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**Legal Personhood of Natural Resources:  
*The potential for ocean jurisdiction***

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Legal personality is the term used to refer to the granting or recognition of independent legal status in nature features, whether they are lakes, rivers, trees, mountains, oceans or any other environmental feature. This paper sets out the basis of legal personality as a concept, its use in New Zealand and overseas, reviews its uses and limits, and considers where and how the concept could be extended in the future.

### 1. The basis of legal personality

The modern development of legal personality in natural features can be dated back to a 1972 article by Christopher Stone in the 1970s about whether trees could be accorded legal standing.<sup>1</sup>

But the idea of non-living objects being accorded legal personality has been a feature of the common law for centuries. The most common example is the company. In his work, *Salmond on Jurisprudence*, the New Zealand jurist Sir John Salmond said:<sup>2</sup>

*Legal persons, being the arbitrary creations of the law, may be as many kinds as the law pleases. Those which are actually recognized by our own system, however, are of comparatively few types ... If, however, we take account of other systems than our own, we find that the conception of legal personality is not so limited in its application, and that there are several distinct varieties.*

The corporate form developed by Anglo–American law can be a very flexible tool, not only for companies but for incorporated societies and charitable trusts. Legal rights are self-evidently not the same as human rights. A legal person does not have to be a human being. Looked at this way, recognising the legal personality of a natural resource is not revolutionary.

In a 1972 United States Supreme Court decision, a dissent by Justice Douglas was strongly influenced by Christopher Stone's article of the same year. Justice Douglas said:<sup>3</sup>

*Inanimate objects are sometimes parties in litigation. A ship has a legal personality, a fiction found useful for maritime purposes. The corporation sole – a creature of ecclesiastical law – is an acceptable adversary and large fortunes ride on its cases. ... So it should be as respects valleys, alpine meadows, rivers, lakes, estuaries, beaches, ridges, groves of trees, swampland, or even air that feels the destructive pressures of modern technology and modern life. The river, for example, is the living symbol of all the life it sustains or nourishes ... Those people who have a meaningful relation to that body of water – whether it be a fisherman, a canoeist, a zoologist, or a logger – must be able to speak for the values which the river represents ...*

In New Zealand, a 1987 High Court decision recognised that the waters draining into the Waikato River could be represented by a guardian before the Court. The judge referred to a 1925 Privy Council appeal where it was held that a Hindu idol could be represented by a friend appointed by a Court.<sup>4</sup> In 1991, the English Court of Appeal was prepared to grant standing to an Indian temple as a party competent to be represented before the Court.<sup>5</sup>

### 2. Recent developments in New Zealand

In 1996, Professor Tony Angelo QC of Victoria University had written an article about whether Māori taonga could be given a form of legal personality.<sup>6</sup> He saw this idea as 'a possible bridge between the Māori legal system and the common law legal system.'<sup>7</sup> Specifically, Angelo reached two conclusions: 'that the Common Law would have much greater flexibility for dealing with taonga if some taonga had legal personality, because this characteristic gives the subject rights and duties under the Common Law' and 'that this legal perception is not incompatible with the nature of taonga in the Māori legal

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<sup>1</sup> Christopher Stone "Should Trees Have Standing? Towards Legal Rights for Natural Objects" (1972) 45 *Southern California Law Rev* 450.

<sup>2</sup> John W Salmond *Salmond on Jurisprudence* (12th ed, London, Sweet & Maxwell, 1966) at 306-308.

<sup>3</sup> *Sierra Club v Morton, Secretary of the Interior et al.* 405 U.S. 727 (1972) at 742-743 per Douglas J dissenting.

<sup>4</sup> *Mullick v Mullick* (1925) LR 51 and Ind App. 245 at [22].

<sup>5</sup> *Bumper Development Corp Ltd v Commissioner of Police* [1991] 4 All ER 638 (CA) at 647-648.

<sup>6</sup> AH Angelo "Personality and Legal Culture" (1996) 26 *Victoria U Wellington L Rev* 395 at 396.

<sup>7</sup> *Ibid.*

system. Having legal personality would mean that a taonga would itself be involved in any decisions made about it, it would not be a commodity and that it would be treated as a single entity rather than a collection of related assets.<sup>8</sup>

Angelo was ahead of its time in perceiving the possibilities of legal personality in the New Zealand context, particularly in his astute observation that there exists an overarching benefit of using legal personality in the context of the Treaty relationship as a 'bridge' between two largely incompatible systems of thought or world-views.

In 2013, New Zealand took a significant step forward with the use of legal personality in a Treaty of Waitangi settlement with the North Island tribe, Ngāi Tahu. The ancestral homeland of Ngāi Tahu, Te Urewera, had been turned into a National Park in the 1950s with no consultation with Ngāi Tahu. Removing the national park status and returning the area to Tahu had been the centre of prolonged negotiations.

The beauty of using legal personality to resolve the status of Te Urewera was two-fold: it allowed the New Zealand Government to avoid difficult discussions about ownership and it allowed Tūhoe to avoid dealing with a western concept that did not particularly fit with their view of Te Urewera as a living ancestor, nor with their views of the environment and its relationship with the people who inhabit it. The current Te Urewera Management Plan, *Te Kawa o Te Urewera*, expands on this view: 'The use of property rights by the western legal system has hidden from view the concept of nature ... The use of property rights to regulate human disputes arising from human society is no longer permissible in and of Te Urewera. Te Urewera may never again be owned by people.'<sup>9</sup>

The legal personality concept was used again in the 2014 Treaty settlement with Whanganui Iwi. The constant position of Whanganui iwi for well over 150 years was that they never willingly relinquished possession or control of the River and the things that give it its essential life. For generations they pursued justice in respect of the river. The pollution of the River had a profound effect on the outlook of many Whanganui iwi, whose association with the River had either been severed or spoiled by new developments.

*E rere kau mai te Awa nui  
Mai i te Kāhui Maunga ki Tangaroa  
Ko au te Awa, ko te Awa ko au*

The Great River flows  
From the Mountains to the Seas  
I am the River and the River is me

The above pēpeha conveys Whanganui iwi's view of the River as Te Awa Tupua: a living being, an indivisible whole incorporating its tributaries and all its physical and metaphysical elements from the mountains to the sea, inseparable from the people connected to it.

The Western world view can have trouble comprehending this outlook, and the western legal system can have even more trouble trying to recognise it. A major issue for negotiations with Whanganui Iwi was how to express in legislation this deep-seated and genuine expression of belief held by countless generations of Māori who had lived along the River. It was the issue to which legal personality ultimately helped find an answer.

The Te Awa Tupua arrangements formed the main feature of the Whanganui River settlement. The River was recognised in legislation as an indivisible and living whole, comprising the Whanganui River from the mountains to the sea, incorporating all its physical and metaphysical elements.<sup>10</sup>

Some people expressed surprise that this kind of language is contained in a statute. Frankly, it is a much more coherent and realistic way of looking at a river as opposed to the unreal and almost bizarre segmentation of a river into a riverbed, water column, airspace above the water, and interest groups that we are used to in the English common law. In order to give effect to Te Awa Tupua, the River was declared a legal person with all the rights, powers, duties and liabilities of a legal person.<sup>11</sup>

The legal effect of this declaration is that any person exercising or performing a function under a large number of specified statutes must recognise and provide for, or give particular regard to, the status of the River and the intrinsic values that represent the River.<sup>12</sup>

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<sup>8</sup> *Ibid.*

<sup>9</sup> Te Urewera Board *Te Kawa o Te Urewera* (2017) at [2.1].

<sup>10</sup> Te Awa Tupua (Whanganui Claims Settlement) Act 2017, ss 12-13.

<sup>11</sup> s 14.

<sup>12</sup> s 15.

There will be at least one more use of legal personality in Treaty Settlements in the upcoming settlement over the Taranaki Maunga. This area comprises the Egmont National Park, whose most well-known feature is the Taranaki volcanic cone which dominates the west coast of the North Island.<sup>13</sup>

### 3. Recent developments globally

The use of legal personality in New Zealand has attracted significant interest from overseas, and particularly from the United States, where the concept of legal personality is at the forefront of the environmental movement. Publications from the New York Times to National Geographic, the Associated Press to – as recently as last week – a small newspaper in Nebraska, have covered the New Zealand experience in detail.

A number of examples now exist of cities and municipalities recognising legal personality in nature. One of the first was Tamaqua, Pennsylvania, where the borough banned the dumping of toxic sewage sludge as a violation of the rights of nature.<sup>14</sup> That was followed by a number of further community-led initiatives across the United States, including campaigns in some states for constitutional amendments. In 2019, voters in Toledo, Ohio, approved an amendment to the city's Charter establishing a bill of rights of Lake Erie, and recognising that 'Lake Erie, and the Lake Erie watershed, possess the right to exist, flourish, and naturally evolve'.<sup>15</sup> This amendment attracted significant media and public attention, which will no doubt continue as it is currently the subject of various legal actions.

This citizen-led use of legal personality is different from New Zealand's approach, both in its method of enactment and in its effect. While the use of legal personality in New Zealand will almost certainly lead to better environmental outcomes for Te Urewera and the Whanganui River, the concept has been used in New Zealand for the reason identified by Tony Angelo in 1994: to bridge what was once thought to be the unbridgeable gap between Māori and European concepts of ownership.

Nonetheless, the Toledo amendment has added to a groundswell of interest in New Zealand's approach. Since the signing of the Whanganui River settlement, I have had a large number of approaches not only from American media, but from American citizens wondering if the New Zealand model could be a useful model to advance everything from environmental protection at a state legislature level, to addressing ongoing resource disputes between the states and Native American groups in the western United States. The answer to this question is yes.

A number of countries have now incorporated some form of recognition of personality and rights of natural features at a national level. Every year, it seems more is starting to head in this direction. At the time of writing, some of the more notable recent examples include:

- Ecuador (2008): National constitution amended to recognise rights of nature;<sup>16</sup>
- Colombia (2016): The Constitutional Court of Colombia recognises the Atrato River as having rights to 'protection, conservation, maintenance and restoration' and the rights of indigenous river communities as biocultural rights. It also establishes joint guardianship of the River between the government and indigenous people;<sup>17</sup>
- India, State of Uttarakhand (2017): A court declares two rivers held to be legal persons with various rights. The decision cites the Whanganui River precedent but is later overturned by the Supreme Court of India;<sup>18</sup>
- Colombia (2018): The Supreme Court of Colombia recognises the Colombian Amazon as an entity, subject of rights, and beneficiary of 'protection, conservation, maintenance and restoration';<sup>19</sup>
- Bangladesh (2019): The High Court recognises rivers as living entities, legal persons and juristic persons.<sup>20</sup>

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<sup>13</sup> Ngā Iwi o Taranaki and The Crown *Taranaki Maunga: Terms of Negotiation* (14 March 2017) at [8.1].

<sup>14</sup> See Community Environmental Legal Defence Fund "Advancing Legal Rights of Nature: Timeline" (26 August 2019) <[www.celdf.org/advancing-community-rights/rights-of-nature/rights-nature-timeline](http://www.celdf.org/advancing-community-rights/rights-of-nature/rights-nature-timeline)>.

<sup>15</sup> Charter of the City of Toledo, Ohio, Chapter XVII: Lake Erie Bill of Rights, s 254(a).

<sup>16</sup> See Constitution of the Republic of Ecuador, Title II, Chapter Seven, particularly articles 71-72, available in English at <<http://pdba.georgetown.edu/Constitutions/Ecuador/english08.html>>.

<sup>17</sup> Constitutional Court, Republic of Colombia, T-622 de 2016, Expediente T-5.016.242 (10 November 2016).

<sup>18</sup> See "India's Ganges and Yamuna Rivers are 'Not Living Entities'" *BBC News* (7 July 2017) <<https://www.bbc.com/news/world-asia-india-40537701>>.

<sup>19</sup> See International Union for the Conservation of Nature "Colombian Supreme Court Recognizes Rights of the Amazon River Ecosystem" (20 April 2018) <[www.iucn.org/news/world-commission-environmental-law/201804/colombian-supreme-court-recognizes-rights-amazon-river-ecosystem](http://www.iucn.org/news/world-commission-environmental-law/201804/colombian-supreme-court-recognizes-rights-amazon-river-ecosystem)>.

<sup>20</sup> See Sigal Samuel "This Country Gave All its Rivers Their Own Legal Rights" *Vox* (18 August 2019) <[www.vox.com](http://www.vox.com)>.

All these examples, whether implemented via legislation or as the result of court decisions, have involved the recognition of varying types of legal personality and rights for a range of different purposes, although environmental improvement is a recurring theme.

In addition, there is now a growing movement among indigenous peoples in a number of countries to utilise legal personality. Several tribes in the United States have made customary laws recognising the rights of nature. In Western Australia in November 2016, native title groups concerned about the impact of development along the Fitzroy River issued a declaration declaring that ‘The Fitzroy River is a living ancestral being and has a right to life. It must be protected for current and future generations, and managed jointly by the Traditional Owners of the river.’<sup>21</sup>

A project that began on a local scale in the United States has crossed the Pacific to New Zealand, been developed, and has now expanded further. What was a local project is now a global project.

What links the New Zealand and American experiences is a fundamental wish to protect the environment. Christopher Stone’s original idea was to protect trees. That then morphed into protecting rivers, lakes and other features. New Zealand then helped develop the concept as a way to protect indigenous rights to the environment.

#### 4. Future uses of legal personality: The oceans

Despite interest in the Whanganui River agreement, the development outlined above have mostly flown under the radar. But the scale of evolution from the Stone article in 1972 to the New Zealand Parliament recognising the Whanganui River as a legal person has been impressive.

My view is that, conceptually speaking, there are no limits to where the concept of legal personality could be taken next. Any limits are political rather than conceptual. It is clear, however, that the concept looks set to expand, not only past environmental features, but potentially outside of domestic law and into the international realm.

In 2018, legal personality was recognised in a wild rice, a staple crop, by the White Earth Band of Ojibwe and the 1855 Treaty Authority in Minnesota.<sup>22</sup> In 2019, the High Court of Punjab and Haryana in India declared all animals to be legal persons with corresponding rights, duties and liabilities of a living person.<sup>23</sup> It has been suggested that rights of nature laws could help save endangered species, such as orca whales.<sup>24</sup> In 2018, two Canadian lawyers considered applying the New Zealand legal personality model to the moon, other space resources and space habitats.<sup>25</sup> Whether or not the concept has extra-terrestrial applicability, there is certainly scope for further examination of how the model could operate on an international or supranational level. It is an interesting exercise to consider its possible application to a number of intractable international problems, including cross-border disputes over natural resources and contested or occupied land.

The increasing and often radical range of possible usages of legal personality reflects the promise and adaptability of the concept for different situations. The results of various legal personality regimes will undoubtedly be mixed. In my 2021 book, *He Kupu Taurangi*,<sup>26</sup> I suggested there are a number of benefits to New Zealand’s approach, which in my view give the Te Urewera and Whanganui regimes a very high chance of enduring success. New Zealand’s approach:

- bridges the gap between incompatible world views within an existing legal system
- allows progress to be made on matters where there is agreement, while transcending issues where there will not be agreement (such as who owns something, and what that means)
- is capable of being implemented in legislation, rather than being left to the courts to develop over time
- allows the exact scope of legal personality to be spelled out clearly, alongside how the legal personality will be represented practically, and for what reasons
- grants the natural resource full powers to be involved in environmental management policy development and decision-making. Vesting ownership of the resource in itself provides it with full powers to sue or take legal action

<sup>21</sup> Traditional Owners from the Fitzroy River Catchment Area *Fitzroy River Declaration* (1 November 2016).

<sup>22</sup> 1855 Treaty Authority *Chippewa Establish Rights of Manoomin on White Earth Reservation and Throughout 1855 Ceded Territory* (11 January 2019) <<https://healingmnstories.files.wordpress.com/2019/01/right-of-manoomin-media-statement.pdf>>.

<sup>23</sup> See Sofi Ahsan “High Court declares all animals in Haryana to be ‘legal persons’” *The Indian Express* (online ed., 2 June 2019).

<sup>24</sup> Dana Drugmand “Could Rights of Nature Laws Help Save Endangered Orcas?” *Common Dreams*, (31 August 2019) <[www.commondreams.org/views/2019/08/31/could-rights-nature-laws-help-save-endangered-orcas](http://www.commondreams.org/views/2019/08/31/could-rights-nature-laws-help-save-endangered-orcas)>.

<sup>25</sup> Eytan Tepper and Christopher Whitehead “Moon Inc.: The New Zealand Model of Granting Legal Personality to Natural Resources Applied to Space” *New Space* (2008) 6(4) 288.

<sup>26</sup> Christopher Finlayson and James Christmas *He Kupu Taurangi* (Huia, Wellington, 2021).

where necessary. This provides more certainty than systems that allow any citizen to take legal action on behalf of a resource

- is the result of the executive negotiating and agreeing arrangements with other interested parties (most notably, the local indigenous people) before the result is enacted. This avoids the problems that have arisen following the 2019 Bangladeshi High Court decision, which may lead to people being evicted from their land<sup>58</sup>
- can be customised to fit a range of different situations.

In my view, these same benefits more or less still apply to an international context.

In many ways, expanding the concept of legal personality to an ocean would be a natural next step, taking the origin of the idea in the rights of nature and using it to confront environmental problems on a trans-national or global scale. It could give more impetus to the often dry, legalistic contents of treaties. The ocean personified would seem to me to have a greater chance of achieving public buy-in than a Treaty.

There have been steps in this direction. A number of proposals have now been made to grant legal personality to the Dutch part of the Wadden Sea.<sup>27</sup> In 2021, Wellington Law Professor Petra Butler suggested the ocean could be awarded legal personality.<sup>28</sup> As Butler says, from the ocean's point of view, it is not particularly interested in treaties or rights. It is more interested in not suffering from plastic pollution.

Expanding the concept of legal personality to an ocean would likely require international agreement and involve more political complexity than legislating at a national level. However, the time could be right to push the idea, particularly in light of the growing interest in legal personality as a concept. The inclusion of legal personality in an international treaty-making process does not seem to me to present any particular legal challenges above and beyond the existing complexity of negotiating such agreements. There are also other intermediate steps that could be taken. For example, the idea could be popularised by New Zealand legislating domestically to recognise legal personality in a part of the ocean or the ocean ecosystem within the New Zealand exclusive economic zone.

Another option could be to seek an advisory opinion from the International Court of Justice, perhaps using plastic pollution, whaling or fish stocks as a 'hook' for the issue to be considered more generally.

A number of these options could proceed in tandem. Whatever course of action were chosen, New Zealand's involvement would seem desirable given the significant attention New Zealand's domestic experience with legal personality has drawn from the United States and elsewhere. There would be scope for significant global interest in a New Zealand proposal for a trans-national or global application of the idea, particularly in our corner of the world.

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<sup>27</sup> Tineke Lambooy et al "A case for granting legal personality to the Dutch part of the Wadden Sea" *Water International* (2019) Vol 44, Issue 6-7, 786-803.

<sup>28</sup> Petra Butler "The ocean and a question of legal personhood" *Ideasroom*, (15 June 2021) <<https://www.newsroom.co.nz/ideasroom/the-ocean-and-a-question-of-legal-personhood>>