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## THE LEGAL PERSONIFICATION OF WATERCOURSES

### Abstract

The following article explores the notion of rights of nature, i.e., the conferment of legal personality to elements of the natural environment, such as rivers or entire ecosystems, in the context of French law. To support its argumentation, the text draws on the historical conceptualisation of legal personality and its first expansion beyond human beings during the industrial era to include business entities. Moreover, it considers the usefulness of its employment – as well as the potential obstacles – not only in the context of the natural environment, but also the emerging issue of artificial intelligence.

### KEYWORDS

Rights of Nature, legal personality, watercourses, French law

### SŁOWA KLUCZOWE

prawa natury, osobowość prawna, ciekły wodne, prawo francuskie

Let us start with an observation – climate change, which is affecting the entire globe, has made most nations aware that the elements of nature, and in particular

watercourses, are essential to human life and must be preserved. According to the United Nations Environment Programme, there are four main reasons for protecting watercourses. Firstly, they support the populations and economies dependent on their use and exploitation. Secondly, the pathogenic pollution they are subject to seriously affects the health of the populations who use the water from these rivers for crop irrigation, fishing or recreation. Thirdly, the natural flow of too few rivers is preserved – the construction of hydroelectric dams and infrastructure designed to restrict the free sprawl of rivers in order to increase the area available for cultivation or for building leads to the weakening of the nearby urban fabric, which falls victim to more frequent and devastating floods. Fourthly, the purely artificial development of watercourses is detrimental to plant and animal biodiversity.

A few years ago, the understanding of the seriousness of the matter led the United Nations Environment Programme to join forces with Rotary International in an initiative titled ‘Adopt a River for Sustainable Development’, aimed at raising public awareness concerning the importance of rivers and scaling up action to restore and protect them. The title of this initiative is indicative of the implicit personification of watercourses, the term ‘adoption’ having been widened in its usage to connote a relationship of responsibility, not only with regard to a human being, but also to a pet, and finally to an element of nature. In French law, the Environment Code, the Urban Planning Code, the Criminal Code and even, since passing the Law of 8 August 2016 on the Restoration of Biodiversity, Nature and Countryside, the Civil Code (cf Articles 1246ff relating to compensation for ecological damage) attempt to protect elements of nature. The question is whether it is possible to go even further.

That is when the notion of bestowing legal personhood springs to mind. Moreover, some applications of this idea are quite daring. The founder of the Patagonia clothing brand, for example, did not hesitate to bequeath 100% of the company’s capital to two entities in order to finance the fight against climate change, namely the Patagonia Perpetual Purpose Trust and the non-profit Holdfast Collective. The idea, in his own words, is ‘to use the business world to save our planet’, with Earth now being the company’s sole shareholder.<sup>1</sup> This initiative, whose announcement in the press was certainly not devoid of advertising intent, is in some respects in line with the approach adopted by several States, such as Colombia with respect to the Atrato River, Ecuador with the protection of Mother Earth inscribed in the country’s constitution, New Zealand with respect to the Whanganui River, or France through the Environmental Code of the Loyalty Islands Province in New

<sup>1</sup> Yvon Chouinard, ‘Earth is now our only shareholder’ (Patagonia, 14 September 2022) <<https://www.patagonia.com/ownership/>> accessed 16 May 2025.

Caledonia, all of which consider that elements of nature can accede to a form of *ad hoc* legal person. Should these examples remain exceptions, to be explained by religious or local considerations, or are they indicative of a legal revolution likely to transform our legal systems entrenched in a Romano-Germanic culture that clearly distinguishes between things and people? Is the legal personification of watercourses anything more than a utopian idea? We do not think so.<sup>2</sup> It is not only possible (as I will argue in section I of this article) but also useful (as I will argue in section II of this article).

## I. ON THE POSSIBILITY OF LEGAL PERSONIFICATION OF WATERCOURSES

To understand that granting rivers legal personality would not conflict with French law, we need to go back to the time when controversy arose as to whether it was desirable and possible to grant legal personality to the at-the-time new entities which had just come into being in the form of trading companies, associations or foundations.<sup>3</sup> This was at the end of the 19<sup>th</sup> century. At the time, the majority of jurists considered that the theory of legal personhood could only be applicable in the case of human beings. Only individuals could be the holders of rights and, therefore, endowed with legal personality. A non-physical, ‘moral’ person was deemed as incapable of existing. A commercial company could not, thus, own property; only its partners had the capacity to be co-owners.

Some thought the answer lay in the idea of fiction, understanding fiction to constitute an artifice that can be used to resolve a technical difficulty. For good asset management, a group of interests, whether commercial or associative, needs to be represented. In such cases, it is sufficient to ‘pretend’ that an entity exists through its representation. Inheritance law is no stranger to this kind of legal manipulation, allowing the deceased to continue to exist, in a legal sense, through his children.

With time, we refined our thinking. We began identifying individual groups of interests by their registered name and stated domicile. We gave them life. Their legal status corresponded to a social and financial reality. A business entity proper could no longer be confused with its members. This formal separation from its founders allowed it to enjoy the status of a fully embodied being, having its own

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<sup>2</sup> See in particular Camille de Toledo, *Le fleuve qui voulait écrire. Les auditions du parlement de Loire* (Manuella Éditions 2021) 107.

<sup>3</sup> On all these theories, see Jean Carbonnier, *Droit civil, tome 1: Les personnes* (PUF 2000) 199.

skeleton and organs, metaphorically speaking. Paul Fauconnet clearly stated as such, arguing that '[we] are all imbued with the idea that social groups have a conscience, a personality and a will distinct from those of their members'.<sup>4</sup> The group of interests was no longer an abstraction, a fiction, but became a technical reality.

We must never lose sight of the fact that the legal personality with which legal entities are endowed enables them to hold and assert rights; notwithstanding, there is no need to emphasize the place held nowadays by trading companies and associations in economic and social life, so fully ingrained they have become in both. However, the employed legal solution does not make commercial companies or associations that enjoy the status of entities with legal personality identifiable as human beings, even if they are composed of flesh-and-blood beings. As the Court of Cassation of France (*Cour de cassation*) recently reminded us, the right to privacy can only be invoked by natural persons.<sup>5</sup> It is easy to see from the judgment that granting legal personality to a non-human entity does not necessarily mean equating its rights to those of human subjects. Why, when the recognition of the legal personality of groups of interest is no longer the subject of debate in contemporary times, is it so difficult to conceive of using the same legal technique to the benefit of environmental entities or animals?

The question is certainly divisive. Where animals are concerned, one explanation is irrational – the risk of confusion between the status of animals and that of human beings, coupled with the notion that elevating animals in the hierarchy of living beings would, in turn, reflect contempt for man. Be that as it may, as far as the elements of the natural environment are concerned, there is no risk of confusion on the horizon between, for example, the legal persons 'Loire' or 'Vistula' and the human persons of the riverside residents or the fishermen. In addition, Sarah Vanuxem's bold proposal that, instead of systematically drawing legal personality towards the notion of 'subject' – in a subjectivist approach to law – it might be possible to conceive of it as an opportunity for the return of 'things' to law, deserves attention. As such, legal personality could be seen as a tool for reemploying the ancient law of 'the properties of the owner'.<sup>6</sup> Law would no

<sup>4</sup> Paul Fauconnet, *La responsabilité. Étude de sociologie* (2<sup>nd</sup> edition, Librairie Félix Alcan 1928) 339 [own translation].

<sup>5</sup> Appeal no 15-14.072 17 March 2016 Court of Cassation of France (Cour de cassation), cf '(...) while legal entities have, in particular, a right to the protection of their name, home, correspondence and reputation, only natural persons can claim an invasion of privacy within the meaning of article 9 of the Civil Code'.

<sup>6</sup> Sarah Vanuxem, *Des choses de la nature et de leurs droits* (Éditions Quae 2020).

longer be based solely on the logic of protecting nature, but on the logic of acting on behalf of natural entities.<sup>7</sup>

Technically feasible, the conferment of legal personality to watercourses also presupposes, for it to become part of the legal landscape in such capacity, that it is useful for the preservation of their integrity.

## II. THE USEFULNESS OF THE LEGAL PERSONIFICATION OF WATERCOURSES

The usefulness of legal personality is essential. As early as the beginning of the twentieth century, René Demogue, in a noted article, wrote that '[the] quality of the subject of law belongs to the interests which men living in society recognise as sufficiently important to protect them by the technical process of personality'.<sup>8</sup> Everything was said – at the heart of the birth of legal personality lies this central notion of 'interests'. It is society, through its institutions, that decides at a given moment to confer legal personality to an entity due to the advantages it can provide, independently of the merit that legal personhood can bring about for the beneficiary entity. Fifty years later, the Second Civil Chamber of the Court of Cassation of France (*Cour de cassation*) endorsed Demogue's position, ruling that 'civil personality is not a creation of the law; in principle, it belongs to any grouping that has collective expression for the defence of lawful interests, which are, therefore, worthy of legal recognition and protection'.<sup>9</sup>

The relationship between personality and interests enables us to extend legal personality to subjects other than the individual (physical person) or collective (group of interests) to those which we might refer to as 'relational subjects' (the natural environment, an ecosystem). Based on this reasoning, which underpins the recognition of the legal personality of groups of interests, we could allow for the legal personalisation of the elements of nature. Such a process could proceed as follows – we would need to begin with the specific interests of the element in question – a river, for example – that we, the human community, deem necessary to protect. These interests would then have to be deemed sufficiently important

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<sup>7</sup> This is the proposal of Marine Calmet, Camille de Toledo and Sarah Vanuxem put forward in Camille de Toledo, *Le fleuve qui voulait écrire. Les auditions du parlement de Loire* (Manuella Éditions 2021) 108.

<sup>8</sup> René Demogue, 'La notion de sujet de droit' (1909) 3 RTDC 611 [own translation].

<sup>9</sup> Appeal no 54-07.081 28 January 1954 Court of Cassation of France (*Cour de cassation*), Bull.civ.II., n°32. [own translation].

to justify the conferment of legal personality to the element in question. Consequently, if, collectively, the residents of a riverside, who have become the ‘people of the river’, were to recognise the river’s own interests, the prerequisite would be thus fulfilled. Endowed with legal personality, the river, which has become a subject of law, would have rights, defined precisely as legally protected legitimate interests, and a patrimony, understood in law to constitute the emanation of a person, a process comparable to the development of this person, to its reaching its full capacity.

Since the notion of patrimony nowadays has not only a material but also an immaterial dimension, it is easy to discern all the benefits that a river could derive from having the status of a person. Jean Carbonnier saw an analogy between the classical notion of patrimony, seen from an economic perspective, and the natural patrimony, since both are transferred through inheritance, either material, natural (genetic) or cultural. Carbonnier applied this reasoning to the person of ‘France’, with all of its rivers and landscapes.<sup>10</sup> By increasing the number of subjects of rights that belong to the natural environment, we simultaneously increase the means of combating environmental damage, making these elements of nature direct participants in the social pact that is the foundation of democracy.

Moreover, integrating a river into the social contract means changing the way human beings view what is added to it. The legal status conferred on these new environmental entities will have to be adapted to the aims that are to be pursued – the conservation of the natural heritage, the protection of biodiversity, the reasonable and sustainable use of natural resources, etc. The rights granted to these entities will have to be defined in relation to the social and ecological objectives that our societies want to achieve. The idea is that legal personality should not have only a symbolic dimension, as such an employment of it would render it but an empty shell. It must be given rights – the right to defend itself in court, to obtain damages in the event of prejudice suffered, and the right to benefit from donations or inheritance.

One of the major obstacles to this legal evolution is the *summa divisio* of persons and things within the French legal paradigm, which prohibits any legal status that might lead to the two being confused. What is more, if rights were granted to an environmental entity, would it not be necessary to correlate them with obligations?

On the first point, it seems possible to jump the hurdle. The development of robots thanks to artificial intelligence raises the question of how these mechanical entities produced by humans should be treated in legal terms, seeing how they are acquiring autonomy of action, including independent capacity to cause damage.

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<sup>10</sup> Jean Carbonnier, *Droit civil. Tome 3, Les biens* (PUF 2000).

Some legal experts are seriously wondering whether they should not be granted legal personality, partly so that they can be found liable to answer for any accidents they may cause.<sup>11</sup> For the sake of our argument, this example showcases that the boundary between people and things does not seem unbridgeable. But there is more. The legal personality conferred to a machine would only be introduced to impose obligations on them, not to grant them rights, which leads us to the second objection when it comes to environmental entities – that there should be no rights without obligations.

However, the answer to this objection is in fact easier to argue for, since it is already established in positive law that a juridical person can exist with rights without there being any obligations imposed on them. This is the case with a group of bondholders. It is, therefore, possible to envisage a personification of a river which would not necessarily entail obligations. On the one hand, there is a question of the feasibility of creating a legal personhood which has obligations but no rights; on the other hand, there is the question of the feasibility of a legal personhood with rights to protect itself from various forms of exploitation, but without any obligations it would have to fulfil. All this is in line with the notion of legal personality in relation to the interests behind its conferment.<sup>12</sup> As such, it constitutes a flexible technique that makes it possible to resolve some of the questions our society is currently asking itself, namely the question of what to do with robots and how to envisage their social responsibility, as well as the question of how to protect the vulnerable ecosystems, landscapes or watercourses that are essential to life.

As far as France is concerned, only one example of the personification of a river can be given. It concerns New Caledonia and the Kanak people. The Loyalty Islands Environmental Code adopted in 2016 includes a highly instructive article 110-3, which reads as follows:

The unitary principle of life, which means that man belongs to the natural environment that surrounds him and conceives his identity in the elements of this natural environment, constitutes the founding principle of Kanak society. In order to take

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<sup>11</sup> The European Parliament, in a resolution adopted on 16 February 2017, did indeed suggest the creation, in time, of a specific legal personality for robots so that at least the most sophisticated autonomous robots could be considered as electronic persons obliged to repair any damage caused to a third party.

<sup>12</sup> This could lead to the creation of an intermediate category between persons and things, called ‘centers of interest’; on this proposal, see Gérard Farjat, ‘Entre les personnes et les choses, les centers d’intérêts’ (2002) RTDC 221. Lucid, René Demogue was perplexed by the usefulness of this notion, arguing that ‘basically, we would have the technical process of personification without the name art’ (cf René Demogue, ‘La notion de sujet de droit’ (1909) 3 RTDC 638, own translation).

account of this conception of life and the organization of Kanak society, certain elements of nature may be recognized as having a legal personality with rights of their own, subject to the legislative and regulatory provisions in force.

Imbued with animism, this approach to Kanak society is difficult to transpose to our Western legal paradigm. The basis of legal personality as we know it in French law is quite different, as it is linked to legitimate interests to be protected. The approach is pragmatic. In order to make legal personality efficient, we need to create a structure to manage the interests of the watercourse, to act as its agent. These are the two conditions laid down by the Court of Cassation of France – distinct interests and a structure representing those interests.

Of course, a lawyer-researcher must do more than simply report on the existing law. They must imagine the law of the future and try to find new interpretations from the known and proven legal approaches; if necessary, they must even create new tools. Faced with the ecological crisis, we must invent and not hesitate to break with conservatism.<sup>13</sup> Legal progress often takes place in a context of a conflict. A famous 19th-century jurist, Rudolf von Ihering, wrote about this in his well-known book *The Struggle for Law*.<sup>14</sup>

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<sup>13</sup> This was the purpose of the *Auditions du parlement de Loire* initiative, organised in 2019–2020 by the Pôle Arts Urbanisme in partnership with the Regional Council of Centre-Val de Loire. The proceedings were published in the aforementioned *Le fleuve qui voulait écrire. Les auditions du parlement de Loire* (Manuella Éditions 2021).

<sup>14</sup> Rudolf von Ihering, *The Struggle for Law* (John J Lalor tr Callaghan and Company 1879).