

<https://helda.helsinki.fi>

Legal Person

Kurki, Visa Anton Julius

Springer

2020-05-26

Kurki , V A J 2020 , Legal Person . in M Sellers & S Kirste (eds) , Encyclopedia of the Philosophy of Law and Social Philosophy . Springer , Dordrecht . https://doi.org/10.1007/978-94-007-6730-0_810-1

<http://hdl.handle.net/10138/344065>

https://doi.org/10.1007/978-94-007-6730-0_810-1

acceptedVersion

Downloaded from Helda, University of Helsinki institutional repository.

This is an electronic reprint of the original article.

This reprint may differ from the original in pagination and typographic detail.

Please cite the original version.

Legal person

Visa AJ Kurki

To be published in the *Encyclopedia of the Philosophy of Law and Social Philosophy* (eds. Mortimer Sellers & Stephan Kirste)

Draft (Jan 22, 2020)

Introduction

Legal personhood is a foundational concept of Western legal thought, yet one which has often been ignored in theorizing. It has recently become a topical notion, given the increasing scholarly, political and wider interest in whether, for instance, nonhuman animals, natural objects, and artificial intelligences should be endowed with legal personhood. Legal personhood is most often explained in terms of the Orthodox View, which equates legal personhood with the holding of legal rights and/or duties. However, some scholars have (implicitly or explicitly) departed from this Orthodox View of legal personhood.

This entry will first introduce the central doctrines and terminology surrounding legal personhood; then go through the history of the notion; give an overview of certain contested issues; and conclude.

Doctrine and terminology

Western legal systems share certain central doctrinal features regarding legal personhood. First, legal persons are normally divided into *natural persons* (human beings) and *artificial persons* (corporations, including business corporations as well as other types of corporations, such as organizations and foundations). Only children born alive count as natural persons. However, foetuses usually benefit from the *nasciturus* rule, according to which an unborn child can for instance inherit the property of her father who passes away before she is born – if she is later born alive. Furthermore, certain jurisdictions have extended some other aspects of legal personhood to unborn children as well, such as counting as victims of crimes. As a matter of contemporary law, depriving any born human being of legal personhood would be an infringement of human rights law. However, humanity has not always been a sufficient condition for full legal personhood; women, slaves, outlaws, life

prisoners, as well as monks and nuns have in certain jurisdictions been excluded from some or all of the rights and duties associated with legal personhood.

In civil-law jurisdictions, it is a commonplace to employ “legal person” and “subject of law/right(s)” (*Rechtssubjekt, sujeto de derecho(s), sujet de droit*) synonymously. Anglophone, common-law jurisdictions typically do not speak of “subjects” in this context, though the mixed jurisdiction of South Africa is an exception. However, some scholars with civil-law backgrounds have recently suggested that “person” and “subject” could be distinguished. For instance, Tomasz Pietrzykowski has argued that animals could be declared as “non-personal subjects of law” (Pietrzykowski 2017).

As can be seen from Table 1, the terminology surrounding legal personhood is easily misleading. For instance, in many languages, “legal person” can refer either to artificial persons merely or to both artificial and natural persons. The phrase “legal capacity” more often than not refers to the status that children are endowed with when they are born, but occasionally – such as in disability law – also to its counterpart, “legal competence”, i.e. the competence to exercise one’s rights and duties. Furthermore, many of the terms and phrases, such as “legal capacity” (explained as the capacity to acquire rights and duties), originate from private-law theory, and it is far from clear that they are suitable for describing legal personhood as a general concept, covering all areas of law. For these reasons, it is clearer to employ the phrases “passive legal personhood” and “active legal personhood” (see MacCormick 2007).

	English	German	French	Spanish	Swedish	Finnish
1. Born human being	<i>natural person, person</i>	<i>natürliche Person, physische Person</i>	<i>personne physique</i>	<i>persona física, persona natural</i>	<i>fysisk person</i>	<i>luonnollinen henkilö</i>
2. Corporations	<i>artificial person, juridical person, juristic person, legal person</i>	<i>juristische Person</i>	<i>personne morale</i>	<i>persona jurídica, persona moral</i>	<i>juridisk person</i>	<i>oikeushenkilö, juridinen henkilö</i>
3. Both 1 & 2	<i>legal person, person, (in South Africa: subject of law)</i>	<i>Rechtssubjekt, Rechtsperson, juristische Person, Person</i>	<i>sujet de droit</i>	<i>sujeto de derecho(s), persona</i>	<i>rättssubjekt, rättsperson, person</i>	<i>oikeussubjekti, henkilö, (oikeusitselö)</i>
4. Passive legal personhood (acquired by a newborn child)	<i>legal capacity, (legal) personhood, (legal) personality</i>	<i>Rechtsfähigkeit, Rechtspersönlichkeit</i>	<i>capacité juridique, capacité de jouissance, personnalité juridique</i>	<i>capacidad jurídica, capacidad de goce</i>	<i>rättskapacitet, rättspersonlighet</i>	<i>oikeuskelpoisuus, oikeussubjektius, henkilöys</i>
5. Active legal personhood (possessed by e.g. adults of sound)	<i>Legal competence, legal personhood (but e.g. in disability law also: legal capacity)</i>	<i>Handlungsfähigkeit, Geschäftsfähigkeit</i>	<i>capacité d'exercice</i>	<i>capacidad de obrar, capacidad de ejercicio</i>	<i>rättshandlingsförmåga</i>	<i>oikeustoimikelpoisuus, oikeudellinen kelpoisuus</i>

Table 1. Legal personhood terminology.

Brief history

The roots of the Western understanding of legal personhood can be found in Roman law and legal scholarship. For instance, the *Institutiones* of Gaius (1904) is often mentioned as the origin of the person/thing/action trifurcation whose significance for modern legal taxonomies can easily be discerned. However, Gaius' purpose with the trifurcation was likely quite different from the taxonomies that he subsequently inspired. He did not present an “inventory of the universe”, nor did he claim that everything would be either a person, or a thing, or an action. For instance, slavery is often understood as the treatment of human beings as things rather than persons – but Gaius deals with slaves extensively also under the law of persons. This reflects the fact that *persona* originally meant “status, role”, and an individual could have numerous *personae*, rather than referring to the kind of “unity” as personhood is most often understood today (see e.g. Brožek 2017). The origins of the notion of corporation (*universitas*) can also be found in Roman law, which treated *universitates* as legally distinct from individuals. However, the Romans did not use the term *persona* to refer to corporations (Duff 1938).

The Middle Ages saw the introduction of the notion of fictional person (*persona ficta*) in the canon law by Pope Innocent IV (Padovani et al. 2005). This was significant in that the term *persona* was used to refer to corporations. However, corporations were regardless – because of their fictitious nature – deemed to be not excommunicable.

The modern notion of legal persons as right-holders started to develop in the works of Renaissance humanists Hugo Donellus (Hugues Doneau, 1527–1591) and Hermann Vultejus (1555–1634). Vultejus defined a *persona* as a *homo habens caput civile* – a human being with civil standing – and claimed that slaves were not *personae* (Hattenhauer 2011). Donellus and Vultejus would be followed by natural lawyers such as Hugo Grotius (1583–1645) and Samuel Pufendorf (1632–1694). Grotius wrote in his *Jurisprudence of Holland* that “law exists between persons, to whom the right belongs, and between things, over which the right extends” (Grotius 1926). Gottfried Leibniz (1646–1716) and Christian Wolff (1679–1754) would proceed to define persons as “subjects of rights and duties” (Leibniz 1990; Artosi et al. 2013; Hattenhauer 2011). Finally, members of the German Historical School – such as the prominent Friedrich Carl von Savigny (1779–1861) – explained legal personhood in terms of *legal capacity* (*Rechtsfähigkeit*), the capacity for rights and obligations. The German legal scholarship of the time was very influential. For instance, John Austin (1759 – 1859) – having studied in Bonn, Germany – imported these ideas to his native England and discussed them in his *Lectures on Jurisprudence* (Austin 1885).

Contested issues

A number of issues regarding legal personhood are highly contested. Topics addressed in this section include the relationship between legal personhood and “real” personhood and the definition of legal personhood. Issues that cannot be addressed here include the question whether legal personhood is a necessary feature of law or rather a contingent feature of Western law; whether persons and things exhaust the “legal space” – i.e. whether everything needs to be either a person or a thing – and the nature of corporations.

Realism and Legalism

Naffine (2009) distinguishes Realists and Legalists. According to Realists, the status of legal personhood ought to track personhood: persons should be recognized as legal persons, and nonpersons should not (see e.g. Finnis 2011). Legalists, on the other hand, detach legal personhood from personhood, treating the former as a technical legal concept: one’s “legal nature [...] should not be confused with one’s nature beyond the confines of law” (Naffine 2009). When debating the legal personhood of e.g. corporations or animals, the question whether such entities and creatures “really” are persons is much more pertinent for a Realist than for a Legalist. One can also detect certain connections between Realism and natural law theory on one hand, and Legalism and legal positivism on the other.

Definition of legal personhood

Yet another point of debate is the definition of legal personhood. Proponents of the Orthodox View associate legal personhood with rights and/or duties. The exact details vary somewhat. Most define “a legal person” as

(1) an entity that holds legal rights and/or duties

or

(2) an entity that can

a. hold legal rights and/or duties, or

b. be a party to legal relations,

or

(3) (a bundle of) rights and/or duties.

Accounts falling under (1) and (2) are relatively similar, though they differ somewhat in the order of priority. For (1), rights and duties have priority over legal personhood: if one has rights or duties, one

is a legal person (e.g. Gray 1997; Bilchitz 2009). Under (2), on the other hand, legal personhood has priority: one can hold rights and/or duties only if one is first determined a legal person (e.g. Wise 2010). The definition of legal personhood as the capacity for legal relations is normally understood as synonymous, or nearly synonymous, with the capacity for rights/duties (see e.g. (Lehmann 2007), even if this equivalence may be contested.

A further complication with regard to (1) and (2) is whether a legal person must (be able to) hold legal rights *or* duties (Bilchitz 2009); rights *and* duties (Lehmann 2007); rights merely (see Austin 1885); or duties merely (Machen 1911).

View (3), represented most prominently by Hans Kelsen, situates the legal person purely in the normative realm. According to Kelsen (2006), *man (Mensch)* is a flesh-and-blood entity in the realm of “is”, whereas *person (Person)* is the bundle of rights and duties situated in the realm of “ought”.

Some authors reject the Orthodox View. For instance, Beaudry (2016) takes personhood rights to be a particular, non-exhaustive category of rights. Pietrzykowski (2016) argues that persons and non-personal subjects of law hold different rights. Kurki (2019) claims that legal personhood is a bundle property and that one can hold legal rights without being a legal person.

Conclusion

The traditional doctrines and theories of legal personhood are in flux. In Argentina, a judge granted in 2016 *habeas corpus* to the chimpanzee Cecelia, thus recognizing her as a “non-human subject of law” (*sujeto de derecho no humano*). In New Zealand, the Whanganui River has been declared a legal person; similar developments have taken place elsewhere. The question of whether AIs could or should be legal persons is also constantly becoming more topical.

Scholars have suggested that the taxonomy that currently only includes natural persons and artificial persons should be amplified to include e.g. “animal persons” (*tierliche Personen*, Stucki 2016) or “nonhuman natural persons” (*personnes physique non-humaines*, Regad 2019). Somewhat similarly, the Legal Affairs Committee of the European Parliament has discussed whether “electronic personality” ought to be granted to the “most sophisticated autonomous robots” (2015).

Cross-references

Persons and personhood; rights; legal positivism; natural law

Bibliography

- Artosi A, Pieri B, Sartor G (eds) (2013) *Leibniz: Logico-Philosophical Puzzles in the Law: Philosophical Questions and Perplexing Cases in the Law*. Springer
- Austin J (1885) *Lectures on Jurisprudence: Or, the Philosophy of Positive Law*, vol. I. John Murray, Albemarle Street, London
- Beaudry J-S (2016) From Autonomy to Habeas Corpus: Animal Rights Activists Take the Parameters of Legal Personhood to Court. *Glob J Anim Law* 3–35
- Bilchitz D (2009) Moving Beyond Arbitrariness: The Legal Personhood and Dignity of Non-Human Animals. *S Afr J Hum Rights* 25:38–72
- Brożek B (2017) The Troublesome ‘Person.’ In: Kurki VA, Pietrzykowski T (eds) *Legal Personhood: Animals, Artificial Intelligence and the Unborn*. Springer
- Duff PW (1938) *Personality in Roman Private Law*. Cambridge University Press, Cambridge
- Finnis J (2011) The Priority of Persons. In: *Intention and Identity: Collected Essays Volume II*. Oxford University Press, Oxford, UK, pp 19–35
- Gaius (1904) *Institutiones or Institutes of Roman Law*, 4th edn. Clarendon Press, Oxford, UK
- Gray JC (1997) *The Nature and Sources of the Law*. Ashgate, Brookfield, USA
- Grotius H (1926) *The Jurisprudence of Holland*. Clarendon Press, Oxford
- Hattenhauer C (2011) „Der Mensch als Solcher Rechtsfähig“ – Von der Person zur Rechtsperson. In: Klein E, Menke C (eds) *Der Mensch als Person und Rechtsperson*. Berliner Wissenschafts-Verlag, Berlin, pp 39–66
- Kelsen H (2006) *General Theory of Law and State*. Transaction Publishers, New Brunswick, New Jersey
- Kurki VAJ (2019) *A Theory of Legal Personhood*. Oxford University Press, Oxford, UK
- Lehmann M (2007) Der Begriff der Rechtsfähigkeit. *Arch für die civilistische Prax* 207:225
- Leibniz GW (1990) *Sämtliche Schriften und Briefe, Sechste Reihe, Erster Band*, 2nd edn. Akademie-Verlag, Berlin
- MacCormick N (2007) *Institutions of Law. An Essay in Legal Theory*. Oxford University Press,

Oxford

Machen AW (1911) Corporate Personality. *Harv Law Rev* 24:253–267

Naffine N (2009) *Law's Meaning of Life: Philosophy, Religion, Darwin and the Legal Person*. Hart Publishing, Oxford, UK

Padovani A, Stein PG, Pennington K, Errera A (2005) *A Treatise of Legal Philosophy and General Jurisprudence, Volume 7: The Jurists' Philosophy of Law from Rome to the Seventeenth Century*

Pietrzykowski T (2017) The Idea of Non-personal Subjects of Law. In: Kurki VAJ, Pietrzykowski T (eds) *Legal Personhood: Animals, Artificial Intelligence and the Unborn*. Springer

Pietrzykowski T (2016) Beyond Personhood: From Two Conceptions of Rights to Two Kinds of Right-Holders. In: Pietrzykowski T, Stancioli B (eds) *New Approaches to the Personhood in Law*. Peter Lang

Regad C (2019) Genèse d'une doctrine : l'animal, personne physique non-humaine. *dA Derecho Anim (Forum Anim Law Stud* 10:201–204

Stucki S (2016) Grundrechte für Tiere. Eine Kritik des geltenden Tierschutzrechts und rechtstheoretische Grundlegung von Tierrechten im Rahmen einer Neupositionierung des Tieres als Rechtssubjekt. Nomos, Baden-Baden

Wise SM (2010) Legal Personhood and the Nonhuman Rights Project. *Anim Law* 17:1

Expte. Nro. P- 72.254/ 15 'Presentación efectuada por a.f.a.d.a respecto del chimpancé "Cecilia"—sujeto no humano'.

European Parliament, Committee on Legal Affairs. Report with recommendations to the Commission on Civil Law Rules on Robotics (2015/ 2103(INL)).