009–2010) (Can.).

143. *Identity*, ENGLISH OXFORD LIVING DICTIONARIES, <https://en.oxforddictionaries.com/definition/identity> [<https://perma.cc/473B-8E2J>] (last visited Feb. 23, 2018).

144. *See, e.g.*, STONE (1996), *supra* note 9, at 59 (citing examples in which the law has imputed preferences into non-human legal personality).

145. *See id.* at 60 (preferring the criterion of “preference” over the one of “interest”, arguing that “[t]he more *interested* we have become in other living things, the more we have been able to discover about their preferences” and describing the construction of non-human preferences as the adoption of their standpoints).

146. *See* Shelton, *supra* note 6, at paras. 21 and 23.

147. *See* FEINBERG, *supra* note 126, at 34.

no interests by definition.”¹⁴⁸ Moreover, it could be asserted that non-human entities, such as rivers or watersheds, have “no self-conscious interests,” or have interests that are distinct from the ones cultivated by human beings.¹⁴⁹ Yet, Shelton has provided an alternative approach:

[i]f an entity does not have interests . . . then legal personhood cannot be based on the protection of those interests for its own sake. Instead, a determination of legal personhood must be based on the protection of the interests of others. Legal personhood based on the interests of others may be more limited than legal personhood based on the interests of the entity itself. Legal personhood based on an entity’s interests is not possible until the entity has actually developed interests. Prior to that development, legal personhood must be based on concerns about protecting the interests of others.¹⁵⁰

Based on this reasoning, the preferences of a non-human entity could be equally defined by internal and external interests, concerns, or benefits. In other words, granting legal personality to a non-human entity could result either from its internal preferences that humans have been able to identify (for instance, through scientific observations) or from external interests defined by various concerns humans have about it. It is essential to note that the idea of external interest is not related to private or individual benefits, but rather to a collective desire to protect a non-human entity that is beneficial to our well-being and sustainability. The underlying idea is to associate external interests with, for instance, ecological services provided by non-human entity.¹⁵¹ As a consequence, for a non-human entity to be recognized as a legal person, it should be identified as a unique or singular individuality in order to obtain the ability to protect its internal preferences or, alternatively, collective external interests surrounding it.

After exploring both the theoretical grounds and the legal foundations, it is time to reap the benefits of their respective contributions. Therefore, the purpose of the following section is to investigate the basis of an alternative legal perception of water, that is, to explore the premises on which water could be generally perceived as a legal person.

148. STONE (1996), *supra* note 9, at 59.

149. *Id.* at 52.

150. Shelton, *supra* note 6, at para. 23.

151. Ecological services can be defined as the functions performed by a natural entity such as soil, water or animals. *See, e.g.*, STEPHEN J. HALL ET AL., BLUE FRONTIERS: MANAGING THE ENVIRONMENTAL COSTS OF AQUACULTURE 81 (2011) (describing the role of ecological services).

III. APPLYING THE STATUS OF LEGAL PERSON TO WATER: OPPORTUNITIES, LIMITATIONS, AND PROSPECTS

What is the purpose of granting legal personality to water? What advantage is there to recognizing this entity as a legal person? And to what extent can water be a subject of law? As mentioned earlier in this article, two precedents demonstrated that this is a feasible legal orientation. However, various scholarly propositions are following distinct paths. Subsequently, we are facing an opposition regarding the way in which water should be granted legal personhood. Should water as a whole be recognized as a legal person? Or should it be specific bodies of water? This section will examine these different avenues and determine some opportunities and limits. It is to be noted that the suggestions arising from the following discussion are theoretical in nature. The advent of a mature and practical framework will only be achievable through additional research, analysis and development.

As explained in the first section of this article, water can be understood as a hybrid entity, as a mind-independent reality defined by the social connections that surround it. Thus, water has its own preferences, advantages, or—in a more tangible manner—its own attributes that interact with the socio-cultural context. Furthermore, water generates collective interests. In that regard, the concept of legal personality appears to meet the requirements of the proposed theoretical conception of water. This approach would allow the preservation of this natural whole by providing the necessary instruments to strengthen its protection while also considering the various interests that gravitate around it.

However, such a generalization might not seem entirely suitable when it comes to its compatibility with legal personhood. In our opinion, this approach provides an innovative mindset toward water, but it would need to be slightly altered to foster its conceptualization as a legal person. To understand water as a subject of law, it seems more pertinent to identify a specific body of water, rather than water as a whole, as it would correspond to the criteria determined for legal personhood. In fact, a river, a watershed, an aquatic ecosystem, a lake, a wetland, or even an aquifer forms a defined body of water that contributes to its identification and eventually to its uniqueness. Even if Stone “advocated that legal personality should be afforded to all natural resources”, granting legal personality to water as a whole seems unattainable for two main reasons.¹⁵² First, by considering water as a fully separated natural entity, it would go against its conception

152. Morris & Ruru, *supra* note 8, at 50.

as a hybrid. Second, the recognition of an overarching entity would presumably create an unstable and risky legal context. One could also hypothesize that the limits to be imposed on water could be drawn by social interactions. Indeed, even if some dimensions of water are global, such as the hydrological cycle, the interactions defining this entity are primarily social and, therefore, essentially local.

From another perspective, conferring legal personality to water, as a whole, could potentially create absurd situations. For instance, what measures should we take when encountering a devastating flood if water as a whole was a subject of law? Should we sue any of its representatives for failing to uphold its obligations? Should we just accept that, as a flood occurs, water is simply following its own attributes and rules by submerging a residential area? Combining the proposed theoretical approach and the legal characteristics that define a subject of law could avoid these tricky situations. Although a “framed” conception of water could be adopted, it leaves questions concerning the scope of legal personhood. As what kind of juristic person can water be understood? Can a body of water be considered as a conventional juristic person?¹⁵³ Conventional juristic persons do not automatically (and rarely) hold natural or constitutional rights.¹⁵⁴ Nevertheless, to ensure the protection and preservation of nature and water, these entities should, to some extent, be granted such rights.

Subsequently, one could raise the fundamental question of prospective duties and liabilities. To what kinds of duties and liabilities could water be subject? Should the idea of respective responsibilities prevail? Further research of reconceptualization, especially from a semantic perspective, would define an appropriate ontology. Yet, this exercise could be achieved based on the concept of ecological services, as it supports the beneficial relational interactions between humans and nature. Furthermore, would society need to develop a distinct and specific kind of legal personality? Would that imply a third kind of legal person? This is a concern that requires further analysis, specifically with respect to the questions of passive and active subjects of law and legal advantages and disadvantages. Nonetheless, an observation emerges from this article. There is a growing need for a legal personality that creates, through the personification of

153. This article focuses on the concept of juristic person not only because there is a clear distinction between this notion and the one of natural person in both common-law and civil-law systems, but also because the idea of conferring legal personality to water does not lie within a desire to “humanize” this entity. Rather, this article understands them as tools to redefine our position toward modern issues. *See, e.g.,* HERMITTE, *supra* note 10, at 198 (discussing the consequences of confusing the juristic person and natural person).

154. Shelton, *supra* note 6, at paras. 21–23.

nature, a status satisfying the interests surrounding water and granting it specific legal rights to protect its unique conditions.

Even though it appears more suitable to consider a body of water as a legal person rather than water as a whole, the question of boundaries still remains central. One could raise the concern of physical limits, as “problems . . . may arise if a part of an ecosystem is declared a legal person and detached from related and necessary components. A river, for example, cannot be fully protected without including the entire catchment area, including tributaries.”¹⁵⁵ In other words, there are large challenges “involved in defining the boundaries of the ‘natural object.’ For example, from time to time one will wish to speak of that portion of a river that runs through a recognized jurisdiction; at other times, one may be concerned with the entire river, or the hydrologic cycle.”¹⁵⁶ As a consequence, specialists describe this situation as being incongruous and therefore suggest that “the methods of legal implementation illustrate the perceived limits within this legal system.”¹⁵⁷ In that regard, an extensive conception of boundaries would be required; not only should a river be recognized as subject of law but also its attachments. The river should be considered as a whole, that is, as a functioning system¹⁵⁸ composed of beds, related streams, tributaries, banks, catchment area, connected lakes, and wetlands.¹⁵⁹ On another note, one can raise the following question: is this conception different from the system we presently have for natural persons? The law currently unifies the various aspects of human beings (whether it is physical, mental, or spiritual) under the single category of natural person.¹⁶⁰ Therefore, why should we consider only part of what makes a river as a whole entity?

To achieve and accept the compatibility of water and legal personality, it is also necessary to overcome the abstraction of modern water outlined by Linton.¹⁶¹ As mentioned previously, a specific body of water seems more appropriate to conceive as a legal person. Yet, the conception proposed by

155. *Id.* at para. 46.

156. Stone (1972), *supra* note 7, at 456.

157. Magallanes, *supra* note 22, at 7.

158. STONE (1996), *supra* note 9, at 52.

159. *See* Shelton, *supra* note 6, at para. 46 (explaining the Whanganui Act “rightly combines the river, bed and banks into one entity, but it still allows nature to be divided into separate units”); Ruruku Whakatupua Te Mana O Te Awa Tupua, Whanganui Iwi and the Crown [2014] (signed 5 Aug. 2014), art 9.13.48 (defining the Whanganui River as the river continuously flowing and all related tributaries, streams, lakes, wetlands, and beds).

160. *See* Elvia Arcelia Quintana Adriano, *The Natural Person, Legal Entity or Juridical Person and Juridical Personality*, PENN. ST. J.L. & INT’L AFF. 363, 369–70 (2015) (discussing the nature of human beings as legal persons).

161. *See* LINTON, *supra* note 36, at 213 (discussing the limitations of a modern view of water).

modern water has the effect of globalizing this entity as well as alienating its social dimension. In other words, modern water eliminates all potential limitations and makes this entity difficult to identify or define. We must not fall into a trap—recognizing water as a subject of law do imply the recognition of an independent body. Nevertheless, it is essential to bear in mind the inputs of hybridity to avoid entanglement in the conception endorsed by modern water. In fact, if the recognition of water as a legal person is only based on its recognition as a mere natural entity, it ultimately comes—again—to bury its social dimensions. The understanding of water as a legal person ought to outline its consubstantial concomitance of nature and society.

CONCLUSION

The purpose of this article is to explore the compatibility of two seemingly antagonistic objects. In that regard, water, from a theoretical and philosophical perspective, could be perceived and recognized as a legal person under certain conditions. It proposes new grounds and an alternative pathway in order to rethink the way in which we manage water. This approach is a reaction to the struggle most Western countries still have to create efficient laws and policies to protect water. However, many substantial challenges and lingering questions remain unsolved: who would be the guardian, or the human representative, of water?¹⁶² How would this guardian be chosen? What would be its role? What would be the rights, obligations or responsibilities of a given body of water? How could we define them objectively? Are these rights absolute? What prevention and compensation mechanisms could be implemented? Would the traditional economic theory be the most relevant to that regard? Although it requires further research, debates, innovations, and developments, the conceptualization of water as a subject of law would be a massive change in the field of law.¹⁶³ Our societies may not be prepared for such an advancement. Nevertheless, to think of water solely as a natural entity separated from us would perpetuate the parasitic relationship between

162. This question is already being discussed within the doctrine. For instance, Bruno Latour discusses this topic by saying that even with a new mindset toward nature and water, a natural entity needs the “fiction of a representative.” LATOUR, *supra* note 24, at 351. In addition, the Te Awa Tupua Act establishes the Te Pou Tupua office, which is “the human face of Te Awa Tupua and act[s] in the name of Te Awa Tupua.” Te Awa Tupua (Whanganui River Claims Settlement) Bill 2016 (129-2), pt 2 cl 18 (N.Z.). The India High Court has also appointed three legal representatives to the Ganga and Yamuna rivers—the director NAMAMI Gange, the Chief Secretary of the State of Uttarakhand, and the Advocate General of the State of Uttarakhand. Mohd. Salim v. State of Uttarakhand, 2017 PIL No. 126 of 2014, ¶ 19 (India).

163. HERMITTE, *supra* note 10, at 202.

mankind and its environment. Alternatively, some existing legal instruments, even though socially constructed by human beings, may lean toward a reconsideration and a reconceptualization of nature in order to move from a parasitic connection to a symbiotic relation.