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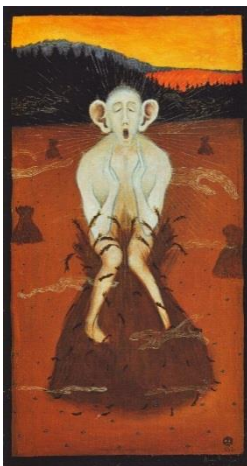
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Special Issue
Traditions, Myths, and Utopias of Personhood

Traditions, Myths, and Utopias of Personhood: An Introduction

*By Toni Selkälä & Mikko Rajavuori**

Abstract

Legal personhood continues to serve an important role in the legal system. The millennial distinction of persons and things, while often unarticulated, is an essential building block of all legal relations. This introduction to persons and things outlines the past tradition, draws on present myths, and construes a utopia of which the articles in this special issue will comment, clarify, and criticize.

* PhD Candidates, University of Turku, Finland. Emails: totase@utu.fi; mijora@utu.fi. We wish to thank Emanuel Towfigh and all the editors at the German Law Journal for their patience and support as well as wonderful attention to detail. We also thank Faculty of Law at the University of Turku, Turku University Foundation and eCoherence project for generous support, which enabled us to organize Persons/Things workshop. We are also greatly indebted to Gail Maunula for her wonderful proofreading help. Toni would further want to extend his gratitude to Law, Science, Technology & Society research group at Vrije Universiteit Brussel and Oxford Uehiro Centre for hosting him during the time of editing this special issue. And lastly, thanks to all the wonderful authors for making our work easy. The usual disclaimers, obviously, apply.

A. Introduction

“In what way is a thing not a person?” asks the bestial protagonist in Margaret Atwood’s short story *Lusus Naturae*.¹ In all its apparent simplicity, this is also what the articles in this special issue on Persons/Things address. Why, what, and when does a person become a mere thing or a thing a person?² What is the function of the legal distinction between persons and things, if any? The most canonical answer to this question argues that persons are ones who command a capacity to possess things—that distinction between the two is a means to establish property relationships. A person has rights and duties that *allow* her to do, to have, and to be,³ while a thing merely exists. How much does a person have to do and have in order to exist? Advancement in science and technology, together with globalization, has brought about many thorny issues for law and legal systems at large to solve over past decades. These issues share an intimate connection with the distinction between persons and things. The legal debates over the status of animals, corporations, unborn, non-biological machines, and nature have, for their part, made questions of personhood and personhood’s connection to rights topical. These and other things question what is the specific character enjoyed by natural persons, living human beings, that makes their actions significant and their rights legally enforceable in comparison to these other entities—the things. This introductory article, together with the articles of this special issue, argues for a gradual re-orientation of our understanding of personhood and, with that, our appreciation of things.

Any inquiry into legal personhood is an attempt to constitute a tradition, a particular reading of the vast terrain of legal personhood. While the tradition of legal personhood is, in many ways, of more recent origin than its oft-quoted millennial heritage dating it to a Roman Law distinction between persons and things, *persona* and *res*, all attempts to justify a re-reading of legal personhood—ours included—commence with this tradition, contrived as it may be. In short, ours is an attempt through “the use of ancient materials to construct invented traditions of a novel type for quite novel purposes,”⁴ that is, an attempt to use legal personhood to argue that there exists a red thread connecting shamanism, fetuses, and corporations, among others, under the umbrella of a new-found tradition. In many ways, such an attempt clings onto a utopia of legal coherence where none might be found. Therefore, rather than arguing for a single, theoretically sound interpretation of legal personhood fit for the present, we trace two divergent paths and encourage following both.

¹ See Margaret Atwood, *Lusus Naturae*, in *STONE MATTRESS: NINE WICKED TALES* 125, 130 (2014).

² In what follows a person is an oft-used short-hand for a legal person but we occasionally variate and use terms such as legal personality or legal subject to refer to legal person.

³ See JEAN-PAUL SARTRE, *BEING AND NOTHINGNESS* 576 (1958).

⁴ Eric Hobsbawm, *Introduction: Inventing Traditions*, in *THE INVENTION OF TRADITION* 1, 6 (Eric Hobsbawm & Terence Ranger eds., 1983).

One path leads to dilution of conditions formerly deemed essential for the existence of personhood. Examples of such practices are relatively commonplace, for one, the norm found in the European Data Protection Regulation equates rights with the existence of a living natural person, while simultaneously recognizing that DNA data of a deceased person can also constitute protected personal data.⁵ The other path evinces multiplication of entities endowed with personhood in an attempt to correctly attribute rights and duties. These are equally numerous as the examples of dilution of norms, as calls for robot personhood, artificial intelligence agency, or animal *habeas corpus* indicate. Rather than attempting to argue for convergence of these two different paths, we invite a diffractive reading of personhood “attuned to differences—differences that our knowledge-making practices make and the effects they have on the [personhood].”⁶

Alongside an invented tradition of ancient origin, there is a myth of unprecedented inattention fostered by authors writing on the topic of legal personhood. It is commonplace to argue that personhood is “grossly undertheorized”⁷ while at the same time participating in a lively debate over personhood across number of disciplines.⁸ This foundational myth constitutes the power of a proposed solution and its original, explanatory power by revealing the unprecedented inattention to personhood and, in doing so, making the author’s attention to it even more mystical in return.⁹ Closely resembling what Susan Marks calls the myth of the dangerous dark,¹⁰ the authors reveal their insights on personhood as a means to reveal something concealed within the dark folds of personhood that the inattention intensifies.¹¹ Most often, the myth of unprecedented inattention highlights the fact that due to this inattention, a legal entity is discriminated against or not seen in the proper light. The present notion of personhood, grossly undertheorized as it might be, is a malign ideological

⁵ See General Data Protection Regulation 2016/679, 2016 O.J. (L 119); see also Opinion 4/2007 of the Data Protection Working Party on the Concept of Personal Data, 01248/07/EN WP 136) 22–23 (discussing the concept of personal data).

⁶ KAREN BARAD, *MEETING THE UNIVERSE HALFWAY* 72 (2007).

⁷ David Fagundes, *Note: What We Talk About When We Talk About Persons: The Language of a Legal Fiction*, 114 *HARV. L. REV.* 1745, 1768 (2001).

⁸ For other examples from upholding this myth, see, e.g., Stephen C. Hicks, *On the Citizen and the Legal Person*, 59 *CINCINNATI L. REV.* 789, 869 (1991); Anu Pylkkänen, *Onko oikeuden henkilöllä sukupuolta?*, 36 *OIKEUS* 147, 148 (2007) (asking to “develop an understanding of the legal person,” or noting how little discussion there is on what personhood entails” (author translation)).

⁹ See ROLAND BARTHES, *MYTHOLOGIES* 29 (1972).

¹⁰ Susan Marks, *Four Human Rights Myths*, in *HUMAN RIGHTS* 217, 231 *et seq.* (David Kinley, Wojciech Sadurski, & Kevin Walton eds., 2013).

¹¹ For a discussion with regard to fetal personhood and women’s rights, see Alejandro Madrazo, *Narratives of Prenatal Personhood in Abortion Law*, in *ABORTION LAW IN TRANSNATIONAL PERSPECTIVE: CASES AND CONTROVERSIES* 327 (Rebecca J. Cook, Joanna N. Erdman, & Bernard M. Dickens eds., 2014).

lens that inverts the universal legal reality it is supposed to uphold to veer towards particularism.¹² Re-adjusting personhood, the myth insists, will correct the wrongs endured. But could it be, as Marks suggests that “we should be more concerned with what happens in broad daylight, then perhaps the key myth is mystification itself—the myth of myths?”¹³ Here, we attempt to steer away from repeating the myth of unprecedented inattention. Rather, we seek to analyze the curious perception that often the very act of casting a light on inattention has been employed to perpetuate injustices attributed to that inattention.

Thus, ours is an attempt to build a new tradition and construct a myth to uphold an ideological utopia of legal personality, or, alternatively, a readjustment of the present voluminous debate to address that which hides in the plain sight. This introduction is divided into two distinct parts. The first part provides a brief historical background of the conceptual development of legal personhood in the Occidental legal systems and their offspring, the Eurocentric international law. The latter part offers a more contemporary backdrop within which the articles of the present special issue operate as well as a modest proposal for a lens through which to reflect the emerging arguments for and against new categories of personhood. Even though these parts function independently, the theory formulation in the latter part builds upon the nuanced history of legal personhood.

B. Building a Tradition

The persons/things distinction in the law has many roots. Most Occidental normative orders, whether ecclesiastical or legal, presume existence of such a distinction. The Judeo-Christian maxim of humans’ dominion over nature, for instance, adheres to it. The most recurrent reference to a starting point of legal distinction between persons and things emanates from Ancient Roman Law. Gaius, in *Institutiones*, divides the realm of law into three categories: persons (*persona*), things (*res*), and actions (*actiones*).¹⁴ According to the system of the Roman law explained by Gaius, slaves as well as *paterfamilias*, head of the household, are humans (*homo*) but not necessarily persons (*persona*). They may be unequal humans, but humans nonetheless. Also, it is important to note that status as a person fluctuated throughout one’s life. Being a human did not prevent one from coming into possession of another. A human could be owned and traded much like a thing, but never become merely a thing. That same human could later gain the status of a person with all the rights and duties that followed. Thus, even though Roman law clearly marks the origin of distinction between persons and things that we still evince today—a fact both lawyers and philosophers agree on—present meaning given to this distinction is of much later origin. The Roman law might

¹² For such a reading of ideology’s traits, see Paul Ricoeur, *Ideology and Utopia as Cultural Imagination*, 7 PHILOS. EXCH. 17 (1976).

¹³ Marks, *supra* note 10, at 232.

¹⁴ See GAIUS, INSTITUTIONES 13 (E.A. Whittuck ed., 4th ed. 1904).

have contributed to what Roberto Esposito titles a *dispositif* of a person,¹⁵ as discussed, or alternatively we may consider that Roman law functioned as an example of Law for later scholars who have been decisive in formulating our present understanding of personhood and “thinghood.”¹⁶

I. An Enlightened Way to Make Persons

Many of the histories of legal personhood share much more than a story of origin. The presence of Immanuel Kant, out of all Enlightenment philosophers, is one of these recurring features among legal scholars, even though the Enlightenment provided several formulations of agency, morals, and law.¹⁷ Kant’s argument for the inner worth of a person through her dignity, in contrast to a price carried by a thing, lays the groundwork for the modern concept of a legal person. As a consequence of embedding Kant’s formulation into law, the formerly porous border between person and thing is sealed. Where relatively late into the 18th century an animal on trial could readily be compared to a human, a thing in the Kantian system cannot be endowed with such dignity.¹⁸ For Kant, the distinction between a person and a thing relies ultimately on the capacity for autonomous agency manifested through moral action that creates a nexus between acts and persons. In short, working his way through Roman law and its distinction between persons and things, Kant established an additional condition for personhood, namely the capacity for moral action, which seemed to exclude not only non-humans but also a part of humanity outside its scope.¹⁹ While similar classifications had permeated both into law and into philosophy before Kant, it was precisely Kant’s formulation that gained widespread recognition and imitation, especially in the civil law tradition through the work of Friedrich Carl von Savigny.²⁰ According to Savigny, rather

¹⁵ See Roberto Esposito, *The Dispositif of the Person*, 8 L. CULT. & HUMAN. 17 (2012); ROBERTO ESPOSITO, *THIRD PERSON: POLITICS OF LIFE AND PHILOSOPHY OF THE IMPERSONAL* (2012).

¹⁶ Christine M. Korsgaard, *Kantian Ethics, Animals, and the Law*, 33 OXF. J. LEG. STUD. 629 (2013); Rafael Domingo, *Gaius, Vattel, and the New Global Law Paradigm*, 22 EUR. J. INT’L L. 627 (2011).

¹⁷ See, e.g., JONATHAN ISRAEL, *RADICAL ENLIGHTENMENT: PHILOSOPHY AND THE MAKING OF MODERNITY* (2001) (discussing the influence of different stages of Enlightenment with different views regarding universality and what he titles Radical Enlightenment). For a materialist critique on the influence of this, see ANTOINE LILTI, 64 COMMENT ECRIT-ON L’HISTOIRE INTELLECTUELLE DES LUMIERES? SPINOZIME, RADICALISME ET PHILOSOPHIE ANNALES. HISTOIRE, SCIENCES SOCIALES (2009); ANN THOMSON, *BODIES OF THOUGHT: SCIENCE, RELIGION, AND THE SOUL IN THE EARLY ENLIGHTENMENT* (2008) (attempting to provide a counter-narrative).

¹⁸ The matter was not solely of having trials for animals, but also “the court, viewing insensate creatures as the equivalent of vulnerable minor.” See Esther Cohen, *Law, Folklore and Animal Lore*, PAST & PRESENT 6, 13 (1986).

¹⁹ As Christine Korsgaard argues, such a position is not sole or even the most likely interpretation of Kant’s formulation. Nevertheless, the way Kant’s tradition is perceived at present matters relatively little to past interpretation of his work by legal theorists. See Korsgaard, *supra* note 16.

²⁰ But see Donald R. Kelley, *Gaius Noster: Substructures of Western Social Thought*, 84 AM. HIST. REV. 619, 645 *et seq.* (1979) (providing an interpretation of Savigny’s limited impact outside his work in Roman law).

than receiving dignity and personhood through moral agency, human beings commanded innate value through the freedom they enjoyed, which ultimately led him to conclude that humans, and humans alone, enjoy legal capacity.²¹ Through these successive steps, an open category of a person was first tied to the capacity to act morally, which gained its legal formulation in an even more restrictive formulation that equated such capacity with humanity.

While legal personhood, on a classificatory plane, granted all humans an inherent and equal recognition before the law, positive law limited or even fully negated these rights on a number of occasions. The most noted instances are related to the treatment of slaves, people in the colonies, women and children, and those deemed to be lacking mental capacity. This friction between general dictates of humanity and reducing humans to property is clearly played out in a late 18th century case of a slave brought from America to England.²² On arrival to England, Somerset—the slave—demanded to be set free, while Somerset’s master rejected his claim to freedom, referring to Somerset as his possession and asserted his rights of property ownership over the slave. The court accepted Somerset’s claim, but for reasons that were more tightly connected to the state of positive law than on general principles of humanity, “drawing a clear distinction between Somerset’s status as a human and his status as a legal person.”²³ Thus, a denial of rights through concepts of individualism and property is the other facet of the Enlightenment tradition carried over to the present, demoting some individual human beings to a status closer to thinghood. It is an idea shared equally by Kant and Savigny, as well as Austin in the common law tradition.²⁴ Austin formulated his own theory as an analytical will theory: for as long as there is a will, there is an entity that the law can command.²⁵ It is this positive law tradition that also clearly expands the philosophical foundation of the distinction between persons and things further

²¹ See FRIEDRICH CARL VON SAVIGNY, 2 SYSTEM DES HEUTIGEN RÖMISCHEN RECHTS 60 (1840).

²² *Somerset v. Stewart*, (1772) 98 Eng. Rep. 499 (K.B.).

²³ David J. Calverley, *Legal Rights for Machines: Some Fundamental Concepts*, in MACHINE ETHICS 213, 219 (Michael Anderson & Susan Leigh Anderson eds., 2011). Compare however to an account provided in JOHN T. NOONAN, PERSONS AND MASKS OF THE LAW: CARDOZO, HOLMES, JEFFERSON, AND WYTHE AS MAKERS OF THE MASKS (1976) highlighting the role of Blackstone in shaping the doctrine rather than considering the outcome merely a neutral enactment between positive law and more general principles of common law.

²⁴ Richard Hartzmann, *John Austin*, in DICTIONARY OF LITERARY BIOGRAPHY: BRITISH PHILOSOPHERS 1800-2000 18–25 (2002); M. H. Hoeflich, *John Austin and Joseph Story: Two Nineteenth Century Perspectives on the Utility of the Civil Law for the Common Lawyer*, 29 AM. J. LEG. HIST. 36 (1985).

²⁵ See JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 5 (1832).

towards contractual and utilitarian foundation,²⁶ though such features were also perceived—at least by its critics—in the main treatises of the German historical school.²⁷

The outline of the persons/things distinction embraced by Enlightenment thinkers and social theorists, lawyers and legal scholars included therein, embedded possessive individualism at the heart of Western normative enterprise.²⁸ A legal person, equated with willfulness or a human holding interest, functioned as a basis also in social reforms pursued from the late 18th century to the mid-20th century. For a disparate range of thinkers, property served as a model of rights: a primary right among rights. The nexus of freedom and property made it entirely justifiable to demote or deprive rights for those lacking property.²⁹ Thus, many of the first human rights declarations, in addition to limiting rights to men, limited political rights of those having large debts. These tensions between property and more general human rights are well illustrated through the example of auctioned children—and in some cases elderly and disabled—in Sweden and Finland in late 19th and early 20th century. In this practice, children that fell under the custody of a municipality were publicly auctioned to the lowest bidder, subjecting some auctioned children to slavery-like conditions.³⁰ The practice—delegalized in 1918 in Sweden and 1923 in Finland—continued in Finland well into the 1930s, an era when supposedly everyone was granted equal rights according to the Finnish Constitution.³¹ A lack of means to economically support oneself allowed persons to be demoted to a category of chattel, while large property holdings garnered an increasingly independent status resembling that of a natural person.

Corporations were the hallmark of the extension of rights and legal personality annexed to bodies of property. These were hardly novel developments in the late 18th and 19th century societies where Savigny, Austin, and others worked. The marked difference between earlier

²⁶ See Hoeflich, *supra* note 24, at 44.

²⁷ See Kelley, *supra* note 20, at 644.

²⁸ It is contested to what extent the individual's command or possession over herself was the very founding treatise of individualism and subsequent form of governance and of law. For debate, see, e.g., C.B. MACPHERSON, *THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM* (1977); Quentin Skinner, *The Ideological Context of Hobbes's Political Thought*, 9 *HIST. J.* 286 (1966), but few would, according to Peter Lindsay, *Possessive Individualism at 50: Retrieving Macpherson's Lost Legacy*, 21 *GOOD SOC.* 132, 134 (2012) question the existence of such claims at the heart of Enlightenment perception of an individual that was later embodied as a person.

²⁹ For the historical origins of this nexus, compare Morris R. Cohen, *Property and Sovereignty*, 13 *CORNELL L. Q.* 8, 18 *et seq.* (1927), with 2 HEINRICH AHRENS, *COURS DE DROIT NATUREL OU DE PHILOSOPHIE DU DROIT. 7 et seq.* (7th ed. 1875) (providing accounts stressing other foundational nexii, such as humanity).

³⁰ See Sofia Lundberg, *Child Auctions in Nineteenth Century Sweden: An Analysis of Price Differences*, 35 *J. HUM. RESOURCES* 279 (2000); Elisabeth Engberg, *Boarded Out by Auction: Poor Children and Their Families in Nineteenth-Century Northern Sweden*, 19 *CONTIN. CHANG.* 431 (2004).

³¹ See FINLAND [CONSTITUTION] July 17, 1919, section 5 (containing general equality clause); *Id.*, section 6(1) (protecting *inter alia* personal liberty).

corporate bodies and those that appeared first in the late 18th century was the seeming absence of the public facet of a corporation.³² Unlike the trading companies of the 17th and 18th century, which combined the sovereign (*imperium*) with property and ownership (*dominium*), the 19th century evinced separation of these two functions.³³ Corporations were no longer seen primarily as a sovereign gift serving a public interest, but as a free enterprise independent of all state interest.³⁴ Savigny considered the corporate body separate from that of its individual owners, such that the decisions a corporation makes or its responsibilities could not be reduced or returned to those of its proprietors. As an independent body wielding significant power, the courts, especially in the United States, started to draw a distinction between the artificial corporate body and its investors. Between the U.S. Supreme Court decision in *Dartmouth College v. Woodward*³⁵ and the first decades of the 20th century, the U.S. doctrine of corporate personhood was formulated with a concrete set of rights and duties belonging to corporations as well. A contract between private parties became the foundation of a corporation, replacing the formerly public nature of corporations as gifts of sovereign. It was this particular model of corporation that saw unprecedented success throughout the 20th century to the present.³⁶

Expansion of rights to corporate bodies was one of the developments that expanded the realm of legal persons. The abolition of slavery as well as women's rights movements across the globe moved many humans towards full legal personhood even though the movement was gradual at best during the 19th and first half of the 20th century. Another corporate body, aside from the economic corporation, that gained recognition internationally during the early years of the 20th century was minorities. Minorities included both minorities as they are at present understood and all aliens residing within a jurisdiction.³⁷ In the 19th century, for instance, the minority protection provided by the Ottoman Empire and the Austro-

³² See Lawrence B. Glickman, Business as Usual: The Long History of Corporate Personhood, BOSTON REVIEW (Aug. 23, 2017), <http://bostonreview.net/politics/lawrence-b-glickman-business-usual-long-history-corporate-personhood> (for an argument of long-standing power of perceiving business interests and corporations as apolitical).

³³ See PHILIP J. STERN, THE COMPANY-STATE: CORPORATE SOVEREIGNTY AND THE EARLY MODERN FOUNDATIONS OF THE BRITISH EMPIRE IN INDIA (2011). For a continued relevance of this distinction, see Mikko Rajavuori chapter in this volume, *Making International Legal Persons in Investment Treaty Arbitration: State-owned Enterprises Along the Person/Thing Distinction*, 18 GERMAN L. J. (2017).

³⁴ See Janet McLean, *The Transnational Corporation in History: Lessons for Today?*, 79 IND. L.J. 363, 373 (2004).

³⁵ Trustees of Dartmouth Coll. v. Woodward, 17 U.S. 518 (1819).

³⁶ See JOSHUA BARKAN, CORPORATE SOVEREIGNTY: LAW AND GOVERNMENT UNDER CAPITALISM (2013). For the most influential formulation in the present, see Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976); Henry Hansmann & Reinier H Kraakman, *The End Of History For Corporate Law*, 89 GEO. L.J. 439 (2001).

³⁷ For this and other earlier history of the minority protection, see Helmer Rosting, *Protection of Minorities by the League of Nations*, 17 AM. J. INT'L L. 641 (1923).

Hungarian Empire was extensive. Crucially, they recognized religious, ethnic, and linguistic minorities as bodies with independent will, interests, and rights. Especially with regard to what were deemed "semi-civilized" states,³⁸ the rights of minorities signaled a deeply felt distrust by the Euro-American states towards the Ottoman Empire, China, Japan, Persia, etc.³⁹ Many of these rights were codified during the 1876 Congress of Berlin and later in 1919 under the aegis of the League of Nations, but their enforcement remained haphazard.⁴⁰ More important than the rights was the creation of yet another group of things at the margin of the international personality.⁴¹ Much like corporations on the domestic plane, peoples and minorities were seen as a natural expansion to accompany the primary subjects of international law, the States. Christian or European minorities, in particular, ought not to remain under rule of semi-civilized States.

The boundary work evident in the separation of the European States from the rest of the world, carried on in the international legal realm during the same era, led to a similarly winding path as the one evinced in general jurisprudence or legal theory. There were two entangled parts to this development, both relevant to what was to be seen as a legal person in international setting. The dominant of these two focused on scoping those entities that *a priori* were recognized as States in Europe and could be considered meaningful international actors. The second concerned internal debates entertained throughout Europe on what was to be understood as a "state." Much of the legal scholarship at the time merely subsumed existence of a European state as an actor and a "person" on the international plane, but yet there was an extensive political debate—starting as late as the 16th century—on what a "state" stands for.⁴² The question of whether a "state" refers to a representation of popular will through actions of a Sovereign or whether it is embodied in a monarch who commands absolutist power had significant repercussions both for the exercise of international relations and also for how personhood came to influence international law. Both the domestic and the international attempts to define state through personhood were based on

³⁸ Here we use the term employed by Umut Özsu. See Umut Özsu, *The Ottoman Empire, the Origins of Extraterritoriality, and International Legal Theory*, in OXFORD HANDBOOK OF THE THEORY OF INTERNATIONAL LAW 123 (Anne Orford & Florian Hoffman eds., 2016). There are other terms as well, such as semi-sovereign employed by Matthew Craven. See Matthew Craven, *Statehood, Self-determination, and Recognition*, in INTERNATIONAL LAW 203 (Malcom D. Evans ed., 3rd ed. 2010). In this instance, the choice of the term carries no particular theoretical leaning.

³⁹ For a critical analysis on the purpose of this system of minority protection in the Ottoman Empire, see Özsu, *supra* note 38.

⁴⁰ See generally CARO FINK, DEFENDING THE RIGHTS OF OTHERS (2004).

⁴¹ See generally Natasha Wheatley, *Spectral Legal Personality in Interwar International Law: On New Ways of Not Being a State*, L. & HIST. REV. (forthcoming).

⁴² For the English debate, see generally Quentin Skinner, *A Genealogy of the State*, 162 BR. ACAD. PUBL. ONLINE 325 (2008).

grosso modo similar contractual models;⁴³ where the contract was used domestically by likes of Hobbes to construe “a reall Unitie of them all, in one and the same Person.”⁴⁴ A contract on the international plane sought to maintain that the “compound Moral Person”⁴⁵ could fulfill interests of “egoistic but interdependent sovereignties . . . to cooperate”⁴⁶ through concluding treaties. Ascribing human qualities to the state through the concept of person on the international plane allowed for internal classification among states, as well as exclusion of entities that were not desired as part of the system of international law—for whatever reason.⁴⁷

All in all, the *persona/res* distinction of Roman law underwent numerous mutations during the Enlightenment. They were later embedded into diverse legal doctrines during the 19th and early 20th centuries on both the national and international plane. Many of these formulations are still commonplace, such as the basic definition of a legal person as the right-and-duty-bearing unit. The vagueness of this legal division provided personhood with an untold generative power as fuzziness at its borders enabled person to serve virtually all ends.⁴⁸ On the international plane, this generative power was occupied by the notion of civilization,⁴⁹ whereas in most domestic orders, this role was reserved for consciousness, property, or intellect. As the definition of a legal person was mostly tautological (i.e., those who have rights are legal persons, legal persons are those who have rights) the power to decide whom to grant rights to was also the power to make legal persons.⁵⁰ A lack of universalism was in part responsible from an outgrowth that amounted, first, to total negation of parts of humanity, and later, to a promotion of universalism.

⁴³ See, e.g., Martti Koskenniemi, *Transformations of Natural Law: Germany 1648–1815*, in OXFORD HANDBOOK OF THE THEORY OF INTERNATIONAL LAW 59 (2016) (showing these contractual similarities); Skinner, *supra* note 42; Craven, *supra* note 388.

⁴⁴ THOMAS HOBBS, *LEVIATHAN* 120 (Richard Tuck ed., 2008).

⁴⁵ SAMUEL VON PUFENDORF, *LAW OF NATURE AND NATIONS* 645 (4th ed. 1729).

⁴⁶ Koskenniemi, *supra* note 43.

⁴⁷ For these classifications, see Craven, *supra* note 38.

⁴⁸ See John Dewey, *The Historic Background of Corporate Legal Personality*, 35 *YALE L.J.* 655, 673 (1926).

⁴⁹ See OUTI KORHONEN, *INTERNATIONAL LAW SITUATED* (2000) (regarding a State seeking membership among the order of civilized States); MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS* (2004) (analyzing inclusion/exclusion through universalism/particularism); Vasuki Nesiah, *Human Shields/Human Crosshairs: Colonial Legacies and Contemporary Wars*, 110 *AJIL UNBOUND* 323 (2016) (discussing the disregard of certain forms of suffering at the dawn of international humanitarian law).

⁵⁰ See Frederic William Maitland, *Moral Personality and Legal Personality*, 6 *J. SOC. COMP. LEGIS.* 192 (1905) (proposing the dilemma with regard to corporations).

II. From Rights of Everyone to a Vanishing Person

The Second World War and its aftermath mark a watershed in much of the debate on legal personhood. Before the War, the system of protection of individuals relied on the protection provided by the State of which the individual was a citizen. Aliens, or stateless persons, were protected based on goodwill of the State that commanded jurisdiction over them. Stateless persons, for instance, were perceived widely as a nuisance or, at most, a problematic individual:

Actually, if it happens that the stateless person is a highly undesirable individual and liable to deportation under the law, it may not be easy to find a way of carrying out the law in this case, for other countries may well regard him as undesirable too and refuse to admit him.⁵¹

These undesirables, according to Hannah Arendt, were but a logical consequence stemming from adherence to domestic, positive law founded on utilitarianism. She maintained that even though such laws would cover the whole of humankind, it could still “for humanity as a whole . . . be better to liquidate certain parts thereof.”⁵² Nonetheless, it was precisely an expansion of rights to every human that became the *modus operandi* of international and domestic rule-making in the postwar era. The United Nations, first through its Declaration of Human Rights and later with the Covenant on Civil and Political Rights and the Covenant on Social, Economic and Cultural Rights, set humanness at the epicenter of rights. At the same time, being human became an increasingly important condition for legal personhood. While making all humans of equal worth in theory, in practice focus on humanity retained many of the prior unarticulated assumptions of personhood, such as its gendered and racial nature.

By foregrounding humanity many of the preconceived ideas formerly held with regard to personhood became blatantly obvious.⁵³ Formerly employed notions that tied rights to protection of a nation-state through an idea of citizenship were deemed untenable, and calls

⁵¹ David Hunter Miller, *Nationality and Other Problems Discussed at the Hague*, 8 FOREIGN AFF. 632, 633 (1930).

⁵² HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 299 (1958). For more recent literature, see Hans Lindahl, *A-Legality: Postnationalism and the Question of Legal Boundaries*, 73 MOD. L. REV. 30 (2010); HANS LINDAHL, *FAULT LINES OF GLOBALIZATION* (2013) (arguing, likewise, against the possibility to include everyone).

⁵³ Brian S. Turner, *Outline of a Theory of Citizenship*, 24 Soc. 189, 194 (1990) (arguing the same with regard to citizenship, claiming that it required a universalistic notion of subject). This universalistic notion created a space, then, for social struggles, as whoever controlled the definition of what it means to be a citizen controlled the construction of the whole political body. See also *id.*, for language requirements, and discrimination of aboriginal people and people of color in granting citizenship.

for an end of the era of nationalism were voiced.⁵⁴ A flurry of international, regional, and domestic treaties, conventions, and laws seeking to protect *inter alia* racial minorities, women, children, and disabled followed one another. Yet, more than anything, human rights were something imposed from outside upon all sovereign States.⁵⁵ While the 19th century had evinced unilateral imposition by the Euro-American powers for protection of their citizens in “semi-civilized” States, it was first in the Universal Declaration of Human Rights where such demands were made with regard to each State—irrespective of recognition of any national political community guaranteeing such rights. A seemingly simple question of membership in a group of human beings turned into a thorny question about how to ensure that all of those human beings were to be respected, irrespective of their differences. As much of the former debate focused on the lacking capacities of those not included among right-holders—for example, criminals, poor, women, ethnic and religious minorities, indigenous people—the postwar debates focused on the denial of such differences. Rather than re-defining “person” or humanity anew, the old standard of personhood was kept alongside with a long erratum listing the others who should also be included.

The end of the World War also captured popular and political imagination in other, more destructive ways.⁵⁶ The beginning of the Atomic Era brought about through the destruction of the Japanese cities Hiroshima and Nagasaki at the end of the Second World War, highlighted the destructive powers of technology.⁵⁷ In the face of technology capable of annihilating the whole of humanity, an Enlightenment dream of progress appeared in a new light.⁵⁸ Wary of such dreams, the military in both the U.S. and the Soviet Union sought to develop ways to foresee incoming destruction—a process that led to development of networked computation, artificial intelligence, and cybernetics. The chasm that had opened after the War between the fear of technology and the humanitarian values of everyone were masterfully captured in Chaplin’s wartime satirical drama, *The Great Dictator*:

We all want to help one another. Human beings are like that. We want to live by each other’s happiness—not by

⁵⁴ See generally BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* (rev. ed. 2006).

⁵⁵ See SAMUEL MOYNS, *THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY* 13 (2010).

⁵⁶ See PAUL BOYER, *BY THE BOMB’S EARLY LIGHT* (1994) (perspective of U.S. events); Special Issue on British Nuclear Culture, 45 *BRITISH J. HIST. SCI.* (2012) (perspective of U.K. events); see, e.g., ALAN MOORE, DAVE GIBBONS & JOHN HIGGINS, *WATCHMEN* (Len Wein & Barbara Kesel eds., 1987); STANLEY KUBRICK, *DR. STRANGELOVE OR: HOW I LEARNED TO STOP WORRYING AND LOVE THE BOMB* (1964).

⁵⁷ See Günther Anders, *Theses for the Atomic Age*, 3 *MASS. REV.* 493 (1962).

⁵⁸ See, e.g., MARTIN HEIDEGGER, *THE QUESTION CONCERNING TECHNOLOGY AND OTHER ESSAYS TECHNOLOGY AND VALUES: ESSENTIAL READINGS* 1 (1977) (presenting an account of technology’s power to reduce humans into mere standing-reserve for technologies to employ).

*each other's misery . . . We have developed speed, but we have shut ourselves in. Machinery that gives abundance has left us in want. Our knowledge has made us cynical. Our cleverness, hard and unkind . . . Soldiers! don't give yourselves to brutes—men who despise you—enslave you—who regiment your lives—tell you what to do—what to think and what to feel! Who drill you—diet you—treat you like cattle, use you as cannon fodder. Don't give yourselves to these unnatural men—machine men with machine minds and machine hearts! You are not machines! You are not cattle! You are men! You have the love of humanity in your hearts! You don't hate! Only the unloved hate—the unloved and the unnatural!*⁵⁹

Chaplin's movie highlights the ways in which popular imagination placed humans into a system of persons and things. The meek that follow are equated with animals and the brutes that lead are synonymous with machines—the animals being too stupid to think, the machines too unnatural, too calculative to care. Law articulated matters differently, and paid little attention to question of animals or machines. The way personhood was operationalized to include everyone within the sphere of human rights proved decisive in the development of animal and machine personhood debates to come. And those debates inherited the initial positions held in the popular imagination and general social processes well illustrated by Chaplin.

Nonetheless, personhood, from the perspective of law in the postwar era, was a relatively solid bastion with little to add. The human being had become synonymous with rights and duties and, with that, the sole entity capable of independently fulfilling the criteria of legal personhood. Yet, the very inclusion of “everyone” to the sphere of rights proved difficult. Many legal institutions were designed in a fashion that made a truly egalitarian system hard to achieve. Marriage, for one, often created a single representational unit of a family with man acting as a representative of not only himself but also his wife, which lead to extensive limitations on women's rights. Similarly, many of the political rights were tied to mental capacity, personal property, or other status, which allowed some to remain more equal than others and to carry more rights than others. The justification for such differing treatment was imbued in the concept of citizenship, and, with that, of the person, as it developed during the early 20th century. Thus, even though virtually all minorities were protected in the minimal sense, their rights were not equally protected. Rather, they were subject to contestation during the postwar era.⁶⁰ While different jurisdictions encountered different

⁵⁹ CHARLES CHAPLIN, *THE GREAT DICTATOR* (1940).

⁶⁰ We follow here Willian N. Jr. Eskridge, *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062 (2002) in dividing different parts of this struggle for full set of rights into three: politics of protection, politics of recognition, and politics of remediation (p. 2065). The first stage

problems with regard to inclusion, yet, at the very least, most if not all encountered some issues related to personhood. For example, Nordic countries carried out an extensive eugenic practice of sterilization of women and sexual minorities, and condoned forced assimilation policies of indigenous Sámi population.⁶¹ In many former colonial States, similar practices were targeting bodies, minds, and liberties of racial minorities. There were commonalities—for example, the suppression of homosexuality—and differences, but the politics of protection and recognition encountered everywhere the politics of preservation seeking to roll back rights legally granted to persons who were perceived as different from the persons protected universally through human rights, namely human beings.

The seeds for the dispute briefly mentioned above, were laid around the turn of the 19th and 20th centuries. With women's rights movements throughout the Occident as the first to initiate and succeed in a struggle to gain equal political rights, suffragette movements sprouted all over Europe and the United States in the latter parts of the 19th century and the early 20th century. Traditionally, man's position as the head of a household had pushed women from the public realm into the strictly private sphere of the family.⁶² The arguments espoused by the suffragette movements were relatively similar, yet the time it took to recognize of women's rights varied. From the perspective of the legal personhood debate, the underlying assumptions and the counter arguments presented are reflective of the essential ingredients of full personhood. In a number of ways, the minimal container of personhood as a right-and-duty-bearing unit endorsed by legal theorists of the 19th and early 20th century was socially constructed in a highly gendered fashion where the male gender came to signify both independence of agency and higher rationality of such male agency.⁶³ Therefore, in order to guarantee voting rights, suffragettes highlighted their similarity with the white male population, which—while an effective argument in most jurisdictions—led to the assimilation of personhood based on certain racial traits. To be an equal person and

(protection) attempts to seek safeguards against life, liberty and property, whilst the second stage (recognition) seeks to address remaining discriminatory practices. The third stage of remediation attempts to rectify past material wrongs of past discrimination.

⁶¹ On eugenic practices, see Merle Wessel, *Castration of male sex offenders in the Nordic welfare state in the context of homosexuality and heteronormativity, 1930–1955*, 40 SCAND. J. HIST. 591 (2015); JENNY BJÖRKMANN, VÅRD FÖR SAMHÄLLETS BÄSTA (2001); JUTTA AHLBECK-REHN, DIAGNOSTISERING OCH DISCIPLINERING (2006); MARKKU MATTILA, KANSAMME PARHAAKSI (1999). For the assimilation policies and colonial legacy of Sámi people, see Jukka Nyysönen, *Sami Counter-Narratives of Colonial Finland. Articulation, Reception and the Boundaries of the Politically Possible*, 30 ACTA BOREAL. 101 (2013); Henry Minde, *Assimilation of the Sami - Implementation and Consequences*, 20 ACTA BOREAL. 121 (2003).

⁶² Nira Yuval-Davis, *Gender and nation*, 16 ETHN. RACIAL STUD. 621 (1993).

⁶³ R.M. Smith, *One United People: Second-Class Female Citizenship and the American Quest for Community*, 1 YALE J.L. & HUMAN. 229 (1988).

a citizen, being white—and in some countries affluent⁶⁴—was the primary condition.⁶⁵ After reaching equal political rights by the 1920s, the women’s right movements became dormant for decades to follow. This early struggle for inclusion—while enabling women’s political rights—shaped the idea of a citizen and a person of rights towards whiteness, tying the process intimately to the nation-building agenda spreading throughout the West during that era.⁶⁶

These politics of whiteness, and its associated values, were clearly manifest in a range of legal disputes over political rights of minorities and indigenous people. An example of such legislation was a widely held demand for the ability to read and write, typically using the language of the white majoritarian population, to gain the right to vote and other political rights.⁶⁷ In Canada, “[t]hese criteria included the ability to read and write in English and French, freedom from debts, and sound moral character,”⁶⁸ which *a fortiori* defined a citizen and a person using those very terms. A failure to conform to these demands, to become a member of a nation, was a sign of mental weakness—a member of the “most backward and wretched population.”⁶⁹ Thus, the politics of protection legally employed two distinct means to achieve those goals: A claim to discriminatory application of enfranchisement criteria or a request for loosening or abolishing them in full. The former was the initial modus operandi of, for instance, the National Association for the Advancement of Colored People (“NAACP”) in the United States, as evidenced by its amicus brief filed in *Guinn v. United States*.⁷⁰ The NAACP successfully claimed that a practice of a grandfather clause,⁷¹ exempting white

⁶⁴ See, e.g., SUZANNE M. MARILLEY, *WOMAN SUFFRAGE AND THE ORIGINS OF LIBERAL FEMINISM IN THE UNITED STATES 1820–1920* (1997).

⁶⁵ See Ida Blom, *Structures and Agency: a transnational comparison of the struggle for women’s suffrage in the Nordic countries during the long 19th century.*, 37 SCAND. J. HIST. 600 (2012) (for arguments employed in Nordic countries); see Smith, *supra* note 62 (presenting arguments in the U.S.); see STEVEN C. HAUSE & ANNE R. KENNEY, *WOMEN’S SUFFRAGE AND SOCIAL POLITICS IN THE FRENCH THIRD REPUBLIC* (1984) (presenting arguments in the French Third Republic).

⁶⁶ See, e.g., LOUISE MICHELE NEWMAN, *WHITE WOMEN’S RIGHTS* (1999).

⁶⁷ See, e.g., Pat Stretton & Christine Finnimore, *Black Fellow Citizens: Aborigines and the Commonwealth Franchise*, 25 AUST. HIST. STUD. 521 (1993) (discussing the practice of enfranchisement and disfranchisement through language requirement); Benno C. Jr. Schmidt, *Principle and Prejudice: The Supreme Court and Race in the Progressive Era. Part 3: Black Disfranchisement from the KKK to the Grandfather Clause*, 82 COLUM. L. REV. 835 (1982).

⁶⁸ A. McGrath & W. Stevenson, *Gender, Race, and Policy: Aboriginal Women and the State in Canada and Australia*, 38 LAB. HIST. 37, 43 (1996).

⁶⁹ KNUT EINAR ERIKSEN & EINAR NIEMI, *DEN FINSKE FARE: SIKKERHETSPROBLEMER OG MINORITETSPOLITIKK I NORD 1860-1940*, 258 (1981); Minde, *supra* note 61, at 131.

⁷⁰ *Guinn v. United States*, 238 U.S. 347 (1915).

⁷¹ See Schmidt, *supra* note 67 (discussing a clause that allowed those whose ancestors were entitled to vote in 1866 to vote without literacy tests.).

population from literacy tests while subjecting black population to such, was a violation of the Fourteenth Amendment preventing racial discrimination. Such legal victories proved short-lived in most jurisdictions. By setting onerous conditions for the exercise of political rights, genuine participation in voting or representation were, often to a great extent, unrealized at the wake of the Second World War.

The dialectic between the emergent politics of protection seeking to establish political and civil rights beyond the white male population, on the one hand, and the countercurrent of the politics of preservation from the side of the politically more potent group of dominantly white males, on the other hand, created a spiral in which persons seeking promised equality came to redefine themselves in terms provided by the past standard of personhood. As, for example, the eugenics movement had debased racial minorities with a stigma of lesser intelligence, it became of paramount importance to question these findings. Yet, the very act of questioning opened a gate for the argument from those seeking to preserve the status quo that, indeed, on some instances the claims of lesser intelligence held true. Thus, rather than denouncing the very classification, the new humanity and the new person that emerged in the postwar era faced a dilemma between expansion of the former categories of citizenship and personhood—for example, indicating that all are human who share same genetic constitution—or their contraction—for example, limiting demands for autonomous agency as too stringent for recognition of core human rights.⁷² In what follows, we will briefly go through four scenarios where the concept of legal personhood has either expanded or contracted as a consequence of the politics of recognition that stems from the egalitarian assumption superimposed to states through human rights.

Rebuilding the rights of minorities—or the rights of the majority, when taken in conjunction with the rights of women—in the postwar Occident was a task of recognizing rights rather than establishing or protecting rights for those groups that had their rights partially protected before the war. Although political and civil rights for women and racial, sexual, and religious minorities were *de jure* recognized, much remained to be done in terms of recognition. It still remained, for one, common that rights of married women were curtailed and that the private sphere of family provided shelter from even grave violations of human rights. Likewise, racial and sexual minorities were often suppressed in the public sphere through segregated schools, forced assimilation policies, or criminalization of non-heteronormative sexuality. As a counterpart to all of these diverse classifications stood the idealized white adult male. Nonetheless, the new globally enacted human rights standards imposed a duty, even if mostly unenforceable, for States to act upon these apparent forms of discrimination. The first impetus for abolishing perceivably differing standards between groups was initiated by the United Nations on race and racial differences. In the early 1950s, the United Nations Educational, Scientific and Cultural Organization (“UNESCO”) first launched a statement and later a series of booklets written by eminent scholars to battle

⁷² See Blom, *supra* note 65 (regarding women’s position).

what were seen as prejudices based on race. The clear message, shared by all statements and booklets, was that humanity is one.⁷³ For example Claude Levi-Strauss argued that the apparent differences in perceivable level of development, noticeable to the man in the street, were not due to the innate aptitude of different races but rather due to cultural differences.⁷⁴

A biological explanation for common humanity thus placed the onus on States to settle the differences that were so apparent in the levels of development of different people. The person, the right-and-duty-bearing unit, ought to be defined simply biologically, UNESCO argued, and such a racially neutral concept of person must apply also in the realm of law.⁷⁵ Whether directly or indirectly, the public pressure from the international sphere led to domestic changes. According to Mary Dudziak, the renowned U.S. desegregation decision *Brown v. Board of Education*⁷⁶ is more meaningfully understood as a response to the U.S. desire to maintain its role as a custodian of civil rights.⁷⁷ She argues that “[t]he abstract principle [of desegregation] of *Brown* seemed to be the thing needed to maintain American prestige,”⁷⁸ even though the decision itself changed materially little in terms of rights of the racial minorities. Simultaneously, while many European nations were appalled by U.S. segregation, they still maintained often strained and oppressive relation with their still existing colonies.⁷⁹ Yet, the impact of *Brown* was felt also more concretely through adaptation of a wide range of anti-discriminatory measures in Europe from the 1960s onwards.⁸⁰ Many of these measures adopted the language of *Brown*, thus expanding scope of discrimination from an abstract equality of chances to cover more indirect forms of discrimination as well.

The changes evinced in the racial narrative also had a profound impact on the perception of a legal person. A demand for singular humanity signaled in the UNESCO race statement and

⁷³ In a UNESCO Statement Issued 18 July 1950, this much is stated in the first paragraph: “Scientists have reached general agreements in recognizing that mankind is one.”

⁷⁴ See CLAUDE LEVI-STRAUSS, *RACE AND HISTORY* 5–6 (1952).

⁷⁵ See UNESCO, *THE RACE QUESTION* 3 (July 18, 1950), <http://unesdoc.unesco.org/images/0012/001282/128291eo.pdf>.

⁷⁶ *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954)

⁷⁷ See MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* 3 (2000); Mary L. Dudziak, *Brown as a Cold War Case*, 91 J. AM. HIST. 32 (2004).

⁷⁸ Dudziak, *supra* note 77, at 39.

⁷⁹ See FRANTZ FANON, *BLACK SKIN, WHITE MASKS* (1952).

⁸⁰ Bob Hepple, *The European Legacy of Brown v Board of Education*, UNIV. ILL. L. REV. 605 (2006); Martha L. Minow, *Brown v. Board in the World: How the Global Turn Matters for School Reform, Human Rights and Legal Knowledge*, 50 SAN DIEGO L. REV. 1 (2013); Ruth Bader Ginsburg, *Brown v. Board of Education in International Context*, 36 COLUM. HUM. RTS. L. REV. 493 (2005).

race booklets biologized personhood. At first sight, a biological explanation appears identical to the one included in the Universal Declaration (“All human beings are born free and equal.”). Yet, for the law’s independence as a system the change was important. Hans Kelsen echoed the views of many contemporary legal theorists when he argued that “[m]an is a concept of biology and physiology, in short, of the natural sciences. Person is a concept of jurisprudence, of the analysis of legal norms.”⁸¹ In short, there was a fear that law could not articulate legal relations on a notion that carried over from the realm of natural sciences—or any sciences for that matter. As the positive law system was bound to a given community, biological human condition seemed to transgress the boundaries of law’s reach by expanding it to everyone. The distinction between every biologically human entity and every legal person is what animates debates on matters such as rights of a fetus or those of a deceased person.⁸² The other important change brought about through the postwar anti-racist movement was the perceived injustice of laws that separated, but treated addressees nominally equal. Thus, when the new women’s rights movement emerged throughout the Occident in the 1950s and 1960s, they inherited a biological conception of personhood together with tools to challenge indirect forms of discrimination.

Victory in a long struggle for political rights for women during the early 20th century left many women in society to face a reality similar to racial minorities: in public life they were considered equal, but in many walks of private life they still ran into problems due to their gender.⁸³ A division between the public and the private, emblematic of a liberal legal order, had pushed many everyday discriminatory practices out-of-sight as matters of individual, private choice. For many women from the 1950s onwards such practices signaled a rallying call for a genuine equality that would even out differing expectations and entitlements between genders.⁸⁴ The “biologization” of life also had a profound impact on lives of many women as birth control and family planning gained importance; contraception and abortion were widely perceived as acts contrary to nature and the biological conception of human served these ends particularly efficiently.⁸⁵ Alongside Catholic dogma, biology seemed to suggest likeness of a fetus to a living human being whose termination would be a particularly

⁸¹ HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* 94 (1949).

⁸² See these debates, Tuo Yu, *Approaches for Dealing with the “Natural Person” in the Chinese Legal System: A Statutory Way and a Principled Way*, 18 *GERMAN L. J.* (2017) and Lisette ten Haaf, *Unborn and Future Children as New Legal Subjects: An Evaluation of Two Subject-Oriented Approaches—The Subject of Rights and the Subject of Interests*, 18 *GERMAN L. J.* (2017).

⁸³ See Charlotte Bunch, *Women’s Rights as Human Rights: Toward a Re-Vision of Human Rights*, 12 *HUM. RTS. Q.* 486 (1990).

⁸⁴ See Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women’s Movement*, 61 *N.Y.U. L. REV.* 589 (1986) (discussing the inadequacy of laws alone as means of social change).

⁸⁵ See Arvonne S. Fraser, *Becoming Human: The Origins and Development of Women’s Human Rights*, 21 *HUM. RTS. Q.* 853 (1999).

heinous act. These naturalized duties of women, according to likes of Simone de Beauvoir, chained women to serve solely domestic roles—leading a life for others.⁸⁶ In international and domestic settings, movements opposing these “traditional” roles of women erected a new person to stand in an oppositional position to that of customarily male personhood.⁸⁷

In order to counter the legal imposition of person as a gendered concept, the quasi-naturalistic positive understanding of law was questioned. If womanhood itself was socially constructed, and not merely a biological condition, the normative order built to reflect on perceivably natural relations between different elements of a community needed revision. A general call for rights to education, health, or employment are not sufficient to ensure the construction of a female gender as equal the male gender. Rather, they necessitate a set of affirmative actions.⁸⁸ Such affirmative actions are highly problematic from the vantage point of any unitary conceptualization of legal personhood. After all, what does a legal person stand for if every legal person is defined using different terms? Thus, women’s rights appear as a central juncture for personhood as they provide a prism that diffracts personhood in at least two opposing directions. On the one hand, debate over a liberal right to abortion narrows a purely biological or open-ended notion of personhood to conscious actors alone.⁸⁹ Demands for wider recognition of *de facto* discrimination, on the other hand, argued for a view of personhood as a simple container or collector of rights that were to be construed and re-construed in a given community countless times. The latter view questioned the centrality of personhood within the whole of the legal system, whereas the former set it centerfold.

Much of the debate over the rights of the child and of disabled persons highlights the inherent tensions within legal personhood prompted by the women’s rights movement. Of these two, the rights of the child command a longer tradition both in domestic and international fora,⁹⁰ yet many of the more contentious issues over rights of the child, such

⁸⁶ See SIMONE DE BEAUVOIR, *THE SECOND SEX* (2010).

⁸⁷ See, e.g., Karen Engle, *Female Subjects of Public International Law: Human Rights and the Exotic Other Female*, 26 NEW ENG. L. REV. 1509 (1992) (showing an international legal perspective).

⁸⁸ Ann Shola Orloff, *Gender and the Social Rights of Citizenship: The Comparative Analysis of Gender Relations and Welfare States*, 58 AM. SOC. REV. 303 (1993).

⁸⁹ See in general of these and other arguments about abortion in KATE GREASLEY, *ARGUMENTS ABOUT ABORTION: PERSONHOOD, MORALITY, AND LAW* (2017).

⁹⁰ See Catherine Rollet, *La santé et la protection de l’enfant vues à travers les congrès internationaux (1880–1920)*, 101 ANN. DEMOGR. HIST. (PARIS) 97 (2001); Joëlle Droux, *L’internationalisation de la protection de l’enfance: acteurs, concurrences et projets transnationaux (1900–1925)*, 52 CRIT. INT. 17 (2011); Declaration of Geneva of the Rights of the Child, Mar. 1924, in *THE RIGHTS OF THE CHILD: INTERNATIONAL INSTRUMENTS* 3 (Maria Rita Saulle ed., 1995) (international legal codification).

as questions regarding the status of a fetus, are of later origin.⁹¹ The Christian doctrine of ensoulment as a reason to protect a fetus through a set of limitations imposed on women's right to terminate pregnancy dates back to the 12th century,⁹² yet in the meaningful context of legal personhood the postwar formulation of human rights, and their inheritance of Catholic doctrine of human dignity, form an important point of departure.⁹³ Even though sanctity of life had protected fetuses in the past, arguments stemming from dignity, encoded at the international level, allowed linking of persons and fetuses under the same moniker of human rights. While fetal rights chiefly dominated the right to abortion discussions,⁹⁴ they also led to more general debates concerning, for instance, the possibility of pre-birth harm.⁹⁵ Dignity served an equally central role in expanding rights to disabled.⁹⁶ Rather than articulating treatment of the disabled through a system of privilege provided by the State, early advocates of the rights of the disabled brought the importance of articulating them precisely in terms of rights therewith to the foreground, making disabled individuals appear as persons before the law.⁹⁷ Thus, the biological condition of being a member of humanity paired with dignity was instrumental in the expansion of rights to yet a wider group of persons based on a naturalistic interpretation of rights.

While the scope of natural persons proliferated in number and became increasingly diverse in definitions, ranging from an empty container to a rational or spiritual build-up, the artificial or compound person gained depth during the postwar years, both domestically and internationally. The corporate person was, in the first half of the 20th century, seen largely as either a simple legal fiction or, alternatively, an aggregate body of ultimately meaningful

⁹¹ See Lee E. Teitelbaum, *Foreword: The Meanings of Rights of Children*, 10 N. M. L. REV. 235, 236 (1980) (presenting a much later general acceptance of the rights of child, declaring "[t]he United Nation's call to arms on behalf of the child apparently finds, therefore, everyone on one side, with no declared enemy to conquer").

⁹² See, e.g., Toni Selkälä, "But in This Twilight Our Choices Seal Our Fate," XLVII OIKEUSTIEDE–JURISPRUDENTIA 253 (2014).

⁹³ See SAMUEL MOYN, CHRISTIAN HUMAN RIGHTS (2015).

⁹⁴ See Philip Alston, *The Unborn Child and Abortion Under the Draft Convention on the Rights of the Child*, 12 HUM. RTS. Q. 156 (1990).

⁹⁵ See Walter Selb, *Schädigung des Menschen vor Geburt—ein Problem der Rechtsfähigkeit?*, 166 ARCH. FÜR DIE CIVILISTISCHE PRAX. 76 (1966).

⁹⁶ For Finland, see HELI LEPPÄLÄ, VAMMAISUUS HYVINVOINTIVALTIOSSA (2014). For Germany, see Elsbeth Bösl, POLITIKEN DER NORMALISIERUNG, ZUR GESCHICHTE DER BEHINDERTENPOLITIK IN DER BUNDESREPUBLIK DEUTSCHLAND (2015). For the U.S., see Robert Perske, *The Dignity of Risk and the Mentally Retarded*, 10 MENT. RETARD. 24 (1972).

⁹⁷ Stanley S. Herr, *Rights into Action: Protecting Human Rights of the Mentally Handicapped*, 26 CATH. U. L. REV. 201 (1977); Gunnar Dybwad & Stanley S. Herr, *Unnecessary Coercion: An End to Involuntary Civil Commitment of Retarded Persons*, 31 STAN. L. REV. 753 (1979).

biological entities exercising power.⁹⁸ From the 1970s onwards, corporate personhood started to gain an even more independent agency with a moral flavor.⁹⁹ Corporations came to be seen as intentional actors that were, in addition to their biological components, responsible for the outcome of their decisions.¹⁰⁰ In stark contrast to what the human rights debate voiced, one of the foremost lessons learned “from an investigation of the legal personhood of corporations [is that] biological existence is not essentially associated with the concept of a person.”¹⁰¹ Turning corporations into moral actors led to two entwined developments. First, the emergence of corporate responsibility in criminal law but also a contemplation of corporations’ role in questions of social justice, “environmental protection, product safety, marketing practice, [and] international bribery,” often centered on the notion of “corporate conscience.”¹⁰² The second development created a shield for corporations from these very concerns by a referral to a flaunted corporate decision-making procedure or the recklessness of an individual. As the moral agency of a corporation came to be defined through the intentionality of an act, the corporate policies and corporate actions could diverge in a relatively similar manner. Only laws and actions were separated in the first wave of human rights codification. A violation was a violation as long as it was the intention of a corporation, rather than merely a negative consequence of its well-intended policies.¹⁰³

On the international plane, the legal personality expanded rapidly to cover new entities in the postwar era. In addition to a whole slew of former colonies becoming states, also

⁹⁸ See, e.g., David Millon, *Theories of the Corporation*, DUKE L.J. 201 (1990). For a historical exposition, see, e.g., Tara Helfman, *Transatlantic Influences on American Corporate Jurisprudence: Theorizing the Corporation in the United States*, 23 IND. J. GLOBAL LEG. STUD. 383 (2016).

⁹⁹ There is a long tradition in philosophy for collective responsibility starting from at latest in Hobbes’ oeuvre with, for example, Joel Feinberg, See Joel Feinberg, *Collective Responsibility*, 65 J. PHILOS. 674, 687 *et seq.* (1968) (suggesting a contributory group fault where responsibility is collective but not distributive). These differ from what came to be argued as a specific responsibility of corporations falling to them due to actions condoned by its executive structures. From Virginia Held onwards there are specific references to corporations and their particular moral agency. See Virginia Held, *Can a Random Collection of Individuals be Morally Responsible?*, 67 J. PHILOS. 471 (1970).

¹⁰⁰ For an example in the field of business ethics, see Rita C. Manning, *Corporate Responsibility and Corporate Personhood*, 3 J. BUS. ETHICS 77 (1984); Kenneth E. Goodpaster & John B. Jr. Matthews, *Can a Corporation Have a Conscience?*, 60 HARV. BUS. REV. 132 (1982); Kenneth E. Goodpaster, *The Concept of Corporate Responsibility*, 2 J. BUS. ETHICS 1 (1983).

¹⁰¹ Peter A. French, *The Corporation as a Moral Person*, 16 AM. PHILOS. Q. 207, 210 (1979).

¹⁰² Goodpaster & Matthews, *supra* note 100, at 133. For a more recent source, see Christine Parker, *Meta-regulation: Legal Accountability for Corporate Social Responsibility*, in THE NEW CORPORATE SOCIAL ACCOUNTABILITY: CORPORATE SOCIAL RESPONSIBILITY AND THE LAW 207 (Doreen McBarnet, Aurora Voiculescu, & Tom Campbell eds., 2007).

¹⁰³ This notion persists among contemporary business & human rights debate. For a discussion on this, see DAVID JASON KARP, *RESPONSIBILITY FOR HUMAN RIGHTS: TRANSNATIONAL CORPORATIONS IN IMPERFECT STATES* (2014).

international institutions gained a status of an international legal person, or subject, already in the 1940s.¹⁰⁴ More than expanding scope of personhood, the international legal personality was profoundly altered in the diversity of States and organizations it came to embrace. While the League of Nations had at most 58 members, the United Nations passed 100 members already in 1960, with majority of new members hailing from the Third World. International organizations, likewise, gained untold influence particularly in the field of economy through the Bretton Woods institutions that became proponents of neoliberal free market ideology at the international plane for decades to come. These two developments—the emergence of Third World States on the international plane and an institutionalized neoliberalism—worked together.¹⁰⁵ International trade and economy was considered early on by many States in the Third World as merely a different sort of colonialism. Proposals such as the New International Economic Order (“NIEO”)¹⁰⁶ were seen as essential tools to mitigate the increasing power of institutions and former colonial powers over the Third World countries.¹⁰⁷ Despite, or because, of these calls for greater economic equality between developing and developed states, many of the reforms suggested by the Bretton Woods institutions led into an African debt crisis.¹⁰⁸ As an outcome of the economic turmoil, “key social services, such as health and education . . . slowly decayed,”¹⁰⁹ depriving international sovereignty, formerly a cornerstone of international legal personhood, from select Third World States and placing it in hands of international economic authority. Much like the concerns of the women’s rights movement, the NIEO saw the international legal personhood found on formal equality of its members to be lacking in terms of true equality.¹¹⁰

Growing diversity and required extensiveness of personhood during the first decades of the postwar era revealed the internal tensions inherent in the notion of legal person: there was little to no consensus as to what personhood entailed. And there seemed to be little reason

¹⁰⁴ See *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 I.C.J. 174 (Apr. 11).

¹⁰⁵ See ACHILLE MBEMBE, *ON THE POSTCOLONY 2* (2001).

¹⁰⁶ See G.A. Res. 3201 (S-VI), U.N. Doc. A/RES/5-6/3201 (May 1, 1974) (adopting the “Declaration on the Establishment of a New International Economic Order”).

¹⁰⁷ See, e.g., MOHAMMED BEDJAOUI, *POUR UN NOUVEL ORDRE ÉCONOMIQUE INTERNATIONAL* (1979); Upendra Baxi, *The New International Economic Order, Basic Needs and Rights: Notes Towards Development of the Right to Development*, 23 INDIAN J. INT’L L. 225 (1983).

¹⁰⁸ For the dismal outcome of NIEO, see Umut Özsu, “*In the Interests of Mankind as a Whole*”: Mohammed Bedjaoui’s *New International Economic Order*, 6 HUMAN. 129 (2015); Margot Salomon, *From NIEO to Now and the Unfinishable Story of Economic Justice*, 62 INT’L & COMP. L.Q. 31 (2013).

¹⁰⁹ NICOLAS VAN DE WALLE, *AFRICAN ECONOMIES AND THE POLITICS OF PERMANENT CRISIS, 1979–1999* 155 (2001).

¹¹⁰ See also Rajavoori, *supra* note 33.

why new entities could not gain the status of a person, following the route taken by women, racial minorities, corporations, or international organizations. After all, “[t]he fact is, that each time there is a movement to confer rights onto some new ‘entity,’ the proposal is bound to sound odd or frightening or laughable.”¹¹¹ Thus, the avenue was opened for proposals seeking to grant personhood to, *inter alia*, animals, environment, artificial intelligence, and robots. These new entities demanding for legal recognition are, to a great extent, an outcome of two entangled developments that took place alongside domestic and international struggles for recognition. First was the development of science, medicine, and technology, and their impact on society as a whole and law as a part thereof. These developments, rather than being seen as an existential threat like the Atomic era had claimed, alleviated everyday through automation of many formerly dangerous tasks and provided treatment to many formerly incurable diseases. The second significant development was globalization that created, in good and in bad, contacts between the developed North and the developing South. These new openings and mutations are where myths of present personhood are construed.

C. Constructing a Myth

Deep Blue was only intelligent the way your
programmable alarm clock is intelligent. Not that losing
to a \$10 million alarm clock made me feel any better.¹¹²

The vivid recollection of Garry Gasparov of his game against a chess computer in 1997 resembles much the earlier accounts of artificial intelligence provided by some of the field’s early pioneers. Quite like Gasparov, Norbert Wiener considered machines of the 1950s as “blind, deaf, and dumb,”¹¹³ but unlike Deep Blue, there was no captivated audience to observe the machine power of early artificial intelligence. Also, unlike the automatic doors and music boxes described by Wiener, the task Deep Blue was set to conduct appeared very human. The witnesses to the spectacle could hardly imagine themselves defeating a grandmaster in a game of chess; in such a game, the achievements of Deep Blue seemed not merely human—they were superhuman.

The scientific and technological progress that brought about the impressive computing power of machines in the late 1990s had but two decades before led to world’s first test tube baby. At the same time, a growing number of people were concerned with environmental deterioration, as they experienced burning rivers and cities enveloped in

¹¹¹ CHRISTOPHER D. STONE, *SHOULD TREES HAVE STANDING?* 8 (1974).

¹¹² Garry Gasparov, *THE CHESS MASTER AND THE COMPUTER* NEW YORK REVIEW OF BOOKS (2010).

¹¹³ NORBERT WIENER, *THE HUMAN USE OF HUMAN BEINGS: CYBERNETICS AND SOCIETY* 22 (1989).

thick smog, caused by the very same advancements of technology.¹¹⁴ The world seemed full of technological problems and wonders that profoundly challenged some of the defining traits of humanity and its relation to nature.

As humanity approached the end of the millennium, its problems and solutions were increasingly tied to technology and science. Both the past tradition of conceptualizing ourselves in relation to religion that had animated the imaginations of drafters of the Universal Declaration of Human Rights, and calls for the inherent naturalism found on the human condition that had fueled the UNESCO reports seemed outdated. Biomedical advances—most notably the discovery of the DNA double helix and the assumption of genes as a “code of life” waiting to be discovered—“profoundly altered the perception of personhood within [Occidental] culture.”¹¹⁵ A chance to foresee our predisposition to medical conditions became likened to the very identity of a person,¹¹⁶ paving the way for the politics of life itself that subjected the “biological lives of individual human beings . . . to judgments of worth.”¹¹⁷ Consequently, interventions and modifications to future life were increasingly targeting fetuses and embryos, casting doubt on their status within the law.¹¹⁸ The scientific and technological advances affected both the perception of human *an sich* and humanity’s connection with nature as well.¹¹⁹ Through “scientific culture, the boundary between human and animal [was] thoroughly breached,”¹²⁰ and also the boundary between human and machine came into question, leading to bold claims for human beings to become “localized in a system architecture whose basic modes of operation are probabilistic, statistical.”¹²¹ Scientifically defined and probability driven, the lot of humanity also had a direct bearing on how the law came to be applied.¹²²

¹¹⁴ With regard to Europe, see Ingmar Von Homeyer, *The Evolution of EU Environmental Governance*, in ENVIRONMENTAL PROTECTION: EUROPEAN LAW AND GOVERNANCE 1, 8–11 (Joanne Scott ed., 2009); Jonathan H. Adler, *Fables of the Cuyahoga: Reconstructing a History of Environmental Protection*, 14 FORDHAM ENVTL. L. REV. 89 (2002); DONELLA H. MEADOWS ET AL., *THE LIMITS TO GROWTH* (1972).

¹¹⁵ Rochelle Cooper Dreyfuss & Dorothy Nelkin, *The Jurisprudence of Genetics*, 45 VAND. L. REV. 313, 315 (1992).

¹¹⁶ *See id.*

¹¹⁷ Nikolas Rose, *The Politics of Life Itself*, 18 THEORY CULT. SOC. 1, 21 (2001).

¹¹⁸ Martin Scheinin, *Ihmisarvon loukkaamattomuus valtiosääntöperiaatteena*, in JUHLAKIRJA KAARLO TUORI 50 VUOTTA 57 (Paul van Aerschot, Paula Ilveskivi, & Kirsi Piispanen eds., 1998).

¹¹⁹ Of the string of theories proposed at the time, the Gaia theory might be the most notable. *See* James E. Lovelock & Lynn Margulis, *Atmospheric Homeostasis by and for the Biosphere: the Gaia Hypothesis*, 26 TELLUS A 1 (1974).

¹²⁰ DONNA J HARAWAY, *SIMIANS, CYBORGS, AND WOMEN: THE REINVENTION OF NATURE* 151 (1991).

¹²¹ *Id.*

¹²² *See* NGAIRE NAFFINE, *LAW’S MEANING OF LIFE* 163 (2009).

Despite embracing science when defining personhood, the law retained many of its past systems of classification, though partly incommensurable with each other:¹²³ legal personhood could be established on a kernel of humanity embodied in an embryo and at the same time denied from a fetus when terminating a pregnancy. Whether a result of invisible exclusionary practices or law's pragmatism matters little,¹²⁴ yet the intricate explanations provided by lawyers and legal scholars fueled additional demands to alter personhood to include some while excluding others. Many of the categories that were contentious in the past were gradually normalized—for example, racial minorities and women—as part of the Western notion of personhood. Although hardly reaching the threshold of equality at a societal level, few would openly question an equal legal standing of, say, women. What the new scientific gaze introduced to law were new entities that appeared to share some of the essential features of these now normalized persons. As courts and scholars struggled during the post-war years to define personhood beyond a bundle-of-rights-and-duties with a human face, the multivariate formulations provided a smorgasbord of classifications for new entities to claim. Is a fertilized embryo not a human in its genetic constitution? Does not an orangutan command as much in terms of will and interests as a child? Would an artificially intelligent machine not show intentionality in its actions if it would prefer some choices and deter others?

Personhood's expansion past the white, affluent, adult male had formerly operated mainly based on the idea of similarity between other categories and the model person. The similarity was often argued based on capacities that were shared between those excluded and included within the remit of personhood. These similarities in capacities relied first on anecdotal evidence, and later on quasi-scientific facts, but they were mostly related to mental faculties. Yet, the "biologized" humanity of the UNESCO reports and claims of rights for the disabled opened up an additional form of kinship, which is founded on belonging to the human species. Rather than looking for capacities, law relied upon concepts such as dignity and humanity to justify expansion of rights to those deemed to lack capacity for moral action. The argument for membership among a species proved potent also in debates over the status of fertilized embryos created as a part of various assisted reproductive treatments ("ARTs"). A fertilized embryo commands attestable uniqueness akin to every living human being. As a capacity to act morally was not a precondition for personhood, the argument went, there hardly exists a reason to exclude members of human species from the scope of personhood simply because they cannot articulate their desires. If law found in itself the ability to protect a fetus during the last trimester of pregnancy, what could possibly

¹²³ *See id.*

¹²⁴ For invisible exclusionary practices, see JUDITH BUTLER, *GENDER TROUBLE* (1990). The pragmatism of lawyers is of an older origin, with the likes of Roscoe Pound and Oliver Wendell Holmes promoting it in name of legal realism: "Not only does the law in the books seek to surround accused persons with safeguards which the practical exigencies of prosecution will not put up with, but at other times it demands conviction of persons whom local or even general opinion does not desire to punish." *See* Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910).

exclude a fetus of an earlier moment or an embryo from such protection? Past claims motivated by religious metaphysics found new refuge from the biomedical knowledge of DNAs, fetal development screening, and later, neurosciences.

Courts and legislators encountered these questions relatively soon after *in vitro* fertilization (“IVF”) and other ARTs became more common in the 1980s. The pragmatic approach of lawyers and legislators that had served them well when equating black and white, women and men was found wanting when faced with embryos. The problem was obvious. Most jurisdictions had come to accept abortion as a right, and clearly, if there was no life to protect in a fetus there certainly could be none in an embryo. Yet treating something that held the potential to become a human being as mere chattel seemed like an unattractive solution as well: There was something there, but the question was how to classify that something without greatly limiting the rights of paradigmatic holders of rights. The solution embraced by most jurisdictions was a mishmash of rights flowing and ebbing away, depending on context. Much like personhood in cultures researched by anthropologists, the model of personhood embraced for embryos is contextual and relational. For an example of contextual personhood, most jurisdictions do not impose limitations for those resorting to ART to fertilize excess embryos that may later be used for research, but the very same jurisdictions often do not allow researchers to create—even with informed consent of gamete donors—fertilized embryos for research. Thus, what is acceptable in the context of procreation leading to research is not acceptable solely for research providing a set of rights to embryo in one context but not in another—albeit the right is the negative right to never become. Alternatively, an embryo may gain protection depending on outcomes of treatment. A good example of such consequentialist rights are those related to patentability of stem cell lines created through destruction of human embryos.¹²⁵ Here the destruction itself is not prohibited, but economic exploitation of the fruits of such destruction is limited at least to, a certain extent, private interest to destroy embryos.

The conundrum of personhood here is that it is at the same time a number of things, especially if personhood is understood solely as a moniker for a right-and-duty-bearing unit. Protecting the dignity and interests of an embryo in one context but not in another simply illustrates the troubling quality of distinguishing embryos as a category, challenging many of the attributes normally granted to legal persons such as unity and equality.¹²⁶ To address these problems, law resorts to a mix of arguments that stem from various sources, even though most arguments are framed scientifically. Yet, whenever protection is granted to embryos, the scientific arguments are set aside and replaced with spiritual or naturalist

¹²⁵ Another example could be drawn between the U.S. Federal prohibition on funding research that creates new stem cell lines through destroying embryos, but does not prevent private funding for such projects nor use of already existing stem cell lines in federally funded research projects.

¹²⁶ See Robin Conley, “At the Time She Was a Man”: *The Temporal Dimension of Identity Construction*, 31 POL. & LEGAL ANTH. R. 28 (2008).

metaphors. The narrative stemming from arguments based on science is employed to set boundaries and rules for recognition,¹²⁷ whereas spiritual or naturalist arguments are mainly used to govern the exception. Thus, when a court needs to assess whether an entity counts as an embryo entitled to protection, but is unable to solve the question based on science alone, it resorts to other arguments, as the Court of Justice of the European Union did in deciding whether a parthenote was an embryo:

an unfertilised human ovum whose division and further development have been stimulated by parthenogenesis does not constitute a ‘human embryo’, within the meaning of that provision, if, in the light of current scientific knowledge, that ovum does not, in itself, have the inherent capacity of developing into a human being.¹²⁸

Thus, it is not the biological constitution of an embryo but rather its inherent capacity to become a human being that marks it as a human embryo. Obviously, no embryo in a laboratory at present possesses within itself a capacity to develop into a human being without implantation, making the argument entirely dependent on an ethical argument concerning inherent value of human genetic material.

Two divergent paths emerge for personhood. On the one hand, science produced a vision that allowed the creation of entities that entered the realm of law equipped with a set of rights due to their shared genetic constitution with the paradigmatic person—a living adult human. Before the first laboratories fertilized embryos, there was no legal concern over fertilized embryos as no one had a capacity to manipulate or even perceive them. Thus, science created new entities for law to protect with rights. On the other hand, embryos are not in a persistent or even a durable state, but rather mark a fleeting period of transition towards either destruction or life. The ways embryos are treated are decisive on their prospects to become human. While science remains silent on the correct use of embryos, the law has encountered this particular question relatively often. Rather than multiplying the amount of new entities, legislators and courts are asked to accommodate embryos within the existing framework of norms. They are seldom designed to apprehend entities whose status is uncertain. After all, the protection afforded by dignity to embryos in Europe, for one, equates the embryo with a legal person, as “fertilisation is such as to commence the

¹²⁷ See, e.g., *Assoc’n for Molecular Pathology v. Myriad Genetics*, 133 S. Ct. 2107 (2013) (showing that science frames the difference between natural DNA and complementary DNA (cDNA) that is not naturally occurring, allowing patenting of latter but not the former).

¹²⁸ ECJ, Case C-364/13, *Int’l Stem Cell Corp. v. Comptroller General of Patents, Designs and Trade Marks*, ECLI:EU:C:2014:2451, Judgment of 18 December 2014.

process of development of a human being.”¹²⁹ It erodes the norm of the person commonly found elsewhere in European Union law that requires a person to be a living human being and transforms the concept of a person into a gradient term resembling more a principle than a norm. The two paths that emerge with regard to embryos can be readily attested also with regard to other new entities that have come at the very least to the brink of gaining a limited set of rights and, with that, a personhood.

The rights of the animal predate the scientific argumentation over the rights of an embryo or fetus, yet their genesis during the past decades shares many commonalities. Whereas modern debate over rights for human embryos and fetuses is closely connected to science, the modern animal rights debate is commonly seen to have originated from a set of philosophical writings in the early 1970s.¹³⁰ In this vein, some of the first rights were formulated negatively, for example, no undue suffering, and had a close link to human behavior. Although philosophically the argument was, from relatively early on, likening animals to humans, the demands by animal rights scholarship for animal personhood are of later origin.¹³¹ While fetal personhood has at times animated heated public debates, the move of animals from the realm of things gradually towards limited personhood has been politically less controversial.¹³² A growing number of States globally recognize in one way or another rights of animals even at the constitutional level, and in recent years courts have also come to recognize *locus standi* for animals, gesturing towards an animal *habeas corpus*.¹³³ How, and with what means these changes have been brought about remain contested, yet here much like with fetal personhood, science plays a decisive role.¹³⁴

The scientific gaze that came to increasingly target humans during the 20th century had, from the days of Darwin, held animals to be just a few evolutionary steps away from humans. Research on primates and a more general zoological evidence from a wide range of animals—from domesticated animals to fish—indicated the existence of many sensory experiences in animals that were commonly connected to human consciousness. The argument from here to rights was straight forward: if animals at large are able to feel pain,

¹²⁹ Case C-34/10, *Brüstle v Greenpeace eV*, 2011 E.C.R. I-09821, para. 35.

¹³⁰ See MARK ROWLANDS, *ANIMAL RIGHTS: MORAL THEORY AND PRACTICE* (2d ed. 2009) (discussing the importance of moral theories in animal rights).

¹³¹ Yasco Horsman, *Braying, Howling, Growling for Justice: Animal Personhood in Law, Literature, and Cinema*, 28 L. LIT. 319 (2016).

¹³² *But see* Steven M. Wise, *Animal Thing to Animal Person—Thoughts on Time, Place, and Theories*, 5 ANIMAL L. 61 (1999).

¹³³ See, e.g., Sabine Lennkh, *The Animal: A Subject of Law? A Reflection on Aspects of the Austrian and German Juridical Systems*, 24 INT. J. SEMIOT. LAW - REV. INT. SÉMIOTIQUE JURID. 307 (2011); *Camara Federal de Casacion Penal, Orangutan Sandra s/ recurso de casacion S/HABEAS CORPUS*, 18 Dec 2014.

¹³⁴ See, e.g., CARY WOLFE, *BEFORE THE LAW: HUMANS AND OTHER ANIMALS IN A BIOPOLITICAL FRAME* (2012).

have meaningful relationships, show intentionality, and even pursue goals why should they not have rights.¹³⁵ Quite like the fetal personhood debate indicates, the existence of scientific, moral, or religious argument in and of itself does not alter law's appreciation of a thing. Law's thing can be commonly held a person and vice versa. Therefore, alongside ethical and scientific arguments, emerged an argument of an animal gaze—a personal account of an encounter between a human and an animal that demands endowment of rights to some or all animals.¹³⁶ The reason to grant personhood to animals was grounded, hence, not solely on scientific evidence and moral theories, but to a personal everyday experience with animals, creating a bridge from double contingency to addressability between human and animal.¹³⁷ This, according to Gunther Teubner, is one of the three assumptions implied in all personification; once the scientific gaze penetrated the black box of animal experience and double contingency¹³⁸ established through moral theories, the addressability took place in a string of anthropomorphic assumptions.¹³⁹

The existence of two overlapping gazes cast on animals, the scientific and the animal or personal, also led the demands for legal personhood down two different paths. The gaze that penetrates the black box of animal behavior classifies animals, normally asking that the greatest appreciation go to primates. They become first among animals with a multitude of animal persons to emerge below them with gradient rights. The second condition of double contingency most notably applies to animals we share the most intimate connection with in our daily lives through consumption or domestication. They are the ones we seek to liberate from suffering. The first path, then, is marked with a proliferation of new contestants for personhood—a diverse set of existing entities that we crave to nominate for personhood either positively, through a set of rights such as habeas corpus or negatively, through animal welfare legislation or ethical fishing standardization. The third condition of addressability achieved through the animal gaze aligns all animals on the same moral plane, what truly matters is the assumedly shared experience between the animal and the human. The brawl that counts is the one experienced by a human, casting doubt on the seemingly rigid

¹³⁵ Sabine Brels, *L'animalité humaine : du constat scientifique aux conséquences éthico-juridiques*, 17 LEX ELECTRON. 1 (2012).

¹³⁶ See Horsman, *supra* note 131.

¹³⁷ Double contingency refers, originally, to a confrontation encountered when meeting another human face-to-face. Through a mutual system of symbols, the problem of social interaction is provided with a solution. It asks a simple question of how the other will understand me. With regard to animals, we presume that we share a symbolic system and are able to understand their problems and provide solutions to them. It also means that we give explanations to their gestures that are often derivative from those we share with other humans.

¹³⁸ See Raf Vanderstraeten, *Parsons, Luhmann and the Theorem of Double Contingency*, 2 J. CLASS. SOC. 77 (2002) (discussing double contingency in sociology).

¹³⁹ Gunther Teubner, *Rights of Non-humans? Electronic Agents and Animals as New Actors in Politics and Law*, 33 J.L. Soc. 497 (2006).

boundaries of law separating humans from non-human animals,¹⁴⁰ turning morality into a compass for our assessment of personhood in an ever more principle-like personhood. Following Hache and Latour, we can recognize two dimensions of personhood the first of which addresses the distribution of beings able to address us, decided chiefly through means of science, and, second, the dimension that considers “varying the *intensity* of the interpellation required to produce a response, *whatever the type* of being under consideration.”¹⁴¹

Both animals and fetuses then seem to lead to a problem with any moderate position on law’s pragmatism relying on scientific evidence, and a similar argument could be made for machines, the deceased, and a number of other entities. As Leiter argues, scientific pragmatism has worked well in helping “depopulate our ontology of leprechauns and gods and ethers,”¹⁴² but does not seem to work well in depopulating or repopulating the ontology of legal personhood. After all, the very pragmatism that dethroned gods also dethroned human’s primary position with regard to the other species populating Planet Earth, wherefore the pragmatist basis of epistemology seems to have lost the foundation it once stood upon.¹⁴³ Thus, we can agree with Naffine’s argument that

[i]nstead of looking for the core of essential meaning of the entity, its supposed kernel of truth, we ask instead: How does the concept really work in law? And the way it does its work is likely to turn out to be quite varied; our meanings are more nuanced and less dogmatic than perhaps we first thought.¹⁴⁴

Even though scientific gaze certainly depopulates and repopulates our legal categories, it is but one of the dogmas adhered to in defining personhood. The other origins gravitate towards reconceptualization of personhood rather than multiplication of its ontological entries suggested by science. A thing excluded from personhood remains as much a mystery for the body politic as ever, unsolvable or unsolved by any community.¹⁴⁵

¹⁴⁰ See generally SHEILA JASANOFF, *DESIGNS ON NATURE* (2007). The nomenclature of non-human animals resembles much of that of the pre-embryo employed in biomedical research to justify interventions to some embryos but not others.

¹⁴¹ Emilie Hache & Bruno Latour, *Morality of Moralism?*, 16 *COMMON KNOWLEDGE* 311 (2010).

¹⁴² Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 *TEX. L. REV.* 267 (1997).

¹⁴³ See Horsman, *supra* note 131.

¹⁴⁴ NAFFINE, *supra* note 122. See, e.g., Niilo A. Mannio, *Yhteisöllisestä juridisesta henkilöstä*, *LAKIMIES* 1 (1918) (showing that these thoughts are hardly novel in law).

¹⁴⁵ GIORGIO AGAMBEN, *THE OPEN: MAN AND ANIMAL* (2004).

The resistance of legal personhood as a concept to scientific objectivism allows both a challenge from without to within and an active exclusion of many perceived as persons. It is a move Giorgio Agamben labels an anthropological machine, which leads to “the inhuman produced by animalizing the human.”¹⁴⁶ In past decades, this animalization of the human has touched large parts of humanity through the construction of an immigrant or a refugee body and through the body of a terrorist. While they pale in comparison to past examples of animalizing the human that took place most notably in the figure of Jews, their logic of operation carries many similarities with the past—a past that was supposedly set aside with the advance of universal human rights. The animalized humans are perceived as an outside threat to the continued existence of the West that should be compartmentalized into pockets of warfare or regional processing centers. Most often related to the body, animalization can take place through varied means from recognition as a military-aged male by a drone operator to issuing a biometric identity at a border.¹⁴⁷ Simultaneously with celebrated cases of primate habeas corpus, a terrorist-suspect in a detention center often in vain seeks to establish a standing under any jurisdiction.¹⁴⁸ Thus, it appears that the present anthropological machine—at least in terms of legal personhood—inherits powers of both the modern machine and that of the earlier times where “non-man [was] produced by the humanization of an animal.”¹⁴⁹

The legal person inside the anthropological machine, then, is amorphous, as it is neither a human nor an animal, nor a machine, nor a corporate body. Agamben calls such an undecipherable life—a “bare life,” wherefore a person without qualities would be a “bare person”—a person of strict legalism and legal fiction. Precisely due to personhood’s amorphous nature, law is at liberty to decide even among humans to whom to grant personhood, in a striking contrast to solemn declarations issued after the war to end all wars. Unlike with animals and fetuses, a move to devalue part of humanity effectively employs existing legal structures:¹⁵⁰ international humanitarian law allows the use of force in a set of pre-defined conditions and the problem of refugees can be solved through the maintenance of safe zones and collection centers. B.S. Chimni, writing in the early post-Cold War years, bluntly states that “[t]he UN Security Council is, I submit, the modern day Benthamite Panopticon monitoring appropriately created subjects in a bid to ensure, *inter alia*, the

¹⁴⁶ *Id.*

¹⁴⁷ The military-aged male as a legitimate target is explored in GRÉGOIRE CHAMAYOU, *DRONE THEORY* (2015); see, e.g., BTHAJ AJANA, *GOVERNING THROUGH BIOMETRICS: THE BIOPOLITICS OF IDENTITY* (2013) (biometric means to control passage).

¹⁴⁸ Linda Bosniak, *Persons and Citizens in Constitutional Thought*, 8 INT’L. J. CONST. LAW 9 (2010).

¹⁴⁹ AGAMBEN, *supra* note 145.

¹⁵⁰ These structures are commonly seen as parts of transnational law, a fusion of international and domestic legal orders, that are instrumental for the liberal theory. See José E Alvarez, *Do Liberal States Behave Better? A Critique of Slaughter’s Liberal Theory*, 12 EUR. J. INT’L L. 183 (2001) (showing liberal theory and its critique).

immobility of people seeking to bridge the North/South divide.”¹⁵¹ This externalized monitoring was embraced in quick succession by developed countries in their policies towards irregular immigrants and refugees, leading to replacement of “absolute legal rules with pragmatic problem solving.”¹⁵² In the light of these pragmatic problem solving rules, it becomes both rational and humanitarian to conclude a treaty transferring misbehaving migrants and replacing them with more noble sufferers,¹⁵³ with the ultimate goal to “break the business model of the smugglers and to offer migrants an alternative to putting their lives at risk.”¹⁵⁴ More than anything, the body of a migrant is kept at abeyance through an exercise of jurisdiction, foreclosing her entry to the system proper.¹⁵⁵

The migrant never successfully enters the jurisdiction proper of the developed world, then, though she remains a target of extensive executive actions from governance of airports to declaration of islands as non-territory.¹⁵⁶ As such, the transformation of a migrant into a thing takes place by rendering her invisible, much like the black slaves in the past—a thing to control, not a person to be concerned with.¹⁵⁷ After all, the lauded human rights system works when it can see past the darkness at sea.¹⁵⁸ While the person of migrant is kept at bay and out-of-sight, the person of a terrorist is transformed into a thing precisely through the omniscient surveillant gaze of a drone.¹⁵⁹ Asymmetric, hybrid, or modern, the warfare at present is often waged from a distance, in small pockets of war or zones of hostilities that contract and expand based on the exigencies of a quasi-permanent war on terror.¹⁶⁰ While

¹⁵¹ B.S. Chimni, *Responses to Hathaway: Globalization and Refugee Blues*, 8 J. REFUG. STUD. 298 (1995).

¹⁵² Itamar Mann, *Dialectic of Transnationalism: Unauthorized Migration and Human Rights, 1993–2013*, 54 HARV. INT’L L.J. 315 (2013).

¹⁵³ See ALAIN BADIOU, *ETHICS: AN ESSAY ON THE UNDERSTANDING OF EVIL* (2001) (showing the importance of noble suffering and evil to human rights).

¹⁵⁴ EU-Turkey statement, 18 March 2016.

¹⁵⁵ See Fleur Johns, *Data, Detection and the Redistribution of the Sensible in International Law*, 111 AM. J. INT’L L. 57.

¹⁵⁶ See James C Hathaway & Thomas Gammeltoft-Hansen, *Non-Refoulement in a World of Cooperative Deterrence*, 53 COLUM. J. TRANS’L. L. 235 (2015).

¹⁵⁷ See generally ACHILLE MBEMBE, *CRITIQUE OF BLACK REASON* (2017).

¹⁵⁸ See generally ITAMAR MANN, *HUMANITY AT SEA* (2016). For an attempt to shed a light to the events taking place on the perilous journey from thinghood to personhood, see LINDSAY POLLOCK, *HASKO POSITIVE NEGATIVES* (2015); see also Julia O’Connell Davidson, *‘Things’ Are Not What They Seem: On Persons, Things, Slaves, and the New Abolitionist Movement*, 69 CURRENT LEGAL PROB. 227 (2016).

¹⁵⁹ A terrorist caught is often rendered invisible through a network of clandestine detention centers or camps that escape all but martial jurisdiction. Here, the logic of person-making between a migrant and a terrorist converge.

¹⁶⁰ See Noam Lubell & Nathan Derejko, *A Global Battlefield? Drones and the Geographical Scope of Armed Conflict*, 11 J. INT. CRIM. JUST. 65 (2013).

the law regulating drone strikes is by no means without contestation, there exist both a relatively well-formed state practice and supportive scholarly writings on the matter.¹⁶¹ As with migrant and refugee law, the international and transnational legal framework that enfolds the practice of drone strikes is practical and motivated with humanitarian and moral arguments: there are less casualties overall, less civilian casualties, and the warfare is cheaper to wage and easier to motivate domestically.¹⁶² Consequently, “[d]rone warfare . . . can seem to be an inhuman form of war in which bodies appear as dead or dying victims, if they appear at all.”¹⁶³

But preceding their disappearance, bodies of victims-to-be are subject to ceaseless, disembodied surveillance from above that turns them into objects of indiscriminate warfare. Expanding the geography of warfare past traditional theatres of war, drone warfare covers large parts of the globe as a zone where being a male equates to being a combatant.¹⁶⁴ While the original intent of drawing a clear boundary between civilians and combatants was to protect civilian lives in a conflict, declaring an everywhere war—where everyone is a potential combatant if linked as a node in terrorism intelligence—does the opposite.¹⁶⁵ The original intent of the Geneva Conventions to provide rules to warfare through enforcement of mandatory distinction between civilians and combatants is overridden with nearly half of the population in countries like Somalia, Iraq, Yemen, and Afghanistan being suspected of participating in a war on terror. The surveillant gaze—or the eye of God¹⁶⁶—that embodies a victim with a gender simultaneously transforms a person into a thing; once commanding a male body in the eyes of a drone operator one ceases to exist as a person and emerges as an object of war, to such an extent that drone operators attempt to turn everyone male.¹⁶⁷ Thus, much like Heidegger warned in the immediate aftermath of the Second World War, the technology risks turning everyone into a standing-reserve for its exploitation,¹⁶⁸ or “the

¹⁶¹ See Christof Heyns et al., *The International Law Framework Regulating the Use of Armed Drones*, 65 INT’L & COMP. L.Q. 791 (2016).

¹⁶² See Roger Berkowitz, *Drones and the Question of “The Human”*, 28 ETHICS INT’L AFF. 159 (2014).

¹⁶³ Lauren Wilcox, *Embodying Algorithmic War: Gender, Race, and the Posthuman in Drone Warfare*, 48 SECURITY DIALOGUE 11, 13 (2017).

¹⁶⁴ For an analysis of such power in action, see Jamie Allinson, *The Necropolitics of Drones*, 9 INT. POL. SOC. 113 (2015).

¹⁶⁵ The term everywhere war is loaned from Derek Gregory. See Derek Gregory, *The Everywhere War*, 177 GEOGRAPHICAL J. 238 (2011). The function of data to construct nodes and linkages as a highly impersonal sign of terrorism is widely discussed in literature. See, e.g., Jutta Weber, *Keep Adding. On Kill Lists, Drone Warfare and the Politics of Databases*, 34 ENV’T. PLAN. D: SOC. & SPACE 107 (2016); Berkowitz, *supra* note 162; Wilcox, *supra* note 163.

¹⁶⁶ See CHAMAYOU, *supra* note 147.

¹⁶⁷ See Allinson, *supra* note 164.

¹⁶⁸ See HEIDEGGER, *supra* note 58.

subordination of everything to impersonal logic and to the reign of calculability and instrumental rationality.”¹⁶⁹ Yet, there is a risk of confounding drone warfare’s technological novelty with its ideological novelty. As Markus Gunneflo shows, there exists a tractable legacy of targeted killings from at latest 1940s to the present.¹⁷⁰ Drone warfare could simply be an extension of a dehumanizing gaze on the global sphere, an extension of methods previously reserved for quelling national dissent.¹⁷¹

Nonetheless, the person of an immigrant and that of a terrorist refer to a particular logic of de-personification or reification of persons. In both instances legal systems in developed countries, through the international legal framework, render part of humanity invisible. The cloaking device here is the very law that was installed to make the rights and their holders visible, yet by pushing the persons into zones of indistinction that high seas, regional processing centers, or zone of hostilities mark they are turned into persons without qualities—or simply things.¹⁷² Being under the control of law but out of its reach clearly signals the relative weakness of safeguards installed through the international codification of human rights; keeping terrorists and migrants at arm’s length from their borders, the developed countries place the onus of protection in the hands of the very entities the persons are fleeing or fighting against. Upholding a tight territorial nexus to jurisdiction as a precondition for recognition to any perceivable rights is difficult to maintain.¹⁷³ Thus, the disavowal of personhood of some has a rationale “far more prosaic: one not grounded in moral theory, principle, or philosophy, but in political expediency”¹⁷⁴—pointing directly at the bareness of person law upholds. Understood in this light, the existence of multiple competing and slightly differing concepts of personhood is, as likely as a unified notion, describing essential features of a bundle of rights that is a legal person.

The fusion of domestic and international law into a “law beyond a state”—or transnationalism—has conditioned the Western legal system to global influences in new ways. In a networked, global society, laws in Asia, Africa, or South America do have a more intimate bearing on, say, rights of labor, new forms of reproduction, or liabilities of corporations. Although rules of engagement were and are chiefly formulated by the developed countries in the global North, laws adopted in the global South allowed for

¹⁶⁹ Achille Mbembe, *Necropolitics*, 15 PUB. CULTURE 11, 18 (2003).

¹⁷⁰ See MARKUS GUNNEFLO, *TARGETED KILLING: A LEGAL AND POLITICAL HISTORY* (2016).

¹⁷¹ See Mbembe, *supra* note 169.

¹⁷² This reading follows Giorgio Agamben. See generally GIORGIO AGAMBEN, *HOMO SACER: SOVEREIGN POWER AND BARE LIFE* (1998).

¹⁷³ See Marko Milanovic, *Human Rights Treaties and Foreign Surveillance: Privacy in the Digital Age*, 56 HARV. INT’L L.J. 81 (2015).

¹⁷⁴ *Id.* at 93.

citizens and persons of the North to become subject to these laws through investments or purchases of goods and service. Personhood is one of arguably many areas of law where there is a marked difference between parts of the global South and the developed countries. While there are obvious difficulties in drawing any direct parallels between legal concepts across such a wide range of systems,¹⁷⁵ it can be said that some concepts travel better than others.¹⁷⁶ Personhood understood minimally as a bundle of rights-and-duties is certainly such a concept. While the more expansive categories of legal personhood found from a set of jurisdictions question the conditions to become a legal person, even these more expansive formulations assume a nexus of rights and persons. There is seldom a doubt whether a person travelling to another country holds a right to purchase goods or services nor is there any doubt that she would be held responsible if she caused damage or harm to someone or something. Under such minimal conditions, the legal personhood conceptualizations of countries throughout the globe come to affect the way personhood is construed in the global North. If congruence and crosspollination of law amid different legal systems of the globe was not obvious at the outset of the United Nations era, with its calls for transnationalism, for globalism, or its embrace of the global order, it has now made this point abundantly clear.

The legal terrain where this infiltration of legal ideas takes place remains heavily contested. We shall focus on the congruence of two different settings, and maybe lived experiences, simply to highlight how the diverse notions of personhood might come in contact with one another and how they influence our perception of legal personhood. The first one is related to non-legal practices, the second to legal practices. First, perhaps the oldest tradition, is that of a certain colonial gaze that “posits a gap, a difference between European and non-European cultures.”¹⁷⁷ Portraying difference in terms of cultural aptitude as Levi-Strauss did,¹⁷⁸ allows setting aside many normative orders that are deemed quaint or uncivilized. On these instances, the ensuing conflict of worldviews is normally settled in favor of a notion of personhood comprehensible to the Western perspective. The blood samples taken from the Yanomami tribes in the 1960s and stored for five decades in various research laboratories in the U.S. are a good example of such conflict. For the Yanomami, the destruction of all physical remains at death is essential “so that the dead person can depart and separate the world of living from the world of the dead.”¹⁷⁹ The perception of the person as consisting

¹⁷⁵ See Pierre Legrand, *The Impossibility of “Legal Transplants,”* 4 MAASTRICHT J. EUR. COMP. L. 111 (1997).

¹⁷⁶ See William Twining, *Have Concepts, Will Travel: Analytical Jurisprudence in a Global Context*, 1 INT’L. J.L. IN CONTEXT 5 (2005).

¹⁷⁷ Antony Anghie, *The Evolution of International Law: Colonial and Postcolonial Realities*, 27 THIRD WORLD Q. 739, 742 (2006).

¹⁷⁸ See LEVI-STRAUSS, *supra* note 74.

¹⁷⁹ *Indigenous Tribe’s Blood Returned to Brazil After Decades*, BBC NEWS (Apr. 3, 2015), <http://www.bbc.com/news/world-latin-america-32178286>.

also of bodily fluids, such as blood stored decades before, was contested and ignored, for the most part, during the five decades of possessing those samples. Thus, a challenge to Western personhood posed simply in terms of cultural differences, especially those based on tribal or communal rather than legal rules, are predominantly overlooked to the detriment of other conceptualizations of personhood. This marks a gap that Anghie places between the universal Indian and the particular Indian—the universal being defined by the Western concept of personhood to which everyone ought to adhere, while deviation signaled by the particular traits ought to dissipate when being in contact with the Western norms.¹⁸⁰

The second practice, and more directly connected to the realm of law, are instances where legal personhood has been extended past the sphere of persons commonly held to such standard in the West. Rather than focusing on the anthropologically recorded plurality of persons,¹⁸¹ this tradition seeks to expand personhood in terms directly articulable to the rule of law and therefore, necessitating a legal response.¹⁸² In recent years more and more jurisdictions have granted a distinct status of personhood to nature; for example New Zealand recognizes a right to personhood for a river,¹⁸³ India for waterfalls,¹⁸⁴ and Ecuador for the environment.¹⁸⁵ In contact with these ideas, it is not simply enough to re-state that a person is a right-and-duty-bearing unit or that a person commands innate value. While it is too early to say how New Zealand and India expect, for example, corporate actors to act with regard to newly personified bodies of water, the Ecuadorian experience provides insights into ways the personified harmonious co-existence between humans and nature is operationalized legally, vis-à-vis external actors—mostly Western corporations seeking rights to excavate natural resources.¹⁸⁶ While the Ecuadorian Constitution categorically prevents excavation in the areas of isolated indigenous people,¹⁸⁷ the country's government has—employing human development as an argument—accepted, for instance, oil drilling in

¹⁸⁰ See Anghie, *supra* note 177.

¹⁸¹ See, e.g., EDUARDO VIVEIROS DE CASTRO, *CANNIBAL METAPHYSICS* (2014); PHILIPPE DESCOLA, *BEYOND NATURE AND CULTURE* (2013).

¹⁸² See P.W. Duff, *The Personality of an Idol*, 3 *CAMBRIDGE L. J.* 42 (1927) for the long history of this meeting of different ideas of personhood.

¹⁸³ See Abigail Hutchison, *The Whanganui River As a Legal Person*, 39 *ALTERNATIVE L. J.* 179–82 (2014).

¹⁸⁴ See *Miglani v. State of Uttarakhand*, Writ Petition No. 140 of 2015, High Court of Uttarakhand at Nainital (India), MCC 139/2017.

¹⁸⁵ See Rickard Lalander, *The Ecuadorian Resource Dilemma: Sumak Kawsay or Development?*, 42 *CRITICAL SOC.* 623 (2016).

¹⁸⁶ See Mary Elizabeth Whittemore, *The Problem of Enforcing Nature's Rights Under Ecuador's Constitution: Why the 2008 Environmental Amendments Have No Bite*, 20 *PAC. RIM L. & POL'Y J.* 659 (2011).

¹⁸⁷ See CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR [CONSTITUTION] 2008, art. 57.

the area through its state-owned corporations acting jointly with Western, and in recent years, Chinese companies.¹⁸⁸ Generalized and under-specified constitutional—or more generally legal—rules such as *Sumak Kawsay* (“good living”) in Ecuador or *Chipko Andolan* (“hug the trees”) in India always imply that humanity is a part of nature, resulting into gradual derogation of norm-like statements.¹⁸⁹ As in Ecuador’s decision to abolish the Yasuní-ITT initiative the arguments of common good were used, the Indian court, when protecting waterways and glaciers, “hasten[s] to observe that the local inhabitants living on the banks of river . . . must have their voice too.”¹⁹⁰ From the point of view of Western legal personhood, many of these formulations resemble in their normative effect more that of awakening of the environmental movement in the 1970s, than profound challenges they are touted to be to the accepted content of legal personhood.

In sum, the promise of globalization to provide new constellations of global and local “glocal” personhood driven by the global South or the developing countries, seems to be relatively modest. This does not negate international and global law’s potency to produce through its processes many new legal persons that merit attention, such as the administrator of Western authority in an invaded country or proliferation of cities as actors on a global scale.¹⁹¹ These have been driven under the auspices of the Western concept of personhood, leaning to neoliberal ideas of development and urbanization¹⁹² or to medieval conceptualizations of ruler’s dual body.¹⁹³ More than affecting the Western legal order, the globalization has through diverse means, but most notably through the proxy of corporate actors and institutionalized idea of development, altered the global landscape to resemble to a great extent its own conceptualization of the person. The existence, yet apparent impotency of alternate worldviews and concepts of legal person merely accentuate this conclusion. Rather than enriching Western law with new ways to signal interests and duties

¹⁸⁸ See REBECCA RAY & ADAM CHIMIENTI, *A LINE IN THE EQUATORIAL FORESTS: CHINESE INVESTMENT AND THE ENVIRONMENTAL AND SOCIAL IMPACTS OF EXTRACTIVE INDUSTRIES IN ECUADOR* (2015); Mikko Rajavuori, *How Should States Own? Heinisch v. Germany and the Emergence of Human Rights-sensitive State Ownership Function*, 26 EUR. J. INT’L L. 727–46 (2015) (discussing how states should own and operate according to the European system).

¹⁸⁹ See Sam Adelman, *Tropical Forests and Climate Change: a Critique of Green Governmentality*, 11 INT. J. LAW CONTEXT 195 (2015); *The Double Life of International Law: Indigenous Peoples and Extractive Industries*, 129 HARV. L. REV. 1755 (2016).

¹⁹⁰ *Miglani v. State of Uttarakhand*, *supra* note 184, at 61.

¹⁹¹ See MATILDA ARVIDSSON, *THE SUBJECT IN INTERNATIONAL LAW: THE ADMINISTRATOR OF THE COALITION PROVISIONAL AUTHORITY OF OCCUPIED IRAQ AND ITS LAWS* (2017); LUIS ESLAVA, *LOCAL SPACE, GLOBAL LIFE: THE EVERYDAY OPERATION OF INTERNATIONAL LAW AND DEVELOPMENT* (2015).

¹⁹² See Peter Brand, *Green Subjection: The Politics of Neoliberal Urban Environmental Management*, 31 INT. J. URBAN REG. RESOL. 616 (2007); see, e.g., Constitution of the City of Mexico (Constitución Política de la Ciudad de México), 5 February 2017, art. 13. (calling for a healthy environment).

¹⁹³ See ERNST KANTOROWICZ, *THE KING’S TWO BODIES: A STUDY IN MEDIEVAL POLITICAL THEOLOGY* (2016); ARVIDSSON, *supra* note 191.

through personhood, the failure, thus far, of these new conceptualizations of a person highlights the unprecedented potency transnational corporations have gained as vehicles of unification.¹⁹⁴

A continual tension between corporation's artificiality and anthropomorphism is, according to Anna Grear, decisive in its capacity to escape and expect human rights.¹⁹⁵ The power of a corporation "to metastasize into a world power"¹⁹⁶ is, to a great extent, explicable in its ubiquity; even though competing on the market, the corporations can join under a single banner when promoting corporate form as a vessel to conduct business globally. As was briefly explored above regarding rights of nature, it appears evidently true, as Upendra Baxi argues that:

human rights of individual human beings [and of indigenous peoples] seem to be best served by according an overweening respect to the needs, interests, and desires of transnational corporations and the 'communities' of direct foreign investors.¹⁹⁷

But what in the corporation turned it from an arguably powerful entity in a national setting into a global power broker in the ways commonly described and evinced? Much of this shift in power is attributable to the ways in which corporate personhood is articulated. Commanding a position of being able to define rights and enjoy their protection, while at the same time escaping attribution to a great extent, is a mighty power attributable to something supposedly fictitious. Essentially, corporations shape the world and rights, but rights and persons are still chiefly defined within the liberal, individualist tone.¹⁹⁸ As neither truly private nor public, the space in-between that corporations command renders them invisible, eternal embodiments of affluence¹⁹⁹ and influence.

¹⁹⁴ See James Thuo Gathii, *Imperialism, Colonialism, and International Law*, 54 *BUFF. L. REV.* 1013 (2007); ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* (2004).

¹⁹⁵ See Anna Grear, *Human Rights–Human Bodies? Some Reflections on Corporate Human Rights Distortion, The Legal Subject, Embodiment and Human Rights Theory*, 17 *L. & CRITIQUE* 171 (2006).

¹⁹⁶ David Ciepley, *Beyond Public and Private: Toward a Political Theory of the Corporation*, 107 *AM. POL. SCI. REV.* 139, 139 (2013).

¹⁹⁷ UPENDRA BAXI, *THE FUTURE OF HUMAN RIGHTS* 17-18 (2d ed. 2006).

¹⁹⁸ See Ciepley, *supra* note 196.

¹⁹⁹ *But see* Fleur Johns, *Theorizing the Corporation in International Law*, in *THE THEORY OF INTERNATIONAL LAW* 635 (Anne Orford ed., 2016).

As a primus motor in global economy and “a major threat to the economic autonomy of the nation-state,”²⁰⁰ the corporation has—long after the trading companies of the 17th century—been re-conceptualized as a sovereign gift endowed by the State. Thus, rather than being solely reflections of private vision and interest, the corporation is perceived as governmental in operation and in provenance.²⁰¹ The power of a corporate body to establish and enforce rules transforms wishes and desires of corporations into normative orders dictating the life of those subject to such norms, whether as a factory worker in Bangladesh or as a Muslim woman employee willing to cover herself by a veil. The employed analogies of corporation to human beings or to states, or republics, all tend to conceal foundational differences that set corporations apart: It lacks a body and its citizens,²⁰² shareholders, are commonly exempt from its rule.²⁰³ Power of a transnational company resides, then, in its disconnect from the preconceived idea of a legal person, while still being able to fully enjoy the benefits of such personhood in terms of rights endowed by state. The corporate body is spectral and unchained, providing it with a global omnipresence no material entity could enjoy, which allows it to “almost produce a substitute for earlier state formation.”²⁰⁴

The myth of legal personhood pursued in the present is best understood as something that “‘goes without saying’ but which, when actually said, begins to appear ‘falsely obvious.’”²⁰⁵ At first sight, contemporary personhood is quite like the personhood that was formulated during the post-war years: it is universal and formally egalitarian with regard to humanity, it recognizes corporate personhood, and it denies demands for personhood from animals, machines, and, to an extent, fetuses. Yet there are subtle changes—science on the one hand, and globalization on the other hand—that have been introduced to personhood. Human capacity to alter, enhance, and augment herself through technological means has called into question qualities that are held to be human and, as such, personal, with subsequent effect on legal personhood. Our knowledge of our genetic affinity with simians, promises of integrated computers and strong artificial intelligence as well as neuroscientific models on brain’s functioning, have led many to ask what is in human dignity that sets us apart if all elements of that uniqueness can be replicated. Once so obvious assumption of the human specific mind or consciousness is difficult to maintain at present. This has amounted to calls for increasingly material explanations for personhood that seek to explain personhood through material constellations rather than ideas. An alternate set of subtle yet significant movements has taken place in the international or global arena. Most significant of these

²⁰⁰ PETER DICKEN, *GLOBAL SHIFT: MAPPING THE CHANGING CONTOURS OF THE WORLD ECONOMY* 106 (5th ed. 2007).

²⁰¹ See Ciepley, *supra* note 196.

²⁰² See Grear, *supra* note 195.

²⁰³ See Ciepley, *supra* note 196.

²⁰⁴ BAXI, *supra* note 197, at 246 .

²⁰⁵ Marks, *supra* note 10, at 230.

has been the overlap of domestic and international legal spheres—transnationalism. As local changes have had repercussions in global events, so have global networks; and increasingly potent multinational corporations have come to define local policies and law's personhood therein included. It has led to more and more recurrent demands to call corporations to account morally for their actions, re-introducing morality to the plane of personhood debate.

D. Upholding Utopia

With "I am a person, and so are you. That much is beyond doubt," Daniel Dennett started his article four decades ago. He simply continued to say that "[i]n the end we may come to realize that the concept of person is incoherent and obsolete."²⁰⁶ He further developed a six-prong analysis that functions as a continuum from a mere material person to ultimately a moral actor in a philosophical sense. Albeit of limited value for law, models of Dennett and others illustrate clearly why law is struggling with personhood. The concept of a person inherits much from our everyday experience and language, and exploring these everyday contexts within which person is understood allows us to assess feasibility of the story of personhood explored in the preceding chapters. The story provided above is a linear and, arguably, a simple story of "progress" where law moves towards greater inclusion and increasingly "rational" justification for our incoherent and obsolete concept of a person. Tensions are simple and direction is clear, but the purchase of any apparent or illusory similarities to the present remains modest. Even if, say, the migrant and the terrorist are set outside the scope of rights in the same way banning people from political community did in the past, the means and outcomes are very different. Thus, there are limits to answers that look simply to the past—even outside the number of novel questions derived from developments related to new technologies and the creation of the "post human."

Stories of and about personhood—the mythical part—are to a great extent shared between a wide range of explanations and theories of personhood.²⁰⁷ Virtually all of the numerous

²⁰⁶ Daniel C. Dennett, *Conditions of Personhood*, in THE IDENTITIES OF PERSONS 175 (Amelie Oksenberg Rorty ed., 1976).

²⁰⁷ For additional sources, see, e.g., LAW, ANTHROPOLOGY, AND THE CONSTITUTION OF THE SOCIAL, (Alain Pottage & Martha Mundy eds., 2004); Mireille Hildebrandt, *Criminal Liability and "Smart" Environments*, in PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW 507 (R. A. Duff ed., 2011); COSTAS DOUZINAS, THE END OF HUMAN RIGHTS (2000); UPENDRA BAXI, HUMAN RIGHTS IN A POSTHUMAN WORLD (2009); Yan Thomas, *Le sujet de droit, la personne et la nature*, 100 DEBAT 107 (1998); Marta Madero, *Penser la tradition juridique occidentale: Une lecture de Yan Thomas*, 67 ANN. HIST. SCI. SOC. 103 (2012); Jonathan Erhardt & Martino Mona, *Rechtsperson Roboter—Philosophische Grundlagen für den rechtlichen Umgang mit künstlicher Intelligenz*, in INTELLIGENTE AGENTEN UND DAS RECHT 61 (Sabine Gless & Kurt Seelmann eds., 2016); Reinhard Damm, *Personenrecht: Klassik und Moderne der Rechtsperson*, 202 ARCH. FÜR DIE CIVILISTISCHE PRAX. 841 (2002); Heike Baranzke, *Das Tier als Subjekt eigener Interessen in Recht und Ethik?—Möglichkeiten und Grenzen interessenethischer Ansätze für eine Ethik der Verantwortung für Tiere*, in TIERSCHUTZ BEI DER RELIGIÖSEN SCHLACHTUNG / ANIMAL WELFARE AT RELIGIOUS SLAUGHTER 91 (Johannes Caspar & Jörg Luy eds., 2010); CRITICAL BEINGS: LAW, NATION AND THE GLOBAL SUBJECT (Peter Fitzpatrick & Patricia Tuitt eds., 2004); YORIKO OTOMO, UNCONDITIONAL LIFE: THE POSTWAR

accounts on personhood propounded focus on similar entities and tell some variation of the story of origin outlined above. Moreover, despite recurrent referral to theoretical omission of personhood, accounts range virtually all fields and approaches of law, and there have been no notable gaps at any recent point on these attempts to provide explanations to what a person in law entails either. Insistence upon the deep dark of theory of the legal person accentuates the story of origin and personhood's often troubled past, without giving much in terms of an answer to the question of why we ought to be concerned with personhood. Often in a circular fashion, personhood is defined as more than a condition of existence for entities carrying rights and duties, but rather the exploration is carried out solely to provide or deny rights and duties of some. Nevertheless, it seems obvious "that unless the question about [personhood] has an answer, we cannot answer certain important questions (questions about such matters as . . . [attribution, morality,] and responsibility)."²⁰⁸ In our effort to uphold the utopia of personhood, we attempt to provide a reading of the expansive debate to cast light not onto the heart of darkness but to that which lies right before us in the voluminous body of scholarship on personhood.

While many of the choices made in the construction of the concept of personhood in the West are defensible, there are parallel or overlapping narratives that might, on the one hand, allow us to better appreciate present problems and, on the other hand, highlight continuity also where ruptures seem more apparent. There is little doubt that the tradition and myths explored above are among the most prominent ones for explaining legal personhood. It is a narrative that seeks to understand personhood through the lens of a dualist human, one torn between a body and a mind or consciousness. At first, the legal personhood served to bifurcate humanity into two, to those who had a civilized mind and those who did not. Over time it has begun to signal a boundary condition between the moral agency of humans and the mere existence of things.²⁰⁹ Much like the Indians were included into humanity in the works of Vitoria,²¹⁰ present models of personhood may grant animals, AIs and others, view personhood with a minimal sense of respect while barring them from moral agency and, with that, responsibility. This dualist understanding is in sharp contrast to materialism, or monism, that was a prominent alternative that law never embraced despite its prominence during the early Enlightenment²¹¹—an era when many formulations of law's person were also made both domestically and internationally. The fascination of 18th century with artificial life and mechanical explanations of the human never truly gained

INTERNATIONAL LAW SETTLEMENT (2016); ALAIN SUPIOT, *HOMO JURIDICUS: ON THE ANTHROPOLOGICAL FUNCTION OF THE LAW* (2007).

²⁰⁸ Derek Parfit, *Personal Identity*, 80 *PHIL. REV.* 3, 4 (1971).

²⁰⁹ See DOUZINAS, *supra* note 207.

²¹⁰ See Antony Anghie & B. S. Chimni, *Third World Approaches to International Law and Individual Responsibility in Internal Conflicts*, 2 *CHINESE J. INT'L L.* 77, 85–6 (2003).

²¹¹ See ISRAEL, *supra* note 17.

support among lawyers and legislators.²¹² Yet, the past few decades with advances in bio and nanotechnology as well as neuroscience and artificial intelligence have forced lawyers, in praxis, to encounter questions of human materiality that scholars have averted in theory. If all elements of a human can be technologically reproduced and replaced—just like the mechanical duck on public display throughout Europe in the 18th century seemed to replicate a biological duck—what does it signify to the human condition?

In her recent article, Britta van Beers marks this bifurcation as one between a natural and an artificial concept of a legal person.²¹³ She argues that in much of the recent legal theoretical scholarship the artificiality of personhood has gained ground as the original meaning of personhood, highlighting the *persona* as a mask worn to signal changing status of its bearer. As a mask, legal personhood is never truly attached to a natural person but is a fictitious role adapted when entering the realm of law. As a critique to such growing fictitiousness or artificiality of legal personality, van Beers argues that while there is much truth in the postmodern demise of naturalness as a representational category, “law’s category of the natural person still has its merits, not only *despite* current [technological] developments, but maybe even *because* of them.”²¹⁴ And while she admits that technological change might “eradicate the naturalistic premises” attached to law’s natural person, she maintains that we have always been partly a product of technological artefacts. While in many ways sympathetic to her arguments in favor of retaining material bind for the concept of legal personhood, the argument van Beers provides to support her premises seems to suggest that the legal fictions related to legal personality are strictly legal—that law construes legal fictions which then come to frame social interaction and society at large. Her examples, taken from the field of biolaw, are related to the definition of death and the so-called wrongful life cases. She argues, in short, that novel definitions of death are means to reach other ends, most notably viable organs for organ donation, and that wrongful life decisions seem to presume existence of another possible world where the genetic constitution of an impaired infant would not have been the same.

While both examples used by van Beers truly highlight how law’s language can change the moment of life’s beginning and end, and consequently create a fictional disconnect between bodily functions and the human condition and law, her analysis appears to abscond artificiality by embracing it. As Sheila Jasanoff, for example, has shown, the discursive means with which medical and scientific experiments on embryos are justified clearly place their origin outside the realm of law.²¹⁵ One could argue that what van Beers considers a

²¹² See, e.g., JULIEN OFFRAY DE LA METTRIE, *L’HOMME-MACHINE* (1865); JESSICA RISKIN, *THE RESTLESS CLOCK* (2016).

²¹³ See Britta van Beers, *The Changing Nature of Law’s Natural Person: The Impact of Emerging Technologies on the Legal Concept of the Person*, 18 *GERMAN L.J.* 560 (2017).

²¹⁴ *Id.* at 582.

²¹⁵ See JASANOFF, *supra* note 140.

perplexing hall of mirrors in the wrongful life decisions is but work of a “pre-embryo” devised by the Warnock Committee.²¹⁶ In its report on human fertilization and embryology in the United Kingdom, the Committee led by Mary Warnock employed strictly scientific, and thus, according to van Beers, *natural*, reason to allow scientific operations on embryos before 14 days from conception. Thus, in cases where a failure to recognize a disease in a pre-implementation genetic diagnosis (PGD) leads to birth of a child with severe cognitive and/or physical disabilities, there appears to be, for science as much as for law, two different entities, both equally “fictionaliz[ing] the way natural person relates to his or her body.”²¹⁷ According to the Warnock Committee, there never was an individual who was tested in the PGD as the pre-embryo could still develop into twins—a fiction as potent as one employed by courts when they argue that there would have been a possible world where a disabled child would have never been conceived had the operation targeting this non-unique embryo been conducted with proper duty and care. A rather similar critique could be targeted toward van Beers’ other example of diverse forms of death and their medico-legal definitions. While law provides a bulwark against accusations of malpractice to surgeons, the definition of, for example, brain death remains strictly medical and, again, *natural* in van Beers’ nomenclature. As early surgeons performing heart transplant surgery noted, calling a person brain dead “is entirely a technical medical decision [that should not], be circumscribed in this decision by legal authority.”²¹⁸

In short, while a natural person might not have suffered the fate of an author, employing arguments stemming from the world of science as natural and their legal counterparts as artificial is incongruous at best. As David Kennedy notes:

[T]he image of experts bringing prefabricated knowledge to bear on world problems captures only a part of the role expertise plays in world making. The knowing, the doing, and the world making are more entangled than that. Background ideas about the world—often experienced as “facts” rather than “ideas”—shape the world before people set to work on the problems they see with the knowledge they have.²¹⁹

²¹⁶ See DEPARTMENT OF HEALTH & SOCIAL SECURITY, REPORT OF THE COMMITTEE OF INQUIRY INTO HUMAN FERTILISATION AND EMBRYOLOGY (1984).

²¹⁷ Van Beers, *supra* note 213, at 586.

²¹⁸ Margaret Lock, *Death in Technological Time: Locating the End of Meaningful Life*, 10 MED. ANTHROPOLOGY Q. 575, 582 (1996) (citing EXPERIENCE WITH HUMAN HEART TRANSPLANTATION: PROCEEDINGS OF THE CAPE TOWN SYMPOSIUM 13–16 JULY 1968, 40 (Hillel Shapiro ed., 1969)).

²¹⁹ DAVID KENNEDY, A WORLD OF STRUGGLE 89 (2016).

van Beers is certainly not alone in elevating natural to artificial when scientific knowledge encounters law. Yet, such elevation seems to be less a condition of artificiality or fictitious nature of legal personhood, and more a symptom of how legal scholars approach their conceptual tools when they lack immediate and precise normative content. Much of the voluminous scholarship on legal personhood seems to assume that personhood is an emanation of “necessary, universal truths about law.”²²⁰ While on these accounts, legal personhood might retain a relationship to the external expertise it embodies, for example neuroscience or data science, when operating within the legal sphere its potency to dictate outcomes is unprecedented—it is seen as a *primus inter pares* explaining why someone is being discriminated against or why society allows organs to be harvested or establishes liability due to a painful existence. Such an account of law and of legal personhood entirely disconnects knowledge of our world from its legal interpretation and cannot help but render everything artificial. Therefore, it is easy to side with van Beers’ conclusion that “what is needed is a legal concept of the person which can bring to expression what is, ultimately, at stake in the coming era of human enhancement technologies: Our embodied, human nature.”²²¹ It is also where our utopia stands.

In many ways, the tentative first steps of building such a utopia resemble a story Heidegger loans from Plato’s *Theaetetus*:

The story is that Thales, while occupied in studying the heavens above and looking up, fell into a well. A good-looking and whimsical maid from Thrace laughed at him and told him that while he might passionately want to know all things in the universe, the things in front of his very nose and feet were unseen by him.²²²

Heidegger continues, suggesting that “[t]herefore, the question ‘What is a thing?’ must always be rated as one which causes housemaids to laugh.”²²³ Truly, for most lawyers practicing law a genealogical quest to unearth what a legal person is might raise a few justified laughs. The person is seldom contested and a conventional knowledge among the ranks of lawyers would quickly frame legal person to a sufficient extent. Moreover, many fields of law command their own specialized vocabulary to recognize a person from other entities closely resembling it: a corporate lawyer would refer to rules of incorporation, an international lawyer to rules of state formation, and so forth. In many ways, these specialized vocabularies of personhood are what biology, physics, or geology are to things

²²⁰ Brian Z. Tamanaha, *Necessary and Universal Truths about Law?*, 30 *RATIO JURIS* 3, 4 (2017).

²²¹ Van Beers, *supra* note 213, at 593.

²²² MARTIN HEIDEGGER, *WHAT IS A THING?* 3 (1968).

²²³ *Id.*

in Heidegger's quest to understanding them. A philosophically motivated questioning of legal personhood always appears too slow and imprecise when law commands more nuanced, precise, and suitable tools to outline personhood.

Folly of the task at hand is further accentuated by the very fact that while there might exist a kernel of what a legal system means with legal personhood, such a kernel is neither universal nor enduring. Change of time and place affect legal personality in much the same way as they change the understanding of any particular thing. As with the rest of human artifacts, there exists no unique, correct way to group entities that would belong under the moniker of a "legal person." Albeit there is no universal and permanent notion for legal personality; it, like other "conventionally recognized legal forms [is] anything but ephemeral."²²⁴ It is rather a human artefact that changes over time in connection to our other artefacts. Perceiving law as a technological artefact—an expertise in world-making, to borrow from Kennedy—among many that shape us and as something that is shaped by us allows for the positing of bodies and matter in a meaningful relationship with ideas. Maintaining a separate category for body as distinct from matter is a sop to Cerberus. Body or embodiment would merely come to occupy the place currently reserved for a human being commanding qualifying traits. There would be little to prevent law from employing categories akin to the pre-embryo to demote bodies into matter, a point made by Norman Fost with regard to anencephalic infants as organ donors. It "invite[s] constant redefinition whenever utility requires it, creating both instability and the perception of and the possibility that unwanted persons can be defined out of existence if it serves the greater good."²²⁵ As such, a consequence of highlighting embodiment could amount to little more than a change of nomenclature.

In many ways, entities that at present are on the brink of personhood also exemplify the pitfalls of such a simple change. Courts, for example, often approach fetuses and embryos as a *sui generis* category of matter, commanding a string of bodily features yet often failing to earn the status of a person. Yet, whenever claims for fetal rights find the support of courts, they do so in a language that embodies them. Hence, in *Vo v. France*, where a claimant argued that a lost fetus was not nothing, the European Court of Human Rights underlined that, indeed, it was "something" but certainly not "someone."²²⁶ Whenever finding rights before courts, these entities are made persons by donning them traits associated with being a human (for example sentience, desires, feelings of pain and pleasure, a human worth) while when denying existence of independent rights courts' simply refuse to entail them

²²⁴ BRIAN Z. TAMANAHA, *WHAT IS LAW?* 60 (2017).

²²⁵ Norman Fost, *Organs from Anencephalic Infants: An Idea Whose Time Has Not Yet Come*, 18 HASTINGS CENT. REP. 5, 7 (1988).

²²⁶ *Vo v. France*, Center for Reproductive Rights (intervening) and Family Planning Association (intervening), App. No. 53924/00 (2004).

within such categories. The idea of the body is the idea of a human and whenever traits deemed human are seen in a matter that matter becomes embodied. The task of courts and legislators would then be no different with regard to a natural, embodied notion of personhood than it is at present, where instead of applying bodily categories courts apply ideas to things. Courts and legislators are often called to readjust the misaligned moral compass and transform personhood into a protean concept able to accommodate fetuses, animals, deceased, robots as well as living human beings and corporations. After a new-found body of a legal person would have emerged, the same artificiality traced by van Beers in present concept of personhood would continue as is—solely more reflective of material bind of humanity than at present.

In order to avoid merely replacing artificial with natural without changing anything but the concept, a simple call for embodiment as such is hardly sufficient. Rather, what an account tied to matter necessitates is a full eradication of a preferred category of a person from the classical Roman trifecta of *persona-res-actiones*, placing the true chasm “not between humans and the world, but between *objects and relations*.”²²⁷ After all, for as long as there exists a preferred category, everything failing to reach such a standard is something of lesser worth. At present, the preferred category of a person at the apex of personhood is that of “the healthy adult, to whom can be awarded the title of being truly and properly a person.”²²⁸ Resembling Agamben’s anthropological machine, Roberto Esposito argues that placing a golden standard of personhood will amount to marking everyone else with qualities attributed to the paradigmatic thing in a gradient scale from personhood to thinghood. If, for example, a lifeless, motionless object is taken as a standard for thinghood, a human being in a permanent vegetative state unable to move or breath independently can easily be seen to stand on the verge of thinghood—embodied or not.²²⁹ Moreover, as science and technology have provided new modes to describe matter they also enable new and ever more nuanced classification of objects on their scale from full personhood to full thinghood as evinced by the constant development of new categories of death.²³⁰ Examples of such newly employed classifications enabled by technology are sentience or pain,²³¹ but

²²⁷ GRAHAM HARMAN, TOOL-BEING 2 (2002).

²²⁸ Esposito, *supra* note 15. One could also conceive of the person at the apex even in a more limited fashion as a masculinist. See, e.g., OTOMO, *supra* note 207. Or one could go even further as to conceive of the person as “the white, European male property-owner.” See Anna Grear, *Deconstructing Anthropos: A Critical Legal Reflection on “Anthropocentric” Law and Anthropocene “Humanity”*, 26 L. & CRITIQUE 225, 237 (2015).

²²⁹ See ROBERTO ESPOSITO, PERSONS AND THINGS 26, 33 (2015).

²³⁰ See Ian Hacking, *Making Up People*, in BEYOND THE BODY PROPER: READING THE ANTHROPOLOGY OF MATERIAL LIFE 150, 158 (Margaret Lock & Judith Farquhar eds., 2007).

²³¹ See Dominique Lestel, *The Question of the Animal Subject*, 19 ANGELAKI 113 (2014).

also more social qualities such as legality of a body at borders based on digitally recorded biometric information.²³²

To avoid contamination between categories that allows debasement of some entities *ab initio*, a removal of the apex of personhood dominated by a natural person allows reinstating material at the epicenter of personhood. Rather than working as a more profound or privileged form of critique to personhood, such leveling opens a parallel form of criticism. Whereas upholding a person/thing distinction populates a single notion of personhood with different intensities of personality, a single category of objects will produce a great number of entities that reflect different facets of personhood. Quite like the two ontological orientations of sociology outlined by Nedim Karakayali,²³³ these two different modes of perceiving a legal person rely on a specific ontological orientation. While persons/things distinction maintains a rigid boundary between the two, a single category of material objects, “considerably blurs the boundaries”²³⁴ between the two. Consequently, there emerges

an imagery that regards the yesteryear theologized body in human rights discourse as an anachronism because both the ‘body’ and ‘mind’ emerge as no more than coded programs of information, which in turn may be disembodied and invested with other more perennially enduring mediums.²³⁵

Yet, these imageries are not limited to humanity but expand to all entities that can or could foreseeably inherit one of the disembodied, coded programs of information. Such a disaggregate account of what is essential to a legal person enables law to summon new, partly overlapping conceptualizations of personhood.²³⁶

Subsuming all objects from stones to humans in a single pool that could merit legally relevant personhood shares much with wider post-humanist scholarship. According to Rosi Braidotti, the posthuman condition “means that matter is not dialectically opposed to culture, nor to

²³² See Irma Van der Ploeg, *The Illegal Body: “Eurodac” and the Politics of Biometric Identification*, 1 ETHICS & INFO. TECH. 295 (1999); AJANA, *supra* note 147.

²³³ See Nedim Karakayali, *Two Ontological Orientations in Sociology: Building Social Ontologies and Blurring the Boundaries of the “Social,”* 49 Soc. 732 (2015).

²³⁴ *Id.* at 738.

²³⁵ BAXI, *supra* note 207, at 206-207.

²³⁶ See, e.g., CARY WOLFE, WHAT IS POSTHUMANISM? 57–61 (2010) (regarding animals).

technological meditation, but continuous with them.”²³⁷ As an essentially deconstructive move, the posthuman condition returns elements of legal personhood to its constitutive parts. Hence, there is a space for shamanism²³⁸ and animism²³⁹ as cultural practices as much as neural networks²⁴⁰ and fetal surgery²⁴¹ as technological events to construe new persons that flourish alongside and partly overlapping the legal person of adult human beings. In a world where everything and everyone can be a person, as in the animistic tradition, the value law can attribute to personhood obviously diminishes—both in good and in bad. On a positive note, multiplication of personhoods to cover diverse entities eradicates the current pitfalls linked to centrality of narrowly defined apex of personhood. The populous mass of diverse personhoods from electronic to animistic, or from orangutan to autonomous vehicle, would grant a legal recognition to a wider range of entities without having to demote human beings.²⁴² Moreover, equating personhood with matter would demystify the criteria upon which law grants rights and duties to entities. With such an expansive category of entities capable of commanding rights, law would have to reassess many of those relations presumption of humans as actors has clouded. For example, to what extent a weak artificial intelligence merely responding to sensory stimuli ought to be held responsible from any damage caused?

Ultimately, the reason to theorize legal personhood cannot be solely to render the category barren and featureless catchall. Turning personhood into featureless and barren serves as such no function. The purpose for doing so is to highlight multifarious tasks personhood does for law, many of which go unnoticed in the everyday functioning of law. Removing the illusion of its precise contours, a featureless object *qua* person serves to highlight those functions and relations, and as such, creates a countercurrent to a narrative of personhood bound to humanity. Which legal relations truly necessitate existence of a human actor and why? Juxtaposing a naked, object-like person to the fuller contours of a legal person bound to humanity provides a diffraction that can guide the reassessment or simply facilitate the closer scrutiny of those legal relations. Thus, alongside its emancipatory potential, a material account of personhood exposes legal relations by showing that a legal person was never

²³⁷ ROSI BRAIDOTTI, *THE POSTHUMAN* 35 (2013).

²³⁸ See Alvarez-Nakagawa chapter in this volume, 18 *GERMAN L.J.* (2017).

²³⁹ See Casper Bruun Jensen & Anders Blok, *Techno-animism in Japan: Shinto Cosmograms, Actor-network Theory, and the Enabling Powers of Non-human Agencies*, 30 *THEORY, CULT. & SOC.* 84 (2013).

²⁴⁰ See John Danaher, *The Threat of Algocracy: Reality, Resistance and Accommodation*, *PHIL. & TECH.* 1 (2016); Lawrence B. Solum, *Legal Personhood for Artificial Intelligences*, 70 *N. CAROL. L. REV.* 1231 (1992).

²⁴¹ Irma Van der Ploeg, “Only Angels Can do without Skin”: *On Reproductive Technology’s Hybrids and the Politics of Body Boundaries*, 10 *BODY SOC.* 153 (2004).

²⁴² Compare to some of the present proposals for animal personhood that rely on sentience that would remove personhood from many humans.

simply a bundle of rights and duties, but a powerful idea that has shaped legal relations even when never articulated. Laying bare the person as nothing but an object enables a reformulation or reassessment of those legal relations to serve, say, other than strictly human ends—of granting trees with standing and apes with copyrights.

To map the role legal personhood serves in diverse legal relations, both interpretations of legal personhood—as a right-and-duty-bearing-unit and as a featureless object—are needed. To reveal personhood’s role, the two are to be used together to find where, if anywhere, effects of personhood are noticeable.²⁴³ Seeing what effects a change has reveals, in part, in which, often unarticulated, ways legal relations have integrated the legal person within them. The articles of this special issue are all tentative steps in understanding how personhood is embedded in more or less obvious ways in a wide range of legal phenomena.

The articles that make up this Special Issue may be divided into two distinctive, if not overlapping, categories. In the first category, authors embark on a series of case studies that investigate specific instances where seemingly stable conceptions of legal personality are problematized. Probing the many invented traditions, myths, and utopias outlined in this introduction, these interventions cover the key areas of law where contemporary legal personality surfaces as an essential concern for the legal relations in question. The human body,²⁴⁴ the post human body,²⁴⁵ the doctrinal body,²⁴⁶ and the corporate body²⁴⁷ are drawn to the fore, and all have their doctrines, ontologies, and politics assessed. In the second category, the articles are more concerned with the future of legal personality and its ramifications. The main commonality between these interventions relates to suspicion of the *persona/res* distinction and their willingness to unearth competing hybrid theories of personality,²⁴⁸ regulation,²⁴⁹ political community²⁵⁰ and, ultimately, law.

²⁴³ See Donna Haraway, *The Promises of Monsters: A Regenerative Politics for Inappropriate/d Others*, in CULTURAL STUD. 295, 300 (Lawrence Grossberg, Cary Nelson, & Paula A. Treichler eds., 1992).

²⁴⁴ See Lisette ten Haaf chapter in this volume, 18 GERMAN L.J. (2017); Tuo Yu chapter in this volume 18 GERMAN L.J. (2017).

²⁴⁵ See Jannice Käll chapter in this volume, 18 GERMAN L.J. (2017).

²⁴⁶ See Ukri Soirila chapter in this volume, 18 GERMAN L.J. (2017).

²⁴⁷ See Mikko Rajavuori chapter in this volume, 18 GERMAN L.J. (2017).

²⁴⁸ See Alexis Alvarez-Nakagawa chapter in this volume, 18 GERMAN L.J. (2017).

²⁴⁹ See Mika Viljanen chapter in this volume, 18 GERMAN L.J. (2017).

²⁵⁰ See Susanna Lindroos-Hovinheimo chapter in this volume, 18 GERMAN L.J. (2017).

Situating the impacts of the personhood and thinghood mostly in the present, the special issue nevertheless begins by confronting the past.²⁵¹ In an article that expands—both in terms of substance and method—beyond the outlined dualist structure, *Visa Kurki* provides an analytic examination on the roots of legal personhood and thinghood. Expanding on our brief description on the significance of Enlightenment to the development of contemporary myths of personhood, Kurki traces the intellectual history of thinghood. Turning to present, Kurki then applies his analytic scheme to one of the most contested contemporary things, the animal.

The first set of articles focuses on the human body, and particularly its earliest forms, embryos and fetuses. As discussed above, the biotechnologies are responsible for perhaps the most intrusive destabilizations in natural and legal personhood. They deeply problematize the origins of quintennial personhood and force clear political borders on our physical bodies. In these circumstances, the case studies by *Lisette ten Haaf* and *Tuo Yu* provide a clear view into two national legal constellations which determine how varied conceptualizations of person, or lack thereof, mutate both the objects of inquiry and the possible legal relations that courts and legislators can use their space to maneuver.

ten Haaf's article explores the status of the unborn and future child within the Dutch legal context. Her article works on the boundaries of personhood and the feasibility of tentatively alluring answers for protecting unborn and future children from harm. *ten Haaf's* analysis indicates, through the characteristic choices of the Dutch law, ramifications for considering an entity to be one with rights and with personhood or, alternatively, one with interests. Both choices trigger different legal mechanisms, while neither choice is evidently better than the other. As such, *ten Haaf's* article is an insightful indication of the power of legal artifacts as well as a useful reminder of the limits of personhood as a protective bulwark.

Yu's article tackles Chinese legal context, which, while greatly influenced by the Continental tradition, presents a rather unique setting for developing the notions on the unborn. In *Yu's* account, the famous one child policy and the lax abortion legislation emphasize the role of civil law concept of the person when Chinese courts, scholars, and the legislator seek to respond to rapid technological change. Contextualized in Chinese case law and the recent adoption of the new civil code, *Yu's* article provides significant possibilities for comparative studies while illuminating Chinese responses to borders of natural and legal personality.

The article by *Jannice Käll* takes a leap from the human to the post-human body. Positioned within the posthuman turn in social theory, *Käll* provides a thorough examination of the concept of “data subject,” a curious but crucial concept developed in the European data protection regime. In her analysis, the strained relationship between the immaterial data and the material body provides an opening to deconstruct subjectivity, analyze it as an

²⁵¹ See *Visa Kurki* chapter in this volume, 18 GERMAN L.J. (2017).

embodiment of advanced capitalism, and offer an alternative normative reading of legal persons and things in the age of big data.

The second set of case studies turn to international law as bodies of law. Opting for the lens of Roberto Esposito's political philosophy, both *Ukri Soirila* and *Mikko Rajavuori* investigate the recalibration of international legal personality along the Esposito's person/thing distinction. *Soirila* takes issue with the emerging "law of humanity," an intellectual tradition, if invented, that places an individual and not a state, at the center of international law as the new quintennial international legal person. In *Soirila's* view, the utopia of the humanity's law does not survive the critical intervention posed by Esposito's broad philosophical framework. Instead of offering radical redemption, construing international legal personality from the perspective on an individual rather reproduces the same immunitary consequences that flow from the Enlightened personality.

While remaining in broadly similar theoretical framework, *Mikko Rajavuori* uses Esposito's concepts to gauge international legal personality in investment treaty arbitration. Introducing the perspective of a state-owned enterprise, a corporate body, in the discussion, *Rajavuori* analyses the creation, maintenance, and ramifications of international legal personality. Juxtaposing doctrinal and postcolonial narratives, *Rajavuori's* intervention is positioned in the liminal stage between traditions and myths of personhood.

In the second stream of articles, *Susanna Lindroos-Hovinheimo*, *Mika Viljanen*, and *Alexis Alvarez-Nakagawa*, pursue their own distinctive paths in the search of a principled way forward in imagining legal relations that a different concept of personhood could bring forward.

Susanna Lindroos-Hovinheimo focuses on the individual as the epicenter of the unique political community known as the European Union. Interested in the place of a subject in a community, her discussion is structured on Jean-Luc Nancy's ontology of singular plurality—suggesting subjectivity be conceptualized as both singular and plural. *Lindroos-Hovinheimo* makes a sweeping claim about the task of European politics and the reconfiguration of subject within the European project.

In contrast to a range of recent interventions, including many articles in this Special Issue that juxtapose changes in legal personhood with rapid technological change, the article by *Alexis Alvarez-Nakagawa* offers a welcome escape into the arcane. Drawing primarily on anthropology, *Alvarez-Nakagawa* makes a unique argument that weaves together legal magic, shamanism, and even cannibalism in search of a framing that transcends the persons/things distinction and provides an alternative to law.

The final piece shifts the lens from the law's person to its strategies and consequences. Rooting his discussion in cybernetic and regulation theory, the article by *Mika Viljanen* explores how various modern branches of law, such as capital adequacy regulation, operate

by affecting the make-up of cybernetic organisms, new kinds of legal subjects that destabilize former conceptual boundaries between humans and non-humans. Ultimately, Viljanen argues also that the cyborg turn into law to lead to distinct *cyborg legality* that feeds upon the shades of grey in law's effectivity and inverts its normal temporality.

All of the articles step from a concrete and present legal conundrum and provide it a reading by reflecting it in the flickering light of personhood. They offer a unique way to glance into what law was, is, and what it might be if we were to reconsider the legal person or even explore its contours in more detail. As always with utopias, the future is where the promise lies. The ideas law and legal scholarship have come to attach to personhood are numerous, but they often seek solely to address the function of personhood as a gatekeeper: a stopgap to prevent yet another affront to human dignity or a sanctuary from the peering eyes of the public. In our utopia, personhood stands for all of those relations and more by highlighting what is taken for granted. The persistence of legal personhood as what remains mostly unarticulated in legal relations conceals well the extent with which personhood shapes our present understanding of law. By talking more about what is right before our eyes, that which we have learned to pass over, is hopefully merely a modest utopia—a utopia these articles will make that much closer to reality.

Special Issue

Traditions, Myths, and Utopias of Personhood

Animals, Slaves, and Corporations: Analyzing Legal Thinghood

Visa Kurki*

Abstract

The Article analyzes the notion of legal “thinghood” in the context of the person–thing bifurcation. In legal scholarship, there are numerous assumptions pertaining to this definition that are often not spelled out. In addition, one’s chosen definition of “thing” is often simply taken to be the correct one. The Article scrutinizes these assumptions and definitions. First, a brief history of the bifurcation is offered. Second, three possible definitions of “legal thing” are examined: Things as nonpersons, things as rights and duties, and things as property. The first two definitions are rejected as not being very interesting or serving any heuristic function. Conversely, understanding legal things as property is meaningful, useful, and helps to understand what it means to say that animals are legally things. Defining things as property has certain rather important implications, which are analyzed at the end of the Article. For instance, not everything needs to be either a person or a thing: The historical institution of outlawry involved treating individuals neither as legal persons nor as legal things. One must conclude that the person–thing bifurcation is less fundamental than is often assumed.

* Researcher, University of Helsinki, PhD (Cantab). I would like to thank the following natural and artificial persons. First, Toni Selkälä and Mikko Rajavuori for their helpful comments on a draft of this paper, as well as all the participants of the Persons/Things Workshop in Turku for the enlightening discussions; second, my supervisor Matthew Kramer, who has been a great source of support and encouragement during my PhD project; and finally, the Kone Foundation for their generous grant that enabled me to pursue a PhD in Cambridge.

A. Introduction

The terms “person” and “thing” are used in numerous contexts—mundane, literary, and academic. Especially when the two terms come together in academic writing, they often refer to a supposed person–thing bifurcation existing in our moral or legal thinking.

In the legal setting, this bifurcation is presented in roughly the following way. We—or our legal systems or our conceptualizations of the law—divide the world into two parts: Persons and things. Persons are those who hold rights and whose interests are protected by the legal system, whereas things do not hold rights and exist merely for persons to use. It is sometimes implicitly or explicitly assumed that this division would be exhaustive: Every entity in the universe is classifiable either as a person or as a thing, and there is no third category—*tertium non datur*.¹

Examples of the person–thing distinction abound. Many civil codes of civil-law jurisdictions contain distinct chapters addressing persons and things; this is the case with the German Civil Code (*Bürgerliches Gesetzbuch*, or BGB). In BGB, things are understood as the property of persons. Another example of where the person–thing distinction is often invoked is when jurists attempt to understand and explain the legal status of animals. For instance, the U.S.-based Nonhuman Rights Project and its founder Stephen Wise argue that nonhuman animals cannot currently hold legal rights because they are legal things.² The legal status of animals will be a major test-case here for different theories of thinghood. Other central examples include the historical institution of slavery, which is sometimes explained as the treating of human beings as things,³ and the interesting double status of the corporation, which is both a thing—*vis-à-vis* its owners—and a person—*vis-à-vis*, say, its clients.⁴

Compared to the other articles in this Special Issue, this Article pursues a distinctive methodology. This Article does not make normative arguments regarding, for example, whether animals should be treated as property. Rather, its aim is to bring more clarity to the discourse by exposing some of the ambiguities and problems pertaining to the label “thing.”

¹ See e.g., SASKIA STUCKI, GRUNDRICHTE FÜR TIERE 175 (2016).

² See generally Steven M Wise, *Hardly a Revolution—The Eligibility of Nonhuman Animals for Dignity-Rights in a Liberal Democracy*, 22 VT L. REV. 793 (1998).

³ Steven Wise endorses this understanding of slavery as well. See *id.* Older examples include, for instance, the Oxford jurisprudence professor Thomas Holland, who wrote that slaves are things, being “Objects of Rights and Duties.” See Thomas Erskine Holland, THE ELEMENTS OF JURISPRUDENCE 68 (1880).

⁴ See generally Katsuhito Iwai, *Persons, Things and Corporations: The Corporate Personality Controversy and Comparative Corporate Governance*, 47 AM. J. COMP. L. 583 (1999).

Much like with “person” or “legal person,” it should not simply be assumed that “thing” has some given, established meaning or that it could be used to draw legal conclusions without specifying its meaning first. Similarly, one should not take as a given that everything is either a person or a thing. This Article argues that the best definition of “thing” is as property, and not every thing needs to be a person or property. The Article is thus primarily analytic rather than normative in nature.

The essay is structured as follows. Section B will provide a historical background for why “person” and “thing” are defined in legal thought the way they are. Both concepts have their origins in Roman legal thought, but our current understanding of them has more to do with how 16th century legal scholars started employing old Roman labels and ideas to systematize legal thought. Those ideas were developed by German legal scholars and philosophers, and then imported to the Anglophone world by John Austin. Section C will identify three modern ways of defining thinghood in legal discourse: A thing is (1) anything that is not a person, (2) rights and duties, or (3) an ownable object—property. The Article will then argue that among these three definitions, the third one is the most apposite. Finally, the Article will point out some implications following from adopting this definition.

The focus here is exclusively on *legal* things. Much like legal personhood is a concept distinct from other types of personhood, legal thinghood should be treated as a specifically legal notion. In moral philosophy, “person” is often used to denote beings that have ultimate value and/or that can hold rights, whereas “things” are only endowed with instrumental value and/or are unable to hold rights. This moral person–thing distinction can very well be a useful and illuminating basic division, but the same does not have to be true of legal personhood and thinghood.⁵

This Article pertains to a larger project: To provide an account of legal personality that is theoretically defensible and fruitful. A successful analysis should shed light not only on the paradigmatic cases of legal personhood and thinghood, but also on the more difficult issues such as the legal status of animals and the historical institution of slavery. This Article will be using slaves and animals as central—though by no means the only—examples here, as well.

B. The Historical Background of the Person–Thing Distinction

I. Persons and Things in Roman Law

⁵ Some moral philosophers have proposed different classifications. For Peter Singer, sentience is sufficient for ultimate value, but he reserves the label “person” for self-conscious rational beings. See PETER SINGER, PRACTICAL ETHICS (1993).

As is often the case, one should start with the Romans. Legal scholar Gaius famously divided law into that of persons (*personae*), things (*res*), and actions (*actiones*) in his introductory book *Institutes*.⁶ It is not at all established, however, that Gaius proposed dividing the reality into three principal parts. Slaves, for instance, were mentioned both as things and as persons; nowhere in the *Institutes* is it mentioned that slaves would not be persons.⁷ The Gaian trifurcation seems rather to have been a practical way of organizing the relevant legal rules under three categories. The law of persons was, according to Gaius, the law of statuses: How different individuals are treated differently depending on whether they are Roman or non-Roman; free or slaves; under the control of a *paterfamilias* (head of family) or not; and so on. This is consistent with the fact that the primary meaning of *persona* had to do with one's role or appearance rather than denoting an individual, as "person" most often does today.⁸ Hence, the law of persons was about the different statuses human individuals could have in the Roman society. The law of things was, roughly speaking, what we would call property law; things were divided between the corporeal and incorporeal. Finally, the law of actions had to do with the enforcement of obligations.⁹

The *Institutes* likely did not propound a strict, mutually excluding bifurcation between persons and things. It is more probable that the idea of the strict person–thing distinction was conceived much later. *Institutes*, written originally around 160 AD, would later be incorporated with some changes into the major text of Roman law, *Corpus Iuris Civilis*, on which much of Western legal scholarship is based. The *Corpus* would serve as an inspiration for the new type of legal scholarship that sought to understand legal materials in terms of general principles and concepts.

II. The Early Modern Era and "Rights over Things"

It would seem that the French law professor Hugues Doneau (also known as Hugo Donellus) took the first steps in developing a technical legal concept of personhood. Doneau, a member of the Renaissance humanist movement, studied the *Corpus* critically and attempted to establish the systematic foundations of the law.¹⁰ He uses the word *persona*

⁶ GAIUS, INSTITUTIONES OR INSTITUTES OF ROMAN LAW (Edward Poste trans., 4th ed., 1904).

⁷ See especially P.W. DUFF, PERSONALITY IN ROMAN PRIVATE LAW 6–25 (1938).

⁸ See, for instance, Christopher Gill, *Personhood and Personality: The Four-Personae Theory in Cicero, De Officiis I*, in OXFORD STUDIES IN ANCIENT PHILOSOPHY: VOLUME VI 169 (1988).

⁹ The law of persons is mainly addressed in Book I, the law of things in Book II, and the law of actions in Book IV. GAIUS, *supra* note 6.

¹⁰ See Ernst Holthöfer and Johanna M Baboukis, *Doneau, Hugues*, in THE OXFORD INTERNATIONAL ENCYCLOPEDIA OF LEGAL HISTORY (Stanley N. Katz ed., 2009). Doneau was not the first humanist jurist; he was preceded by several scholars

in a new, technical sense in his main work, *Commentarii in iure civili* (“Commentaries on the Civil Law”). *Persona* is now the point of departure of legal analysis, and any individual that has a positive *status libertatis, civitatis, and familiae* is a *persona*.¹¹ There is an analogy here to the original idea of *persona* as a role, as one’s legal personality would now refer to one’s legal roles in the civil society. Doneau did not yet clearly distinguish between *homo* and *persona*. This was done by the German jurist Hermann Vultejus. According to Vultejus, *homo* refers to a human being, whereas *persona* is a *homo habens caput civile*, a human being with a civil standing. Vultejus uses the word *caput*, which, as noted, the Roman jurists occasionally used to refer to the kind of legal standing that free men had and slaves lacked.¹² Vultejus, however, seems to be the first to have defined these terms clearly, and the first to have claimed that slaves lacked legal personality—that they were not *personae*.

The great 17th century natural lawyer Hugo Grotius continued on the path paved by Doneau, employing a systematic approach to legal doctrines that would replace “the disorderly assemblage of formularies, commentaries and glosses characteristic of medieval legal scholarship.”¹³ Grotius is renowned for his foundational work on the theory of international law, but he also worked on systematizing domestic law in his *Introduction to Dutch Jurisprudence*. He wrote: “In order to understand rights of persons to things, since law exists between persons, to whom the right belongs, and between things, over which the right extends, we must treat first of the legal condition of persons, secondly of the legal condition of things.”¹⁴ Here, the mutual exclusivity is much more palpable than in the *Institutes*.

who would start systematizing Roman law in a critical manner. See Peter Stein, *Systematization of Private Law in the Sixteenth and Seventeenth Centuries*, in *ENTWICKLUNG DER METHODENLEHRE IN RECHTSWISSENSCHAFT UND PHILOSOPHIE VOM 16. BIS ZUM 18. JAHRHUNDERT 122–3* (Jan Schröder ed., 1998).

¹¹ Christian Hattenhauer, “*Der Mensch Als Solcher Rechtsfähig*”—*Von Der Person Zur Rechtsperson*, in *DER MENSCH ALS PERSON UND RECHTSPERSON 44–46* (Eckart Klein & Christoph Menke eds., 2011).

¹² *Id.* at 47–9.

¹³ NE Simmonds, *Grotius and Pufendorf*, in *A COMPANION TO EARLY MODERN PHILOSOPHY 210* (Steven Nadler ed., 2002).

¹⁴ HUGO GROTIUS, *THE JURISPRUDENCE OF HOLLAND 15* (R.W. Lee trans., 1926). See also JR Trahan, *The Distinction between Persons and Things: An Historical Perspective*, 1 *J. CIVIL L. STUD.* 9, 12–13 (2008). One should note, however, that Grotius did not use the Latin derivative *persoon* but rather the word *mensch*—archaic for *mens*, “human being”—in the Dutch original. The Dutch original reads as follows: “Wat het eerste belangt, om ‘t selve welt te verstaen, alsoo ‘t recht bestaet tusschen de menschen, dien het recht toe-komt, ende tusschen de zaecken, daer over het recht streckt, zoo state eerst te handelen van de rechtelicke gestaltenisse der menschen, ende daer nae der zaecken.” HUGO DE GROOT, *INLEIDINGE TOT DE HOLLANDSCHE RECHTS-GELEERDHEID 6* (2d ed., 1910).

III. Things as “Objects of Rights” According to Leibniz

After Grotius, many German philosophers and thinkers would start employing the person–thing distinction. The ethos of the Enlightenment and philosophical rationalism of the 17th century would lead to a particular type of natural law scholarship in Germany. Hugo Grotius had still been rooted in the scholastic and humanist traditions, but the natural law scholarship that would succeed him attempted to depart both from the Christian scholasticism and from Roman law toward a putatively “ahistorical” type of legal scholarship. Legal works of this era can even be described as quasi-mathematical in nature; they were attempts to derive answers to any legal problem from a set of basic axioms.¹⁵

Gottfried Leibniz was an important representative of the natural law tradition. One of his many projects involved the creation of a civil code for Holy Roman Emperor Leopold I.¹⁶ Leibniz was strongly influenced by Grotius, and he employed the Roman trifurcation in his attempt to build a system of private law. Incorporating the basic elements of person, thing, and action, his system defined them respectively as the *subject*, *object*, and *cause of a right*. The concept of right would thus serve as the fourth basic concept. He compared these concepts to the basic terms of geometry:

[B]oth have elements and both have cases. The elements are simples (*simplicia*); in geometry figures, a triangle, circle etc.; in jurisprudence an action, a promise, a sale, etc. Cases are complexions (*complexiones*) of these, which are infinitely variable in either field. Euclid composed the *Elements of Geometry*; the elements of law are contained in the *Corpus Juris* To us it seems thus: the [simple] terms from whose complexion there arises the diversity of cases in the law are persons, things, acts, and rights.¹⁷

¹⁵ See FRANZ WIEACKER, *A HISTORY OF PRIVATE LAW IN EUROPE 199–278* (1995) for a thorough exposition of the legal scholarship of this era.

¹⁶ ROBERT BERKOWITZ, *THE GIFT OF SCIENCE. LEIBNIZ AND THE MODERN LEGAL TRADITION* 17 (2005).

¹⁷ GOTTFRIED WILHELM LEIBNIZ, *SÄMTLICHE SCHRIFTEN UND BRIEFE, SECHSTE REIHE, ERSTER BAND 189* (2nd ed., 1990). English translation from Latin in Alberto Artosi, *Leibniz: Logico-Philosophical Puzzles in the Law*, in *PHILOSOPHICAL QUESTIONS AND PERPLEXING CASES IN THE LAW* xxv (Bernardo Pieri & Giovanni Sartor eds., 2013).

According to Leibniz, these four basic terms are present in any particular legal situation. First, subjects or persons—which can be natural (*naturalia*,) or artificial (*artificialia*)¹⁸—have the capacity to hold rights (*iura*). The holding of a right means that a person has the “moral power to execute his or her will”¹⁹; a right imposes on some other person “the moral necessity to forebear some right,” which Leibniz terms an obligation (*obligation*). In addition, every right pertains to a thing—an object—and is acquired on the basis of an act or cause.²⁰ Peter König describes the system as follows: “When one asks: who against whom?, one is asking about the subject of rights and duties, when one asks: to what?, [one is asking] about the object of a right, and when one asks: on what ground?, [one is referring] to the *causa*.”²¹

There are some exceptions to the basic rule that persons are the subjects and things are the objects of rights. Things, such as animals, could occasionally own things: For instance, a bridle could be bequeathed to a horse. On the other hand, in family relationships, persons could occasionally be the objects of rights, if a person was under the power of another.²² It seems thus that Leibniz continued along the path paved by Grotius: Understanding things as “objects of rights” is not so different from understanding them as those “over which the right extends.”

Leibniz also seems to have been one of the last authors that paid attention to the third category of actions. Grotius had already been much less interested in actions than in the other two categories, and ever since actions have received much less attention from legal and moral thinkers than the first two.²³ This development is understandable, given that Romans likely lacked the concept of a “subjective” right that exists in modern Western legal thinking. For Romans, *actiones* afforded redress in different ways, and an “action” could

¹⁸ LEIBNIZ, *supra* note 17, at 189.

¹⁹ BERKOWITZ, *supra* note 16, at 57.

²⁰ *Id.* at 56–57.

²¹ “*Sofern man fragt, wer gegen wen? fragt man nach dem Subjekt des Rechts und der Verpflichtung, sofern man fragt: auf was? nach dem Objekt des Rechts, und sofern man fragt: aus welchem Grund? nach der causa.*” Peter König, *Das System des Rechts und die Lehre von den Fiktionen bei Leibniz*, in *ENTWICKLUNG DER METHODENLEHRE IN RECHTSWISSENSCHAFT UND PHILOSOPHIE VOM 16. BIS ZUM 18. JAHRHUNDERT* 156 (Jan Schröder ed., 1998).

²² Klaus Luig, *Die Privatrechtsordnung im Rechtssystem von Leibniz*, in *GRUND- UND FREIHEITSRECHTE VON DER STÄNDISCHEN ZUR SPÄTBÜRGERLICHEN GESELLSCHAFT* 356 (Günter Birtsch ed., 1987).

²³ Certain contemporary authors do make some mention of actions. For instance, Tomasz Pietrzykowski maintains that this is “the standard conceptual framework of the legal thinking, which, from Roman times, has divided reality principally into three categories: persons, things and actions.” Tomasz Pietrzykowski, *Law, Personhood and the Discontents of Juridical Humanism*, in *NEW APPROACHES TO THE PERSONHOOD IN LAW* 13, 16 (Tomasz Pietrzykowski & Brunello Stancioli eds., 2016).

include both lawsuits and self-help.²⁴ On the one hand, modern legal systems distinguish between rights and the legal procedure pertaining to their enforcement, which is why procedural law does not need to be included in an account of the world outside of law.²⁵ Moral philosophy, on the other hand, is relatively uninterested in the details of the legal enforcement of rights. Thus, it is understandable that moral philosophers have paid little attention to the third Gaian category.

IV. Kant, Hegel, and the Historical School

The person–thing bifurcation was central to the moral and legal philosophies of the immensely influential Immanuel Kant and G.W.F. Hegel. For instance, according to Kant, persons had a dignity (*Würde*), whereas things had only a price (*Preis*).²⁶ Even though both Kant and Hegel were familiar with Roman law, they, like Grotius, did not seem interested in the third category of actions.

Kant’s moral philosophy is founded on the categorical imperative, the second formulation of which demands that we never treat the humanity in ourselves and in others purely as a means to an end, but always also as an end in itself. Conversely, things may be used purely as means. They do not have a value, but only a price.²⁷ One can see a connection to the Roman-influenced person–thing distinction, and this is no coincidence: Kant was familiar with Roman law and took it to be superior to the German law of his time.²⁸

In addition to Kant’s legal philosophy, one must take account of G.W.F. Hegel’s “philosophy of right,” which was strongly influenced by Kant’s works. Hegel employed the person–thing distinction to the same extent as Kant. In Hegel’s work, persons have the “capacity for right” (*Rechtsfähigkeit*), which he terms the *abstract right*—personality can simply be understood as the abstract basis for the right to things.²⁹

²⁴ See generally Ernest Metzger, *Actions*, in A COMPANION TO JUSTINIAN’S INSTITUTES 208 (Ernest Metzger ed., 1997).

²⁵ Procedural law is naturally of central interest to lawyers and judges, but it does not have to do with construing an “inventory” of the non-legal world.

²⁶ IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS*, 4:435 (Mary Gregor trans., 1998). See also Christine M. Korsgaard, *Kantian Ethics, Animals, and the Law*, 33 OXFORD J. LEGAL STUD. 629 (2013).

²⁷ *Id.* at 631.

²⁸ IMMANUEL KANT, *METAPHYSICAL ELEMENTS OF JUSTICE. PART I OF THE METAPHYSICS OF MORALS* xxxi (1797).

²⁹ GEORG WILHELM FRIEDRICH HEGEL, *ELEMENTS OF THE PHILOSOPHY OF RIGHT* § 36 (1820). One should note that the German word *Recht* can denote both “a right” and “law.” *Rechtsfähigkeit* can be translated as “capacity for right(s)” or “legal capacity.”

[P]ersonality alone confers a right to *things*, and consequently that personal right is in essence a *right of things*—‘thing’ [*Sache*] being understood in its general sense as everything external to my freedom, including even my body and my life. This right of things is the right of *personality as such*.³⁰

The “right of personality” is thus the capacity to hold rights to things, and things are anything external to persons. This is related to the idea of a “sphere of freedom” that persons hold in relation to things that are external to them. Persons can “place” their will in “any thing,” whereby the thing “becomes *mine* and acquires my will as its substantial end (since it has no such end within itself), its determination, and its soul.”³¹ Animals are also things, which is why they can be owned, as Hegel explicitly notes.³²

Hegel’s idea of the sphere of freedom would be echoed in some German jurists’ works. Hegel’s general emphasis on the role of history as a process which would realize the freedom of persons and the “objective spirit”—*Geist*—of a people³³ would also inspire the Historical School of jurisprudence of the late 18th century and the first half of the 19th century. Its most important proponent was Friedrich Carl von Savigny, whose scholarship would have a lasting impact on the legal thinking of much of the Western world. In his major work, *System of the Modern Roman Law*, Savigny propounded a theory of legal personality, which equated legal personality with the capacity to hold rights (*Rechtsfähigkeit*). Savigny also introduced the term *Rechtssubjekt*, “legal subject” or “subject of law/right(s),” as a synonym for “legal person.”³⁴ John Austin seems to have been the first Anglophone legal theorist to employ the Continental views on personhood and thinghood in his works. He had studied in Bonn, Germany, and had become acquainted with Roman law and Continental legal scholarship.

³⁰ *Id.* at § 40. (emphasis in original, word in brackets by translator).

³¹ *Id.* at § 44.

³² *Id.*

³³ See GEORG WILHELM FRIEDRICH HEGEL, *THE PHILOSOPHY OF HISTORY* (2001).

³⁴ The first appearance of the term *Rechtssubjekt*—or its 19th century spelling *Rechtssubject*—in the text corpus *Deutsches Textarchiv* is in Savigny’s *System*. Yves Charles Zarka claims that Leibniz was the first to use the phrase *subjectum iuris* (“subject of law”). Yet, Leibniz’s use of the phrase was different from the use of it since Savigny, as becomes apparent from the example employed by Zarka: *Deus est subjectum juris summi in omnia*, that is, “God is the subject of supreme law over all things.” Yves Charles Zarka, *The Invention of the Subject of the Law*, 7 *BRITISH J., FOR THE HIST. PHIL.* 245, 258–9 (1999).

At that time, Bonn was still dominated by natural law thinking, rather than the Historical School, though Austin would become familiar with both schools.³⁵ He was persuaded by the systematic approach of German jurisprudence and used it in his lectures which he started delivering at University College London in 1829. Some of his lectures were published during his lifetime as *The Province of Jurisprudence Determined*, which is mainly concerned with expounding Austin's general theory of positive law. The end of the book, however, contains an outline of the rest of his lectures wherein he already makes numerous references to persons. He writes for instance: "There are certain *rights* and *duties*, with certain *capacities* and *incapacities* to take rights and incur duties, by which *persons*, as subjects of law, are variously determined to certain *classes*."³⁶

The influence of Continental scholarship is clear in this passage, as can be seen when Austin identifies persons as "subjects of law"—assumedly a translation of the German *Rechtssubjekt*. He also introduces the distinction between rights *in rem* and rights *in personam* to Anglophone jurisprudence and discusses the bifurcation of law into that of persons and that of things.³⁷

Most of Austin's remarks about personhood and thinghood in *Province* are made *en passant*, whereas a whole chapter is dedicated to such questions in his *Lectures on Jurisprudence*, published posthumously in 1879. In *Lectures in Jurisprudence*, he makes reference to "the modern Civilians," that is, the Continental jurists of his time:

['Human being'] is the meaning which is given to the term person, in familiar discourse. . . . Many of the modern Civilians have narrowed the import of the term person as meaning a physical or natural person. They define a person thus: . . . a 'human being, invested with a condition or *status*.' And, in this definition, they use the term *status* in a restricted sense: As including only those conditions which comprise *rights*; and as excluding conditions which are purely onerous or burthensome, or which consist of duties merely.

³⁵ MICHAEL HOEFELICH, *ROMAN AND CIVIL LAW AND THE DEVELOPMENT OF ANGLO-AMERICAN JURISPRUDENCE IN THE NINETEENTH CENTURY* 11–12 (1997).

³⁶ JOHN AUSTIN, *PROVINCE OF JURISPRUDENCE DETERMINED* xvi (1832). (emphasis in original)

³⁷ *Id.* at xvi ff.

According to this definition, human beings who have no rights are not persons, but things.³⁸

Austin, however, dissents from this definition. He uses “person” in the sense “individual,” and claims that “[p]ersons are invested with rights and subject to obligations, or, at least, are capable of both.”³⁹ Austin does not completely agree with this definition. For him, “person” and “human being” are virtually the same thing; it just happens that only human beings can hold rights and bear duties. Hence, Austin even took slaves to be persons rather than things. Regardless, he introduced the Continental person–thing distinction to the English-speaking world.⁴⁰

C. Definitions of Thinghood Today

In the legal writing of today, it is often assumed that “person” and “thing” would have established meanings. “Person” or “legal person”—or, in civil-law countries, “legal subject”—is usually taken to mean “someone or something that holds legal rights,” even though there are ample slightly differing formulations. Regardless, this definition of legal personality—which will be referred to as the *legal-persons-as-right-holders view*—is often taken to be more or less axiomatically true. I have argued elsewhere against this orthodox account—defining a legal person as an entity that holds rights serves to muddle our understanding of both right-holding and legal personhood, because there are either legal nonpersons that hold rights or legal persons that do not hold rights.⁴¹

First, note that Western legal systems normally define born human children as legal persons and animals as legal nonpersons. It should follow that human children hold legal rights and nonhuman animals do not. Yet, this does not follow when applying modern jurisprudential theories of what right-holding means.

³⁸ JOHN AUSTIN, LECTURES ON JURISPRUDENCE: OR, THE PHILOSOPHY OF POSITIVE LAW, VOL I 348 (1885). I am not certain why Austin claims that civilians would have taken only right-holding to be constitutive of personhood; Wolff and Thibaut, for instance, clearly define persons as the subjects of rights and duties/liabilities (*Verbindlichkeiten*). ANTON THIBAUT, SYSTEM DES PANDEKTENRECHTS 140–41 (1803). The Prussian Civil Code of course defined personhood in terms of right-holding, as noted above. (emphasis in original)

³⁹ AUSTIN, *supra* note 38, at 358. (emphasis in original)

⁴⁰ Regarding the influence of the German personhood theories in the Nordic countries, see LARS BJÖRNE, BRYTNINGSTIDEN: DEN NORDISKA RÄTTSVETENSKAPENS HISTORIA. DEL II, 1815-1870, 349–65 (1998).

⁴¹ See generally Visa AJ Kurki, *Why Things Can Hold Rights*, in LEGAL PERSONALITY: ANIMALS, ARTIFICIAL INTELLIGENCE AND THE UNBORN (Visa AJ Kurki & Tomasz Pietrzykowski eds., 2017).

For instance, thinking that children hold the right not to be physically abused is most likely subscribing to the *interest theory*, a conception of rights that equates rights with the legal protection of interests through legal duties. The duty not to hit children is in the interests of children, which is why such duties constitute rights for the affected children. If we agree that such protections can legitimately be called “rights,” then we must likely attribute rights to nonhuman animals as well: The interests of nonhuman animals are protected in a similar, though less robust, way as those of human children. Conversely, the *will or choice theories* of rights understand right-holding in terms of choices. According to these theories, right-holding consists of being able to affect the duties of others by, for instance, choosing to enforce or waive a contract. Yet, young children are unable to make these kinds of choices even though they are widely classified as legal persons. Hence, we either have legal nonpersons that hold rights, like animals, or legal persons that do not hold rights, like young children.⁴² It is perfectly reasonable in this discourse to talk of the rights of animals, as jurists do in their everyday language talk of the rights of children—and hence occasionally employ the interest theory of rights.

Legal personality is, then, usually equated with right-holding, even if it should not be. Legal personality should instead be understood as a cluster concept, incorporating distinct, but interconnected incidents. The notion of a legal thing, on the other hand, can be understood in at least three main senses, which are related to each other, but clearly distinct.

I. Three “Things”

First, “thing” can refer to anything that is not a person.⁴³ This usage was endorsed by the German 19th century scholar Anton Thibaut and by Hegel.⁴⁴ The same definition is endorsed, at least implicitly, by all legal scholars who claim that the person–thing distinction would be jointly exhaustive, meaning that it would cover the whole universe and that there would be no third category.

⁴² For contemporary interest theories, see Matthew Kramer, *Rights without Trimmings*, in A DEBATE OVER RIGHTS. PHILOSOPHICAL ENQUIRIES (Matthew H Kramer, NE Simmonds & Hillel Steiner eds., 1998) and Joseph Raz, *On the Nature of Rights*, in MIND 194 (1984). For will theories, see Nigel Simmonds, *Rights at the Cutting Edge*, in A DEBATE OVER RIGHTS. PHILOSOPHICAL ENQUIRIES (Matthew H Kramer, NE Simmonds and Hillel Steiner eds., 1998) and CARL WELLMAN, REAL RIGHTS (1995).

⁴³ See Trahan, *supra* note 14, at 11.

⁴⁴ “By Person is meant whatever in any respect is regarded as the subject of a right: by Thing, on the other hand, is denoted whatever is opposed to person.” ANTON THIBAUT, AN INTRODUCTION TO THE STUDY OF JURISPRUDENCE § 101 (Nathaniel Lindley trans., 1885), cited in Trahan, *supra* note 14 at 15. According to Hegel, a thing in its “general sense” was “everything external to my freedom, including even my body and my life.” G.W.F. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT 71 (Allen W. Wood ed., H.B. Nisbet trans., 1991).

Second, *res* was also used by Roman scholars to refer roughly to what we could call rights and duties.⁴⁵ For instance, Gaius mentions “the right of letting rain-water fall in a body or in drops on a neighbour’s roof or area” as an example of a “thing incorporeal.”⁴⁶ This sense is still reflected in certain modern usages, such as the common law phrase “thing in action,” or “chose in action,” meaning essentially the right to sue.

Third, “thing” can refer to anything, or at least any physical object, that is susceptible to being owned. Gaius called these “things corporeal”; they were “tangible” and included “land, a slave, clothing, gold, silver, and innumerable others.”⁴⁷ Many contemporary legal scholars use “thing” in a similar manner. Jeffrey Nesteruk defines “thing” as “the subject of property,” writing that “[i]n law, ‘property’ is not a ‘thing’ although ‘things’ are the subject of property.”⁴⁸ This understanding of “thing” is also reflected in phrases such as “rights *in rem*” or “rights to things,” meaning crudely speaking property rights, as opposed to “rights *in personam*” or “rights in relation to persons,” such as contractual rights. Similarly, the phrase *res nullius* denotes an object that can be owned, but is not currently owned by anyone. Some modern civil law codifications employ this third sense of “thing” as well, defining things as physical objects that can be owned. For instance, Part II of the German Civil Code is titled “Things and animals,” which follows Part I, “Persons,” and contains rules pertaining to the possession, buying, and selling of goods. Before the year 1990, that part was called simply “Things,” but animals have since then been declared as “not things” — even if the provisions that apply to things apply to animals as well, unless otherwise provided.⁴⁹

“Thing” is used in different contexts, and none of the usages can be said to be “wrong” or self-contradictory. Nevertheless, using the same label for different concepts is prone to cause confusion and conflation, which is why it is worth considering whether preference should be given to one of the usages. I will therefore examine these usages of “thing” and determine whether they are useful legal categories that serve a heuristic or an explanatory purpose.

⁴⁵ Trahan, *supra* note 14, at 11.

⁴⁶ GAIUS, *supra* note 6, at § 14.

⁴⁷ *Id.* at § 13.

⁴⁸ Jeffrey Nesteruk, *Persons, Property and the Corporation: a Proposal for a New Paradigm*, 39 DEPAUL L. REV. 543, 543 (1990).

⁴⁹ BÜRGERLICHES GESETZBUCH [BGB] [Civil Code], § 90a.

II. Things as "Not Persons" and "Rights"

This and the next Section will address the first two conceptions, according to which things are "not persons" and "rights," focusing mostly on the "not persons" conception.

Defining a legal thing as "anything that is not a legal person" gives the word an extremely wide scope of application. Such a concept includes not only cars, houses, and animals, but also quarks, numbers, ideas, and so on. Does employing such a concept serve any heuristic purpose? Do these various entities have anything legally relevant in common that would make this category interesting? First, it is commonplace to claim that only legal persons hold legal rights and/or duties. Hence, nonpersons would be united by the fact that they do not hold any such rights or duties. Nevertheless, as already mentioned, one can reasonably say that nonhuman animals already hold legal rights even though they are currently property and not legal persons. Similarly, slaves in the antebellum United States held both rights and duties despite being property and being commonly classified as not persons.⁵⁰ Therefore, we would have things that hold rights and duties. This putative commonality between all nonpersons can consequently be dismissed.

Another potential unifying feature between all non-persons would be that all rights "pertain" to nonpersons. This is a rather multifaceted issue that will be analyzed next.

⁵⁰ For instance, Section XXVIII of the South Carolina Slave Code of 1740 penalized the willful killing of slaves:

And whereas cruelty is not only highly unbecoming of those who profess themselves Christians, but is odious in the eyes of all men who have any sense of virtue or humanity; therefore to restrain and prevent barbarity being exercised toward slaves, Be it enacted, That if any person or persons whosoever, shall willfully murder his own slave, or the slave of another person, every such person shall upon conviction thereof, forfeit and pay the sum of £700 current money.

Such a protection would constitute rights according to the interest theory.

III. Things as “Objects” of Rights and Duties

Leibniz claimed that things are “objects” of rights.⁵¹ A related claim is that rights and duties, or legal relations, always “pertain” to things.⁵² We have to be careful because it is not clear what the words “object” and “pertain” mean here—the terms are very vague. Can we give them more precise definitions that are legally interesting?

What unifies all duties is that they prescribe or permit someone to perform an act or refrain from some act. Conversely, rights are often understood as the correlative entitlements of duties. Consequently, one could say that rights and duties only pertain to acts and forbearances. As mentioned above, the interest theory of rights defines rights as interests that are protected or served by some duty, whereas the will theory of rights understands rights as control over someone else’s duty.⁵³ We do not need to pick sides between these two theories because both of them yield the same conclusion: As duties prescribe or prohibit some action and thus “pertain” to actions and forbearances, their correlative rights must also pertain to the same actions and forbearances. Yet, using the word “thing” as a synonym for “act” or “forbearance” would be odd.⁵⁴ It would be a rather radical departure from ordinary language without any conceivable benefit, as the more specific and established terms—such as “act” and “forbearance”—are better-suited for the task.

Do rights and duties pertain to something else other than acts and forbearances? Property rights and some other rights can have a “subject-matter” or a “compass” that is usually a physical object.⁵⁵ Such rights are occasionally called rights *in rem*, “rights to things.” Thus,

⁵¹ See *id.* at X. See also Tomasz Pietrzykowski & Brunello Stancioli, *Introduction: Modern Challenges to the Concept of a Person in Law*, in *NEW APPROACHES TO THE PERSONHOOD IN LAW* 7 (Tomasz Pietrzykowski & Brunello Stancioli eds., 2016) (“In other words, one may be either a subject of a party of legal relations (a person) or merely their object (a thing).”).

⁵² Hegel was rather famous for insisting that all rights pertain to things. See HEGEL, *supra* note 29, at 71. See also STUCKI, *supra* note 1, at 176.

⁵³ See generally A DEBATE OVER RIGHTS. PHILOSOPHICAL ENQUIRIES (Matthew H Kramer, NE Simmonds & Hillel Steiner, 1998). I am here talking of rights and duties as Hohfeldian legal positions, for example, as outcomes of legal interpretation. There are of course some alternative accounts of rights. According to Joseph Raz, rights are *reasons* to set someone under a legal duty. Regardless, they pertain to duties and hence to actions and forbearances. RAZ, *supra* note 42.

⁵⁴ I use the word “act” here, rather than “action,” to underscore that I’m not referring to the Gaian category of actions.

⁵⁵ John Austin was likely the first to use the compass metaphor. AUSTIN, *supra* note 38 at 874 and 973. See also JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 201 (2011):

Lawyers frequently talk about rights, not as three-term relations between two persons and an act of a certain type, but as two-term

the subject-matter of a property right is a physical object of a certain type, a banana or a mobile phone, for example. Such objects fall under the third definition of “thing” *qua* property. In this property context, saying that the right pertains to the physical object makes sense and is not overly vague, as the legal rules of ownership apply here: Bananas and mobile phones can be sold and stolen. But we cannot generalize this observation to all rights—not every right has this kind of connection to the rules of ownership. Consider X’s right not to be murdered. What does the duty “pertain” to here, other than everyone else’s conduct with respect to X? It does, of course, in some sense pertain to X’s body, but differently than how ownership rules pertain to the bodies of pets, for example. Pets can be sold and stolen because they are property; legal persons cannot, at least under normal circumstances.⁵⁶

Talking about what all rights “pertain to,” or their “objects,” can easily get either confusing, vague, or both. Different kinds of rights and duties have different kinds of salient subject-matters: With the central instances of property rights, the subject-matter is a physical,⁵⁷ clearly defined object that can be owned, whereas this is not the case with the rights and duties flowing from the legal prohibition of murder. It would be odd to assemble all these disparate subject-matters under the category of legal things.

To conclude, there is surely nothing inherently problematic or contradictory with defining a “legal thing” as “anything that is not a legal person,” but this proposed category is not very interesting or heuristically useful. Classifying an entity as a thing—*qua* not a legal person—does not tell us, for instance, whether a given entity holds rights or what kind of legal rules likely apply when dealing with these entities. This Article would propose “nonperson,” or “legal nonperson,” as a better alternative for covering the wide range of entities that are not legal persons. This simple term is much less ambiguous, and illustrates the fact that nonpersons are defined by making reference to persons: Everything that is *not* a legal person is a legal nonperson.

The second proposed definition identified “things” as rights and duties themselves. Much of the criticism that has been advanced above applies to this definition of “thing” as well. Most importantly, we have at our disposal much less ambiguous terms to discuss rights and duties,

relations between persons and one subject-matter or (in a broad sense) thing: for example, someone’s right to £10 under a contract, or to (a share in) a specified estate, or to the performing rights of an opera.

⁵⁶ The exception is of course corporations, which can be bought and sold, though not really stolen, in a literal sense.

⁵⁷ Immaterial property is, however, not physical in nature.

such as “right” and “duty”—or the more precise Hohfeldian terminology if we need to make specific distinctions.⁵⁸

IV. *Things as Ownable Objects*

As already hinted, understanding “things” as objects that are susceptible to being owned is a much more fruitful approach. Even though ownership is a cluster concept, consisting of distinct incidents that are not always present at every instance of ownership, it still serves a heuristic purpose. If something is owned, there is at least a *pro tanto* reason to assume that a certain array of legal rules applies to the object in question. For instance, property can freely be sold, donated, destroyed, and used by the owner, even if there are exceptions—the owner of a master painting can be forbidden from destroying the painting, whereas the owner of a banana may usually freely consume the fruit.⁵⁹

Understanding things specifically as property refines the claim that slaves and animals are “things.” For instance, Steven Wise has often compared the status of animals as things to that of the historical status of slaves.⁶⁰ Yet he clearly has in mind things *qua* property. Slaves were not simply legal nonpersons; they were property. The same is true of animals today. Consider the difference between slaves and outlaws—the latter being another historical category of human beings stripped of the rights that belong to persons. Both slaves and outlaws are legal nonpersons. Slaves, however, can legally be bought and sold; whereas, an outlaw is simply outside of the law’s protection and in a sense “unregulated.” A legal system would neither forbid nor enforce the sale of an outlaw. Animals are in this regard like slaves, not outlaws, because Western legal systems actively enforce the sale of animals. Though the institution of outlawry has now disappeared, the legal status of undocumented migrants resembles the status that was occupied by outlaws in some ways: Such migrants are not treated as property, but they lack—at least *de facto* if not *de jure*—most of the legal rights that are accorded to the country’s lawful permanent residents.⁶¹

⁵⁸ Wesley Newcomb Hohfeld presented his scheme in Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Legal Reasoning*, 23 YALE L. J. 16 (1913).

⁵⁹ See generally Anthony M. Honoré, *Ownership*, in OXFORD ESSAYS IN JURISPRUDENCE (A.G. Guest ed., 1961).

⁶⁰ See e.g., Steven M. Wise, *Legal Personhood and the Nonhuman Rights Project*, 17 ANIM. L. (2010).

⁶¹ I would like to thank Toni Selkälä for this example. Slavery as a legal institution has disappeared, but *de facto* slavery likely still exists. See KEVIN BALES, *DISPOSABLE PEOPLE: NEW SLAVERY IN THE GLOBAL ECONOMY* (2012).

V. Implications

This Article has now analyzed the concept of a legal thing; understanding a legal thing as property has appeared as the most meaningful definition of the concept. This Article now looks at the implications of that analysis, and in particular how it can aid in analyzing the normative discourse concerning animals.

First, some things can hold rights. Animals are property, but hold rights regardless; these rights mostly serve to limit the property rights of the owner, though they also impose duties on all human beings and corporations collectively. Similarly, slaves in the antebellum United States held certain rights toward both their owners and third parties.

Second, not everything needs to be a legal person or a legal thing—*tertium datur est*. This is true of entities that conceptually cannot be either legal persons or things—such as numbers—but also of entities that can conceptually be owned.⁶² An outlaw would be neither a legal person nor a legal thing—even if human outlawry is likely legally impossible in an era of universal human rights. Animals could potentially receive a similar status, which would involve not treating them as property, but not endowing them with legal personality in the full sense either. For instance, one could make the argument that we can indeed use animals for different purposes, but that it is wrong for the legal system to enforce animal exploitation.

Thirdly—and perhaps most interestingly—one can be *both* a legal thing *and* a legal person for certain purposes. As legal thinghood does not imply legal nonpersonality, there is nothing intrinsically problematic with this result. Business corporations are famous for having this kind of double status, as they are both the objects and subjects of property rights: Companies are owned, yet as legal persons they can also own things themselves. Nevertheless, this example is somewhat knotty; for instance, one could argue that it is not the corporations themselves that are owned, but rather their stock.⁶³ In addition, this Article maintains that being owned enables the corporations to act as legal persons, as the owners contribute to the group agency of the corporation in much the same way as members or delegates can contribute to the group agency of an association.

Regardless, it is easy to think of less problematic examples of a being that is both a legal person and property. Slaves in the United States were treated as property and as potential malefactors in the eyes of the criminal law. This is very explicit in Thomas Morris's book on

⁶² Strings of numbers can of course constitute immaterial property.

⁶³ See *e.g.*, Iwai, *supra* note 4, at 593.

slavery, Part II of which is entitled “Slaves as Property” and Part III “Slaves as Persons.”⁶⁴ An animal could also be property, but have a limited legal personality, as is exemplified by David Favre’s account of animals as “living property.” The debate over the legal status of animals can—very crudely—be divided into two camps: Welfarists and abolitionists. On the one hand, welfarists believe that animals should be protected from cruelty in many ways, but that they should not be accorded anything resembling legal personhood. Abolitionists, on the other hand, demand that animals’ status as property be abolished altogether. Favre argues for a middle position: Animals could *both* retain their status as property *and* receive a limited type of legal personhood, with accompanying rights. He writes:

Within this new property status, animals have the right:

1. Not to be held for or put to prohibited uses.
2. Not to be harmed.
3. To be cared for.
4. To have living space.
5. To be properly owned.
6. To own property.
7. To enter into contracts.
8. To file tort claims.⁶⁵

Even if this list of rights is extensive, Favre denies that animals should be classified as legal persons rather than “living property.”⁶⁶ If one wants to understand this proposal in the context of the person–thing bifurcation, one cannot understand that bifurcation as mutually exclusive.

Understanding things as property serves also to explain certain further issues regarding the legal status of slaves and animals as “things.” The fact that an object falls under the legal category of property does not only imply certain private law rights and duties for the owner and third parties—such a classification also has implications for the field of public law and criminal law. For instance, according to Finnish animal welfare law, animal welfare officials typically can only issue administrative decisions to the owners or possessors of the animals.⁶⁷

⁶⁴ THOMAS D MORRIS, *SOUTHERN SLAVERY AND THE LAW 1619-1860* (1996).

⁶⁵ David Favre, *LIVING PROPERTY: A NEW STATUS FOR ANIMALS WITHIN THE LEGAL SYSTEM*, 93 *MARQUETTE L. REV.* 1021 (2010).

⁶⁶ *Id.*

⁶⁷ See generally Birgitta Wahlberg, *Pro bono publico? En studie om fjäderfäns välbefinnande och tillsynsmyndighetens befogenheter i relation till livsmedelssäkerhet och folkhälsa*, 144 *TIDSKRIFT UTGIVEN AV JURIDISKA FÖRENINGEN I FINLAND* 1 (2008).

The private law concepts of ownership and possession—both of which pertain primarily to physical objects that are susceptible to being owned—serve a kind of indirect function in public law. Similarly, certain crimes are only applicable to things that are owned: Animals can be stolen and slaves could be stolen, whereas an outlaw could not. Natural persons can be kidnapped, but this does not constitute theft.

D. Conclusion

This Article sought to problematize legal thinghood, much like legal personhood should be problematized. Both concepts are vague, and authors employing them occasionally do so without specifying their meaning; they can also simply assume that the meaning they have chosen is the axiomatically “correct” one. The person–thing bifurcation should, however, be specified in various ways before it is used to systematize our legal thinking.

This Article argued that it is best to understand the person–thing distinction as a person–property distinction. This gives an account of legal things that has heuristic value and that can be defined positively—as something to which the incidents of ownership can apply—rather than negatively, as for instance “everything that is not a legal person.” Many negative definitions of thinghood have turned out to be problematic: For instance, the idea of understanding things as nonpersons is simply not very useful or interesting.

The legal person–thing distinction can also be a red herring regarding the perceived moral status of some entity. Sweeping claims about the moral implications of legal personhood and thinghood should at least be avoided. For instance, a moral philosopher might criticize the fact that corporations are legal persons on the ground that the law treats as intrinsically or ultimately valuable something that is merely of instrumental value. Corporations should, according to the philosopher, be treated as legal things because they are moral things, but such a claim would require further argumentation. It is not in any way obvious that the legal personality of corporations has anything to do with their perceived moral value—nor do most jurists likely think that. A budding group of business associates who decide to found a corporation are probably not seeking legal recognition for their putative claim that the common venture would be of ultimate value. Rather, for example, they want the corporation to own property—things—that is distinguishable from the property of the members.

Moral considerations may, in fact, require endowing moral things with legal personhood. For instance, Protocol 1 Article 1 of the European Convention on Human Rights—which protects property—includes not only natural persons, but also artificial persons, such as

business corporations, within its ambit.⁶⁸ One could very well make the argument that some moral considerations underlie the inclusion of artificial persons. Protecting the property of corporations is likely understood as protecting, by extension, the property rights of the stockholders. Thus, extending the protections of legal personality to a moral thing could even be the morally right thing to do.

The legal category of thinghood and the label of “thing” can have moral import in many other ways as well. For instance, the civil codes of certain countries, such as Germany, have relabeled animals as “animals” instead of “things.” It is rather interesting that this relabeling does not purport to change the legal treatment of animals in any way. The German Civil Code, for instance, is explicit in that the provisions that apply to things apply to animals as well, unless otherwise provided.⁶⁹ Saskia Stucki has—when addressing the Swiss Civil Code, which has undergone largely the same relabeling with regard to animals as the German Civil Code—summarized this change in legal taxonomy as follows: “[A]nimals are not treated as things but *like* things.”⁷⁰ As the legislative change does not effect any direct legal consequences, it must be interpreted as conveying a certain message about the perceived moral value of animals.

Finally, it should be questioned whether the person–property distinction is as fundamental as it is occasionally taken to be. It does occupy a central position in Western legal thinking, but if things can hold rights, persons can be things, and some entities are neither persons nor things, perhaps the distinction in fact explains fewer issues than is occasionally assumed. Additionally, if everything does not need to be a person or a thing, whole new categories could be introduced. Perhaps the category of animals will eventually become a truly independent and idiosyncratic third category. For instance, Tomasz Pietrzykowski has proposed that animals be reclassified as “non-personal subjects of law.” They would not receive the rights that legal persons hold today. Yet, they would receive the right to have their interests considered.⁷¹ This proposal is, in fact, quite close to how animals are treated today. Animals are currently things *qua* property, but also protected by the animal welfare

⁶⁸ See also MARIUS EMBERLAND, *THE HUMAN RIGHTS OF COMPANIES: EXPLORING THE STRUCTURE OF ECHR PROTECTION* (2006); DAVID JASON KARP, *RESPONSIBILITY FOR HUMAN RIGHTS: TRANSNATIONAL CORPORATIONS IN IMPERFECT STATES* (2014) and Peter Oliver, *Companies and Their Fundamental Rights: A Comparative Perspective*, 64 INT’L & COMP. L. Q. 661 (2015).

⁶⁹ BGB, *supra* note 49.

⁷⁰ *Tiere [werden] rechtlich also statt als Sachen wie Sachen behandelt*. Saskia Stucki, *Rechtstheoretische Reflexionen zur Begründung eines tierlichen Rechtssubjekts*, *Developments and Perspectives in the 21st Century*, in ANIMAL LAW—TIER UND RECHT 146 (Margot Michel, Daniela Kühne & Julia Hänni eds., 2012).

⁷¹ Tomasz Pietrzykowski, *The Idea of Non-personal Subjects of Law*, in LEGAL PERSONHOOD: ANIMALS, ARTIFICIAL INTELLIGENCE AND THE UNBORN (Visa A.J. Kurki & Tomasz Pietrzykowski eds., 2017).

law, which grants them rights and does not apply to other legal things, such as bananas and mobile phones. Thus, one could make the argument that the law of many Western countries already purports to take the interests of animals into account—though whether it in fact succeeds in this task is another question. Regardless, if Pietrzykowski's proposal were implemented, we would have returned to a trifurcation—though a trifurcation very different from the one proposed by Gaius. The almost-forgotten Gaian classification of actions would have been replaced by the category of animals.

Unborn and Future Children as New Legal Subjects: An Evaluation of Two Subject-Oriented Approaches—The Subject of Rights and the Subject of Interests

By Lisette ten Haaf*

Abstract

The desire to prevent prenatal and preconceptual harm has led to a call for more legal protection for unborn and future children. This Article analyzes the way in which the Dutch legal system has responded to this call by identifying and critically scrutinizing two strategies employed in this response. First, to protect the unborn child from maternal harm, the concept of legal personality has been expanded to include the unborn child, albeit only the viable fetus. This strategy is criticized because its measures are presented as if they follow directly from the existing legal framework, whereas these measures are in fact based on several obscured assumptions and, therefore, bring to bear a new perspective on the concept of legal personality. The second strategy is applied to the future child. Instead of expanding an existing category, a new category is created to offer the future child a place within the law. The future child is addressed as the subject of legal relevant interests instead of rights. Although this strategy seems promising, it still faces difficulties when applied to the future child, which presumably has an interest in non-existence.

* Lisette ten Haaf is a Ph.D. candidate in Legal Theory at the Vrije Universiteit Amsterdam, Faculty of Law.

A. Introduction

As discussed in the introduction of this special issue, the classical distinction between persons and things is still present in contemporary jurisdictions.¹ A legal person is the bearer of rights, the actor in law, while a thing is the object of those rights, and is thereby at the disposal of the person. Traditionally, the category of the legal person was only open to human beings and corporations. In recent years, however, the person-thing distinction has been put under pressure due to an increasing demand for legal protection for different types of entities.² This call for legal protection is often formulated in a plea for the recognition of legal rights; for example, by arguing that entities such as animals, robots, and artificial intelligence have rights that need to be protected. This novel approach has caused a shift in the traditional person-thing dichotomy, and now offers these entities some form of legal protection. Entities that used to be regarded as objects are now becoming subjects.

The call for legal protection from harm also extends to future human life. Due to developments in human biotechnology and, in particular, Assisted Reproductive Technologies (ARTs), the potential to control human reproduction has rapidly increased. As a result, having a child has become more a matter of intentional choice rather than chance.³ This shift has given rise to “the idea of respect for the child as a future autonomous person with his or her own interests.”⁴ According to some, this respect for an unborn or future child also involves providing legal protection for these new, not yet existing, entities. As a result, law is currently challenged by two new entities: The conceived, yet unborn child and the unconceived, future child. If the law wants to give these entities some form of legal protection, it must incorporate these entities into the existing legal system. In other words, the law needs to qualify these entities to address them. The question is: Are these entities of future life protected as persons or things?

This question concerns how the Dutch legal system could and should protect the unborn and the future child from harm. The main obstacle for the attribution of legal personality to the future child and the unborn child is the fact that legal personality traditionally starts at birth. For this reason, the future and unborn child, in principle, are not seen as legal persons, that is, as subjects of rights. Nevertheless, this has not stopped the Dutch legislature and courts: In recent years, new legal measures have emerged, aiming to protect the unborn and future

¹ See Toni Selkälä & Mikko Rajavuori chapter in this volume, 18 GERMAN L.J. (2017).

² See *id.*

³ Of course, the technology cannot guarantee a child to prospective parents. Yet, it cannot be denied that human reproduction has become more at our disposal, and because of this, there is a strong felt responsibility toward unborn and future children.

⁴ Guido Pennings et al., *ESHRE Task Force on Ethics and Law 13: The Welfare of the Child in Medically Assisted Reproduction*, 22 HUM. REPROD. 2585, 2585 (2007).

child from possible harm⁵ caused by, for example, a genetic defect or harmful conduct of the child's mother or parents. Moreover, though these recent measures seem far-reaching in themselves, there is increasing demand for further legal protection. These measures are characterized by a subject-oriented approach—they focus on the subjects' individual interests, rights, and risk of being harmed. More specifically, these measures are justified in terms of the benefits they provide to an individual subject, for example, the unborn or the future child. As a result, the unborn and future child have become a subject in the law. In sum, in Dutch law, there is an emerging trend in which the classic person-thing distinction has been reinterpreted with regard to new entities. Dutch law treats the unborn and the future child as a sort of person rather than a thing, even though these entities do not meet the standard requirements for legal personality.

The aim of this Article is twofold. First, it focuses on the concept of the legal person and identifies two subject-oriented strategies developed in Dutch law offering legal protection to some of these new entities. Second, this Article critically scrutinizes both strategies and points out some problematic aspects of both approaches. The first strategy for legal protection is discussed in Section B—the expansion of legal personality to protect the unborn child from harm. The focus lies on the protection of the unborn child from maternal harm, which is a type of foreseeable harm. Consequently, because the harm is foreseeable, prevention measures take place before the child's birth. After discussing the available measures for preventing this predictable type of harm, I argue that these measures imply a problematic expansion of legal personality. Section C deals with the second strategy, which is endorsed with regard to the future child. Instead of presenting the future child as the default legal subject—a legal person, and thus a subject of rights—it is presented as a subject of legally relevant interests. Although this strategy seems more promising, it still faces one problematic obstacle in particular when applied to the future child's interest in non-existence: Even the interest approach requires an entity to exist in the future, while the future child in this case is characterized by its non-existence. It should be noted that the main purpose of this Article is not to compare both strategies to each other, but to point out the pitfalls of both subject-orientated strategies. This analysis and reflection answers the main questions of this Paper: Which strategies are currently being used to incorporate the unborn and the future child in Dutch law and why are these subject-oriented strategies problematic?

Although this Article mainly focuses on Dutch law, it should be noted that the call for more legal protection for these future entities exists in other legal systems as well.⁶ The Dutch

⁵ See J.H.H.M. Dorscheidt, *Developments in Legal and Medical Practice Regarding the Unborn Child and the Need to Expand Prenatal Legal Protection*, 17 EUR. J. HEALTH L. 433, 442 (2010).

⁶ See, e.g., E.A.J. Beveridge et al., *What Protection for the Unborn Child of a Psychologically Vulnerable Adult?*, 96 J. R. SOC. MED. 92 (2003); see Kenneth McK. Norrie, *Protecting the Unborn Child from its Drug of Alcohol Abusing mother*, in *Law and Medicine: Current Legal Issues* 223 (Michael Freeman & Andrew Lewis eds., 2000); see PROJECT PREVENTION, <http://www.projectprevention.org/>. Also, Wicks acknowledges that even though the behavior of

legal system is of special interest because it has developed a variety of measures that offer legal protection to these entities, and because it is using innovative legal techniques where other countries seem more reluctant to do so. Furthermore, the applied strategies and the justification given for these strategies show the downfalls of both subject-oriented approaches. Nevertheless, there has been little in-depth discussion about the adopted approaches. Not only do I reflect upon the Dutch legal framework and Dutch legal-doctrinal literature, but I also include legal philosophical literature, for three reasons. First, this discussion puts the Dutch examples into a more general context. It shows that Dutch doctrine does not stand on its own, but is interconnected with legal philosophical thought. Therefore, the discussion of the Dutch legal system is also relevant for other legal systems struggling with the incorporation of new entities. Second, using legal-philosophical literature helps to elaborate and explain certain concepts that have not received sufficient attention in Dutch doctrinal discussion. Finally, an in-depth elaboration of the concepts currently employed helps to evaluate current strategies.

B. The Unborn Child and the Expansion of Legal Personality

I. Legal Protection for the Unborn Child

The knowledge that excessive drinking, smoking, and drug abuse during pregnancy or the refusal of prenatal care can harm the unborn child has put a spotlight on maternal harm—prenatal harm caused not by a third party, but by the unborn child’s mother itself.⁷ This type of harm does not occur suddenly, like prenatal harm caused by, for example, a motorist who knocks down a pregnant woman and thereby hurts the fetus. On the contrary, it is foreseeable and therefore avoidable. The question is which legal measures can be adopted to prevent maternal harm during the pregnancy.

In the Netherlands, there are two ways to protect the unborn child from harmful maternal conduct.⁸ Both measures have been developed in adjudication and constitute new

pregnant women is barely regulated in the United Kingdom, “it is an issue often debated in legal circles.” Elizabeth Wicks, *The State And The Body: Legal Regulation Of Bodily Autonomy* 42 (2016). Moreover, as Tuo Yu’s contribution points out, the Chinese legal system is also confronted with the demand for more legal protection of the unborn child. See Tuo Yu chapter in this volume, 18 GERMAN L.J. (2017).

⁷ Several jurisdictions have addressed the question of whether alcohol or drug abuse during the pregnancy can be criminalized. For example, in the UK, a test case in which a girl suffering from damage caused by her mother’s drinking during the pregnancy claimed that she was entitled to payments from the Criminal Injuries Compensation Authority. This case triggered the question of whether alcohol abuse during the pregnancy constitutes a criminal act. The claim, however, was rejected. See *CP (a Child) v. First-tier Tribunal (Criminal Injuries Compensation)* (2014) EWCA Civ 1554. In 2014, the US state of Tennessee enacted the Fetal Assault law, which permitted women to be prosecuted if they illegally used drugs while pregnant and their child was born addicted or harmed because of the drug abuse. Due to a sunset clause, the law remained in effect until July 2016.

⁸ See Dorscheidt, *supra* note 5 (providing a more elaborate discussion of this topic).

interpretations of existing legal norms. One possibility is imposing a family supervision order on the unborn child. If a family supervision order is issued, the legal authority of the parent(s) is restricted, and a family guardian is appointed to oversee the child's development. Importantly, imposing the family supervision order on the unborn child arguably raises a number of serious legal issues. The regulation on the family supervision order, article 1:254 of the Dutch Civil Code, refers to a minor, implying a child already born. To apply the regulation to the unborn child, the judge uses the *nasciturus* fiction, codified in article 1:2 of the Dutch Civil Code: "If it is in the interest of the child of whom the woman is pregnant, it will be regarded as already born. If it is born dead, it is considered never to have existed at all."⁹ With the help of this fiction, the unborn child is treated as if it had been born, so that a family supervision order can be issued.

The second way to protect the child is by admitting the pregnant woman to a psychiatric hospital.¹⁰ Importantly, compulsory admission cannot force the pregnant woman to accept prenatal care. Nonetheless, it does prevent her from taking drugs or alcohol, and treatment of her mental condition might make her more tolerant towards prenatal care. Based on article 2 of the Dutch Compulsory Admission to Psychiatric Hospitals Act (the CAPH act), such an order can be issued if someone, due to a mental disorder, is a danger to him- or herself or to "another person."¹¹ In case law, judges have ruled that the unborn child may count as "another person."¹² Contrary to the juvenile protection cases, the court does not appeal to the *nasciturus* fiction to make the interests of the unborn child legally relevant. It simply assumes that the unborn child counts as "another person."

II. Problematic Aspects

Although these developments in law are presented as self-evident and as if they logically follow from the existing legal framework, they give rise to several fundamental questions that have not received sufficient attention so far. First, it is not explained why the unborn

⁹ In Dutch: "Het kind waarvan een vrouw zwanger is wordt als reeds geboren aangemerkt, zo dikwijls zijn belang dit vordert. Komt het dood ter wereld, dan wordt het geacht nooit te hebben bestaan."

¹⁰ Similar cases appeared in other jurisdictions with different outcomes. For example, in *St George's Healthcare NHS Trust v S*; *R v Collins and others ex parte S* (1998) 2 FLR 728, a pregnant woman refused highly recommended treatment and was admitted to a psychiatric hospital against her will. The British Court, however, laid the emphasis on the mother's autonomy and her right to refuse medical treatment. See generally Melissa Nau et al., *Psychotic Denial of Pregnancy: Legal and Treatment Considerations for Clinicians*, 39 J. AM. ACAD. PSYCHIATRY L. 31 (2011) (discussing the approach of this topic in the United States).

¹¹ In Dutch: "een of meer anderen."

¹² See District Court Amsterdam April 25, 2000, *kBJ* 2000/47, H.J.J. Leenen; see District Court Amsterdam February 21, 2006, *Bj* 2007/6, J.K.M. Gevers (following the judgment in *kBJ* 2000/47). In another case, the pregnant woman was not admitted because addiction itself does not constitute a mental illness, but the judge emphasized the importance of protecting the unborn child against maternal harm. See District Court Amsterdam April 6, 2005, *Bj* 2005/19, W. Dijkers,

child fits into these categories that are usually restricted to existing people, that is, legal persons. Moreover, the court assumes that only the viable fetus deserves legal protection, but its attempt to justify the significance of the boundary of viability is not convincing; the justification is logically inconsistent and based on assumptions that are at odds with the general legal doctrine. Finally, as a result of the way these measures are applied, legal personality is attributed to the viable, unborn child. Consequently, one can say that birth is no longer a requirement for the attribution of legal personality; instead, the promise of existence is enough. In sum, regardless of whether legal personality should be attributed to the unborn child, I argue that these measures implying an expansion of the legal person do not follow from the law as logically as is often assumed.

1. *The Unborn Child as Another Person*

The first problematic aspect of these new developments is the lack of an explanation of why an unborn child can be understood as “another person” in the context of compulsory admission to a psychiatric hospital. In these cases, there is a strong focus on the interests of the unborn child, as courts stress the risks the unborn child faces due to its mother’s conduct or mental condition.¹³ These risks, however, can only be treated as a substantive ground for compulsory admission if the unborn child is seen as “another person.” Leenen, a renowned Dutch health law scholar, argues that the term “another person” can only refer to legal persons. Because the unborn child has no legal personality, as legal personality starts at birth, this concept cannot apply to the unborn child. Leenen also refers to the European Convention of Human Rights, where the term “everyone” does not include the fetus.¹⁴ Interestingly, the same line of reasoning was used in a similar British case: Despite the fact that a pregnant woman put her unborn child at risk, the Mental Health Act Commission concluded that the term “‘other persons’ does not include an unborn child irrespective of gestation and viability,” for an unborn child has no legal rights.¹⁵

Whereas the British Commission argued that there was no legal ground for admission,¹⁶ Dutch judges opted for a more extensive interpretation of the notion of “another person.” Ignoring the argument posed by Leenen, they emphasized the unwanted consequences of

¹³ See Leenen, *supra* note 12; Dijkers, *supra* note 12; Gevers, *supra* note 12.

¹⁴ Two years after Leenen’s annotation, the ECHR left a little bit more wiggle room in the *Vo* case. In that case, it refused to answer the question of whether the term “everyone” in Article 2 of the Convention also included an unborn child. The Court left it up to the member states to decide on the legal status of unborn life. See *Vo v. France*, App. No. 53924/00, para. 85 (Jul. 8, 2004), <http://hudoc.echr.coe.int/>.

¹⁵ Beveridge, *supra* note 6, at 92.

¹⁶ There was no legal ground not only because the unborn child has no legal rights, but also because the patient did not have a mental condition that could justify the compulsory admission. Also in other areas of UK law, it is assumed that the unborn child’s lack of legal personality prevents it from being regarded as “another person.” See *CP (a Child) v First-tier tribunal (Criminal Injuries Compensation)*, *supra* note 7, para. 39.

refraining from interfering. By not interfering, the child would only be protected from harm after its birth, while the harm is caused in the prenatal stage. In one case, the judge states that this result is unacceptable, and that it is necessary to include the unborn child in the concept for this reason.¹⁷ Several scholars have applauded this extensive interpretation, approving of the fact that the interests of the unborn child are taken into account.¹⁸ They argue that the extensive interpretation is in line with the law because the preamble of the Convention on the Rights of the Child states that the child deserves protection both before and after its birth. Moreover, in Dutch law, the fetus gains more legal protection during its development: Once the fetus is viable, which, according to Dutch law, is after 24 weeks, abortion is no longer legal. For this reason, viability constitutes an important reason to offer the unborn child more legal protection. Even though the court does not refer to the developmental stadium of the unborn child, Dutch health law lawyer Gevers believes that the fetus can only count as an “another person” if it is viable because viability is such an important demarcation point.¹⁹ Another legal scholar, Dijkers, also claims that in these cases, the interests of the unborn child should be taken into account, at least in the final stages of the pregnancy.²⁰ Neither considers, however, the question of whether the stronger status of the fetus implies that it can be treated as “another person,” and thus as a legal person for the purposes of the Compulsory Admission to Psychiatric Hospitals act. Only Flinterman addresses this point, connecting the CAPH act to the *nasciturus* fiction. She argues that once the fetus is viable and there is no possibility of abortion, it follows from article 1:2 BW that the fetus should be treated as a person,²¹ to the extent its interests require.²² In other words, the unborn child is treated as a legal person in this context, but only once it has reached viability.

¹⁷ See Gevers, *supra* note 12.

¹⁸ See Dorscheidt, *supra* note 5, at 444; Gevers, *supra* note 12, at 66; see J.G. Sijmons, *Reactie op FJR 2009*, 3, 31 TIJDSCHRIFT VOOR FAMILIE EN JEUGDRECHT 15, 16 (2009).

¹⁹ See Gevers, *supra* note 12, at 66.

²⁰ See Dijkers, *supra* note 12.

²¹ Interestingly, contrary to what Flinterman argues, Article 1:2 CC does not directly state that the future child is deemed to be a legal-person whenever its interests require this. Instead, it is considered to be born. Of course, according to legal doctrine, legal personality coincides with the biological birth and as Van Beers has pointed out, the only benefit the unborn child could gain from being considered to already be born, is to be considered a legal person. See Britta van Beers, *Persoon en lichaam in het recht. Menselijke waardigheid en zelfbeschikking in het tijdperk van de medische biotechnologie* 231 (2009).

²² See Dia Flinterman, *Het ongeboren recht op ongeschonden bestaan. Jeugdbescherming en jeugdstrafrecht nader bekeken*, in HONDERD JAAR ZORG OM HET KIND 73, 75 (A.P. van der Linden ed., 2006).

2. *The Importance of Viability*

Another aspect that raises questions is the assumed importance of the viability boundary. The court attributes a certain significance to viability that does not follow from law or legal doctrine. Whereas in the case law on mental health law it is merely assumed that the protection only includes a viable fetus, in the family supervision order it is explicitly stated that the order can only be applied if the mother is pregnant for 24 weeks or more. In one case the court ruled that the family supervision order cannot be imposed on a 17-week old fetus. The argument the judge used to justify this claim was, however, rather peculiar. He claimed that “allowing the request would imply, because the fetus is not yet viable, that the mother is placed under supervision” for which there is no legal basis in Dutch law.²³ The judge stressed the importance of viability, but he failed to give a convincing argument. After all, both the non-viable and the viable fetus are still in the womb of the mother. For this reason, viability does not change the effect of imposing a family supervision order on an unborn child: In both cases, the mother is put under supervision, for which, as the court argued, there is no legal basis in law. In short, the argument used is logically inconsistent. If the fact that, effectively, the mother is put under supervision is the reason why the order cannot be imposed on the non-viable unborn child, it should not be any different for the viable unborn child; after all, just like the non-viable fetus, the viable fetus child is still in the mother’s womb. Therefore, in both cases the mother is affected in the same way by the family supervision order. In conclusion, this argument cannot justify the distinction between the viable and the non-viable unborn child.

This weak argumentation raises the question of why viability should be deemed so important for the legal protection of the unborn child. Some authors refer to the doctrine of progressive protection: The unborn child, or fetus, gains a stronger legal status during the pregnancy, during which nidation and viability mark the most important stages of development.²⁴ The moment of viability is of legal importance because after 24 weeks, abortion is no longer allowed. Consequently, it is argued, if the fetus is protected from abortion, it also must be protected from other possible harms, such as maternal harm. This protection would fit with the stronger legal status given to the fetus upon attaining viability. Moreover, attributing legal protection to a non-viable fetus may be problematic for a second reason. It may collide with the existing abortion regulation.²⁵ After all, if the non-viable fetus is protected from lesser forms of harm, can we still justify not protecting it from abortion, which has the largest impact on the fetus? In short, the possibility of legal abortion seems to have had a general impact on what sort of protection is deemed justifiable for the fetus.

²³ District Court Dordrecht February, 7 2012, *JPF* 2012/82, P. Vlaardingerbroek.

²⁴ See Dijkers, *supra* note 12, 125; see Gevers, *supra* note 12, at 66.

²⁵ See M.W. Bijlsma et al., *De mogelijkheid van ondertoezichtstelling van het nog ongebooren kind bij twijfels over de veiligheid van de thuissituatie*, 152 *NEDERLANDS TIJDSCHRIFT VOOR GENEESKUNDE* 895, 898 (2008).

Notably, connecting the *nasciturus* fiction and legal protection to viability is based on two assumptions that are problematic because they contradict both the fiction itself and legal doctrine as well. First, the presumed connection suggests the *nasciturus* fiction can only be applied to the viable fetus, as if only the interests of the viable fetus are legally relevant and require legal protection. Nonetheless, the application of the *nasciturus* fiction is not restricted to the 24th week and subsequent weeks.²⁶ On the contrary, the Civil Code itself speaks of “the child of whom the woman is pregnant” (and not merely the viable fetus). Additionally, Dutch legal doctrine states that the fiction may be properly applied in an earlier developmental stage, in any event, from the moment of nidation²⁷ or perhaps even before that.²⁸ There is therefore no legal rule stating that only the interests of a viable fetus may be taken into account.

The second problematic assumption arises because restricting the application of the *nasciturus* fiction and applying the protection measures to only viable fetuses gives the impression that the non-viable fetus deserves no legal protection. One judge even argued that “because the mother is only 17 weeks pregnant, the unborn child deserves no legal protection.”²⁹ Several Dutch legal scholars, however, have stressed that a non-viable fetus also deserves some protection. Leenen acknowledges the importance of viability, for the purposes of international law, pointing out that a fetus younger than 24 weeks can have interests that ethically and legally deserve protection.³⁰ Dutch health law scholar, Blankman, calls the 24 week-boundary “artificial” if there is, in an earlier stage of the pregnancy, an evident desire to carry the child to term, and the unborn child faces the risk of being harmed. He claims the degree of probability and extent of the harm should be equally decisive.³¹ In addition, judge and family law scholar, Vlaardingerbroek, states that the fetus or unborn child deserves legal protection from the moment of conception, instead of viability, and that this protection does not interfere with the woman’s right to abortion.³² Legal philosopher, Van der Burg, takes it one step further, claiming that the boundary of viability is only relevant with regard to abortion. According to him, it does not attribute legal protection or a specific legal status to the unborn child in any other respect; for this reason, the mother cannot be

²⁶ See B. Sluyters, *Civielrechtelijke aansprakelijkheid voor medische fouten voor de geboorte*, in *Grenzen aan de Zorg; Zorgen aan de Grens* 133, 134 (J.K.M. Gevers & J.H. Hubben eds., 1990).

²⁷ See H.J.J. Leenen et al., *Handboek Gezondheidsrecht* 348 (2014).

²⁸ See Asser 1*, *Personen- en Familierecht* § 1 Section no. 23 (J. de Boer ed., 2010); see Wibren van der Burg, *De juridische ‘status’ van het embryo: een op drift geraakte fictie*, *TJDSCHRIFT VOOR GEZONDHEIDRECHT* 386, 388 (1994).

²⁹ Vlaardingerbroek, *supra* note 23.

³⁰ See Leenen, *supra* note 27, at 352.

³¹ See K. Blankman, *Reactie op FJR 2009*, 3, 31 *TJDSCHRIFT VOOR FAMILIE EN JEUGDRECHT* 13, 13–14 (2009).

³² See Vlaardingerbroek, *supra* note 23.

forced, before or after the fetus has become viable, to live a healthy life or to stop smoking or drinking.³³

The examples discussed in this paper show courts struggling to justify their claims on the status of the unborn child. This struggle seems to focus particularly on the distinction between viability and non-viability, and the attempt to rationalize its significance. Nonetheless, the mere fact that the viable fetus may have a stronger legal status does not imply that only the interests of the viable fetus are worth protecting. Although this strict distinction applied in adjudication cannot fully be explained from a legal perspective, there may be an explanation from a social perspective. Before the 24th week, a woman may lawfully terminate her pregnancy. Hypothetically, we are left with the odd situation in which, to get rid of unwanted outside interference, a woman may lawfully take the ultimate step to end her pregnancy, for without the unborn child, there is no ground for interference. In this case, the interference ostensibly aiming to protect the unborn child would backfire: Instead of securing the child's health interests and ensuring it comes into existence without health damage, the child would not come into existence at all. If the prospective mother, however, does not choose to abort within the legal limit, then it can be said there is an *intention* to bring the child into existence.³⁴ After all, if she did not want to carry the child to term, she would have opted for an abortion when she had the chance. Only after 24 weeks can one be confident of the child's birth, and hence its legal recognition.³⁵ Because the unborn child's future existence is certain at that point, all things being equal, it is argued, there is a compelling reason to anticipate the future child's existence and prevent it from being harmed. Because of this reasoning, the viability boundary gains a new meaning because it no longer just marks a step in the embryo's development. Instead, it has become the demarcation point of a future person's existence becoming more certain, requiring new forms of protection for this future person.³⁶

³³ See Van der Burg, *supra* note 28, at 393–94. Due the new developments, it seems that nowadays it is possible to push the mother into a certain life style by controlling her behavior.

³⁴ See also Flinterman, *supra* note 22, at 75.

³⁵ Of course, the possibility remains that for some reason, the child is stillborn.

³⁶ It is at this point that two different perspectives on unborn life become clear. Certain actions, such as (late term) abortion or selling embryos are prohibited or heavily restricted in order to protect the embryo itself. Because of the inherent value of the embryo, whether because it has human dignity or because it is part of human life, the embryo itself challenges the person-thing distinction, as has been elaborated by Selkälä and Rajavuori in the introduction. See Selkälä and Rajavuori, *supra* note 1. However, other actions, like the mother's behavior, are regulated or controlled, or an attempt is made to do so, not because of the need to protect the embryo, but to protect the child that will be born in the future and that, at that moment, will suffer from the negative consequences of these actions.

III. The Expansion of Legal Personality: From Existence to a Promise of Existence

So far, I have discussed two concerns, namely the lack of explanation why the unborn child fits into certain categories and the lack of a sound explanation why viability is deemed so important. The two maternal harms preventing measures developed in Dutch adjudication are not only challenged by these two concerns. They also imply a problematic expansion of legal personality to include the viable, unborn child. In addition, this expansion changes the relation between legal personality and existence. The promise of existence has become sufficient for the attribution of legal personality.

Existence, or being alive, can be seen as a requirement for legal personality. In Dutch law, as in most legal systems, legal personality starts at the moment of birth³⁷ and ends at the moment of death. Although this rule is not part of statutory law, legal philosopher Van Beers claims that the relation between birth and legal personality can also be derived from the *nasciturus* fiction found in article 1:2 of the Dutch Civil Code. The fiction designates the child can be regarded as already born, and the only benefit it gains from this fiction is the attribution of legal personality. Moreover, the relation between existence and legal personality becomes also visible in the second sentence of this article: If the child is born dead, it is considered never to have existed at all. From this, Van Beers concludes that existence or being alive is a condition for legal personality.³⁸

Of course, exceptions can be made with the help of this *nasciturus* fiction: The unborn child is regarded as born when its interests require. This fiction enables a person to legally respond to events that took place before his or her birth. In Roman law, the *nasciturus* fiction enabled a child to inherit from its father if the latter died before the child's birth. In our age, the fiction is also used in cases of prenatal harm, so that a child, once born, can respond to a legal wrong that occurred during the pregnancy.³⁹

³⁷ See Asser 1*, *supra* note 28, no 21.

³⁸ See Van Beers, *supra* note 21, at 231.

³⁹ For example, in the *Baby Kelly* case, the fiction was used. Importantly, the *Baby Kelly* case was not about prenatal harm, but about wrongful life. In UK law, the *nasciturus* principle is also used to award damages in case of prenatal injury or other types of prenatal harm. See Norrie, *supra* note 6, at 225.

Although it is not clearly stated which interests can invoke the fiction,⁴⁰ many have argued that it should also extend to health interests.⁴¹ This may seem unproblematic at first, yet taking health interests into account differs in one important aspect—the fiction is applied at a different moment. The fiction can only be applied if the child is born alive; after all, if it is born dead, it is considered never to have existed at all.⁴² Therefore, to be certain whether the fiction can be applied, it is better to wait until the child is born. In property law, on the one hand, it is no problem to wait until the child is carried to term and born before its interests are retrospectively considered. The distribution of the inheritance or filing of claims for damages can be postponed until the child is born without the risk that this will affect its interests. On the other hand, to secure health interests, especially in cases of prenatal harm, interference needs to take place before the child is born to prevent damage.

This proactive, anticipatory application of the *nasciturus* fiction constitutes an expansion of legal personality. Importantly, if interference takes place during pregnancy, there is no guarantee that the child will be born alive. Especially because the child's health is affected, there is a risk the damage already done is fatal. If the child dies before birth, then it is considered never to have existed at all. Put differently, there is and never was a child that required anticipatory protection of its interests. As a result, the justification for imposing the measure that restricts the mother's freedom does not exist and has never existed. Nonetheless, the possibility that the child may not come into existence and for this reason never will exist, seems to be ignored in the Dutch legal doctrine. Instead, the focus lies on the assumed intention to bring the viable fetus into existence. The child's *possible* future existence is deemed enough to anticipate the interests and rights it will have, if it comes into existence. In sum, the measures discussed above differ from existing law on the point that the child is not yet born when the fiction is applied. At that moment, there is no absolute certainty of the child's existence. Still, considering the fact that only viable fetuses are protected this way, it can be argued there is an intention to bring the child into existence. Consequently, the actual birth is no longer necessary, as the child's assumed future existence is enough to treat it as a legal person.⁴³

⁴⁰ It is clear that the fiction pertains to property law. See Asser 1*, *supra* note 28, at no. 23. Also in other legal systems, the *nasciturus* fiction is often invoked in the context of monetary interests. See, for example, §1923 abs. 2 of the German Civil Code, which enables an unborn child to inherit from someone who died before its birth. Also Tuo Yu has pointed out the *nasciturus* fiction at least pertains to monetary interests. See Yu, *supra* note 6.

⁴¹ See Sijmons, *supra* note 18, at 15–16; see Flinterman, *supra* note 22, at 76; see R.J.P. Kottenhagen, *Botsende rechten van moeder en ongeboren kind*, TIJDSCHRIFT VOOR GEZONDHEIDSRRECHT 492, 498 (2008).

⁴² According to Norrie, the *nasciturus* principle endorsed in UK law also requires the child to be born alive. See Norrie, *supra* note 6, at 228. The requirement that the child has to be born alive in order to apply the fiction is also pointed out in the contribution of Tuo Yu regarding Chinese succession law. See Yu, *supra* note 6.

⁴³ Of special interest in this respect is Kottenhagen. He claims that with the help of a proactive interpretation of the *nasciturus* fiction, the legal duty of parents to take care of their children and secure that physical and mental wellbeing can be applied to the unborn child. As a result, once a pregnant woman does not choose for abortion, but chooses to bring the child into existence, she also accepts the moral and legal duty to take care of her unborn

IV. Final Remarks on the Unborn Child

To prevent maternal harm, Dutch adjudication has developed two measures to protect the unborn child. These measures are characterized by the expansion of legal concepts, which normally only apply to legal persons, to include the unborn child. First, Leenen has pointed out that “another person” refers to a legal person. Moreover, in the case of the family supervision order, the expansion is achieved with the help of the *nasciturus* fiction. By applying this fiction, the child is considered to be born, and therefore, to be a legal person, as far as its interests require. Further, even though existing concepts traditionally refer to existing subjects with legal personality, these have been applied to unborn children instead of creating new legislation. By treating the unborn child as already born if its interests require, the unborn child is included in these concepts. By doing so, the unborn child is regarded as a legal person. Consequently, the implications of these measures are that legal personality has been attributed to the unborn child, albeit in a limited form and in a restricted number of cases.

The expansion of legal personality is *prima facie* not contradictory to law. The rule that legal personality starts at birth has always had exceptions, hence the *nasciturus* fiction, which can create the fiction that the juridical birth took place at an earlier moment. Importantly, regardless of whether unborn life deserves legal protection from harm and should have legal personality, the strategy chosen in Dutch law does not simply follow from the existing legal framework, even though it is presented as if it does. Instead, these measures are based on several implicit and unelaborated assumptions, rendering two aspects of this strategy problematic. The first aspect—the problematic distinction between the viable and non-viable fetus—pertains to the fact that it is not deemed necessary or desirable to legally protect the unborn child against maternal harm from the beginning to the end of the pregnancy. Strengthening the legal position by legally protecting the embryo in the earliest stages of its development is especially likely to go against the existing Dutch legal framework on the embryo and abortion. Be that as it may, the strong emphasis on viability may leave the non-viable child unprotected while in the earliest stage of the pregnancy when maternal harm can cause the most damage. So, although the expansion of legal personality does offer possibilities to protect the unborn child from its mother’s harmful conduct, it also raises several questions on whether these constructions really follow from the existing legal framework, as is claimed.

child and accept adequate, prenatal care. See Kottenhagen, *supra* note 41, at 499. This, however, is an even further expansion of legal personhood and the status of the unborn child. The unborn child in Kottenhagen reasoning is not treated as an entity that will exist in the future and whose interests need to be anticipated; instead, accepting a legal duty to prenatal care in order to bring the child into existence pertains to the unborn child as a fetus and therefore, implies an enormous increase of the legal status of the embryo, rather than the unborn child.

The second problematic aspect pertains to the moment of application of the fiction. Traditionally, the fiction was applied after the child's birth because in the case of a stillborn child, no child—and therefore no legal person—has ever existed. The prevention of harm, on the contrary, requires a proactive approach because waiting for the child's birth may be too late. By that point, physical harm may already have manifested, perhaps even causing the child's death before its birth. This risk of stillbirth renders the proactive application problematic because if the child does not come into existence, the child, and consequently the justification for interfering in the mother's private life, never existed at all. Moreover, because existing legal measures to prevent harm are currently deemed only applicable to the viable fetus, it can be said the unborn child's intended existence is already enough to apply the *nasciturus* fiction and to attribute legal personality. This causes a shift in the relation between legal personality and existence; existence as a requirement for legal personality is replaced by the promise of existence.

C. The Future Child and the Subject of Interests

I. Legal Protection for the Future Child

Prenatal harm to the child does not have to be caused *during* the pregnancy; in some cases the risk of harm is inherently connected to the child's condition of existence. This is the case when, for example, the child has a severe genetic condition or when its biological parents lack the capacity to raise the child and thereby pose a risk of abuse or neglect. This type of harm cannot be prevented by influencing or guiding the woman's behavior during the pregnancy. The only way to prevent such harm is to act before the child's conception has taken place. This is the domain of the future child—the child that has not yet been conceived but might be in the future.

In Dutch law, there are several examples of regulation and legislation that explicitly refer to the future child.⁴⁴ First, the professional guidelines for access to fertility treatments⁴⁵ point out that a fertility treatment may be refused on moral grounds alone. Physicians can take the interests of the child resulting from the treatment—the future child—into account; if they believe the child does not have a reasonable chance of decent welfare, they can refuse

⁴⁴ In other jurisdictions, the interest or the welfare of the child is taken into account in decision making on the application of fertility treatments and Assisted Reproductive Technologies. One example is section 13(5) of the British Human Fertilisation and Embryology Act 2008: "A woman shall not be provided with treatment services unless account has been taken of the welfare of any child who may be born as a result of the treatment." Also in the ECtHR case *S.H. e.a. v. Austria*, the interests of the future child were considered an important factor in the regulation of Assisted Reproduction Technologies. See *S.H. e.a. v. Austria*, App. No. 57813/00, paras. 101, 105, 113 (Nov. 3, 2011), <http://hudoc.echr.coe.int/>.

⁴⁵ See NVOG Modelprotocol: Mogelijke morele contra-indicaties bij vruchtbaarheidsbehandelingen (2010).

the treatment.⁴⁶ This guideline allows physicians to exclude prospective parents with a history of child abuse or neglect, or those suffering from a mental or psychological disorder.

Another topic in which the interests of the unborn child play a central role is in the regulation of preimplantation genetic diagnosis (PGD). This technique, also known as embryo selection, can be applied when the future child runs the risk of suffering from a severe genetic condition.⁴⁷ Notably, the interests of the future child serve as the only justification for PGD. The technique may not be employed for gender selection to fulfill the parents' wish to have a boy or a girl, nor can the technique be used to select a suitable donor for a relative, if only this relative will benefit from it.⁴⁸

Whereas PGD can only be used for prevention of harm caused by a genetic condition, refusing access to fertility treatment can be used to prevent harm caused by both a genetic condition and the potential parents. Nevertheless, prevention of harm to the future child in these cases is only possible if the prospective parents require fertility treatment. Blankman correctly points out that there are barely any measures for intervention in the stage before the pregnancy.⁴⁹ He suggests the possibility of compulsory contraception. Compulsory medical treatment like this is only possible in Dutch law if the woman is incapacitated and if the treatment is beneficial for the woman herself; treatment that prevents harm to others, such as the child, is not legally possible.⁵⁰ With the help of extensive interpretation, it might be possible to issue compulsory contraception in a limited number of cases—that is, only those cases in which the woman is incapacitated and a legal guardian has consented in her place. Still, the problem lies in the fact that there are many cases in which the prospective parents are not incapacitated, and not in need of a fertility treatment, but still pose a risk for the future child. This problem has been addressed in Dutch public debate over the past few years, advocating the possibility of introducing forced contraception upon prospective parents who appear incapable or ill-equipped to raise a child, thereby exposing the child to

⁴⁶ The professional guidelines argue that this standard offers the right balance between the prospective parents' interests and right to family life and the physicians duty to provide decent health care. After all, with regard to reproductive treatments, the involved physicians have a double responsibility and must take care of the interests of both the mother and the child. The responsibility towards the future child requires that the physician does more than only securing the minimum for the child. Moreover, the professional guidelines argue that the standard of a decent chance to reasonable welfare is also internationally preferred. See NVOG Modelprotocol, *supra* note 45, at 2, 3.

⁴⁷ See Parliamentary Documents "Kamerstukken II 2005-2006, 30 300 XVI, nr 136," 1.

⁴⁸ The creation of savior siblings, or selection on HLA-type is only allowed if the procedure is necessary in the first place to select on the genetic condition for which a donor is necessary. So, only when the future child itself runs a risk to have the same genetic condition as its ill sibling which justifies the PGD process, then additional selection is allowed.

⁴⁹ See Blankman, *supra* note 31, at 14.

⁵⁰ See also Art. 7:465 BW.

physical or psychosocial harm. Although an MP of the Dutch labor party⁵¹ attempted to instigate this discussion in parliament⁵² and proponents have emphasized the necessity of this measure in public debate,⁵³ it is not possible, for now, to force contraception on people despite their incapacity to raise a child.⁵⁴ Nevertheless, this discussion does show that there is an increasing demand for more legal protection of the interests of the future child. Because the future child remains on the agenda, the legislator must find a way to deal with it.

Importantly, with regard to the legal protection of a future child, a different strategy has been endorsed. Instead of expanding legal personality, the future child is presented as a different type of subject, namely a subject of interests. As a subject of interests, the future child becomes relevant to the Dutch legal system. Legislation does not refer to the “rights of the future child,” nor does it attempt to fit the future child into existing categories; instead, it only refers to the future child’s interests. In the examples discussed here, the future child is attributed one specific interest—the interest in its own non-existence. It is assumed that in those cases in which the future child’s wellbeing cannot sufficiently be guaranteed, the child is better off if it does not exist at all. What all the different ways of protecting the future child’s interests have in common is that as a result of taking its interests into account, the child’s conception is prevented. In other words, the future child is protected by preventing its existence rather than by improving the circumstances under which it comes into existence, as is currently the practice with regard to the unborn child. By taking this approach, the Dutch legislator resorts to a wrongful life-argument, which assumes that it can be in the interest of the future child not to exist, if it has a “life not worth living” in which not even a bare minimum of wellbeing can be guaranteed, although in some legal systems the concept of “*lebensunwertes Leben*” has been rejected, with the argument that all life, despite its impairments, has a value and is worth living. Many philosophers have accepted

⁵¹ “Partij van de Arbeid.”

⁵² See Parliamentary Documents “Kamerstukken II 2009-2010, 32 405 nr. 2.”

⁵³ See J. Boonekamp, G. de Wert, R. Bergmans, *Geef een junk geld voor geboortebeperving*, NRC November 9, 2010; N. Smet, *Als je haar kind afpakt, neemt ze meteen een nieuwe*, NRC next September 2, 2011; *Zembla: Vader en moeder: ongeschikt*, VARA Nederland 2, April 13, 2012 (featuring a Dutch tv show on this topic); *Wij, rechters, willen een wet die verplichte anticonceptie mogelijk maakt*, NRC Handelsblad maart 4, 2015; *Verplichte anticonceptie bij falende ouders*, Algemeen Dagblad April 17, 2015; ‘Verplicht kwetsbare ouder tot tijdelijke anticonceptie’, *Volkscrant* oktober 1, 2016; *Rotterdam: verplicht spiraaltje bij incompetenten ouders*, Algemeen Dagblad oktober 2, 2016.

⁵⁴ Forced sterilization has been condemned by the European Court of Human Rights as a violation of Articles 3 and 8. See *V.C. v. Slovakia*, App. No. 18968/07, (Nov. 8, 2011), <http://hudoc.echr.coe.int/>. Nonetheless, the case presented before the European Court differs in two important aspects from the Dutch debate on compulsory contraception. First, the European Court of Human Rights did not have to address the question of whether forced contraception could be justified in order to protect the interests and wellbeing of the future child, as argued by the Dutch proponents of compulsory contraception. Second, the proposals in the Dutch debate pertain to a temporary, reversible form of contraception instead of sterilization.

the idea that the prevention of certain lives can be justified.⁵⁵ Contrary to the philosophical debate—which assumes that if this interest in non-existence indeed exists, however, it only pertains to the most severe and gruesome cases⁵⁶—the Dutch regulation rejects the standard of minimum wellbeing in favor of “reasonable wellbeing.”⁵⁷ Aside from raising the question of whether the assumption of an interest in non-existence is compatible with the notion of human dignity, this approach also raises the question of whether non-existence is indeed in the interest of the future child.⁵⁸ Yet, despite this criticism, the Dutch regulation appeals to the interests and welfare of the future child as a pivotal justification for its regulation of reproduction, thereby treating the future child as a subject of interests.

The attribution of interests may seem less problematic than the expansion of legal personality, because the vocabulary of interests is less bound by legal doctrine. While legal doctrine has dictated, for example, which entities can be legal persons, it has not elaborated as much on the subjectivity of interests. Therefore, other entities can also be the subject of interests. Moreover, an additional benefit is that the attribution of the subjectivity of interest does not immediately give an entity the same legal—and moral—status as a legal person. Still, this strategy gives rise to two important questions. First, what the attribution of interests means for the legal status of the entity remains unexplained. More specifically, what are the legal implications of having an interest as compared to having a right? What is the difference between the two concepts? The second question pertains to the capacity to possess an interest. Which entities are capable of having interests, and in that vein, can the future child, in the form of a non-existent entity, have interests—particularly the interest in non-existence? In order to answer these questions, we need to look beyond the regulation regarding the future child and explore a more philosophical account of interests and their relation with rights.

⁵⁵ See, e.g., John A. Robertson, *Children of Choice: Freedom and the New Reproductive Technologies* 75 (1994); Allen Buchanan et al., *From Chance to Choice* 239 (2009); Stephen Wilkinson, *Choosing Tomorrow's Children: The Ethics of Selective Reproduction* 70–71, 97 (2010); I. Glenn Cohen, *Regulating Reproduction: The Problem with Best Interests*, 96 MINN. L. REV. 423, 439 (2011); P.G. Peters, *Protecting the Unconceived: Nonexistence, Avoidability, and Reproductive Technology*, 31 ARI. L. REV. 487, 487 (1989).

⁵⁶ See Cohen, *supra* note 55, at 472–73; Joel Feinberg, *Wrongful Life and the Counterfactual Element in Harming*, in *Freedom and Fulfillment: Philosophical Essays* 3, 17 (Joel Feinberg ed., 1994); Buchanan et al., *supra* note 55, at 239; Wilkinson, *supra* note 55, at 71; Julian Savulescu, *Is there a Right not to be Born? Reproductive Decision Making, Options and the Right to Information*, 28 J. MED. ETHICS 65 (2002).

⁵⁷ See NVOG Modelprotocol, *supra* note 45, at 2. Importantly, it is highly unlikely that a same standard would be endorsed if a compulsory contraception measure ever would become reality because the higher standard used in the context of ARTs is considered justified due to the responsibility of the physician towards the child that would result from the treatment.

⁵⁸ Glenn Cohen has pointed out that in different legislation in which the future child's existence is prevented, it is justified with an appeal to the future child's interests. He also points out the problematic nature of this appeal, as it cannot be said that the future child in all these cases actually has an interest in its own non-existence. See generally Cohen, *supra* note 55.

II. *The Subject of Interests*

1. *Rights vs Interests*

Understanding the difference between legal rights and interests is complicated because of the close entanglement of the two concepts. As civil law scholar Nieuwenhuis points out, a right cannot exist without an interest.⁵⁹ Also, in legal philosophy, the relation between interests and rights is a common notion, especially in the debate on who may be the subject of rights. Many legal philosophers hold that only those entities that can have interests are capable of having rights.⁶⁰ Feinberg offers two reasons for the close link between rights and interests.⁶¹ First, he claims, “a right holder must be capable of being represented and it is impossible to represent a being that has no interests.” Furthermore, “a right holder must be capable of being a beneficiary in his own person, and a being without interests is a being that is incapable of being harmed or benefitted, having no good or ‘sake’ of its own.” According to the interests theory of rights, the relation between interests and rights is even stronger: Not only is the capacity to have interests a requirement for the capacity to have rights, the function of rights is to protect and further the rights holder’s interests. Raz, one of the main proponents of the interests theory, says one (X) has a right “if and only if X can have rights, and, other things being equal, an aspect of X’s well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty.”⁶² For Raz, rights constitute grounds for duties.⁶³ Therefore, a right is defined by referring to the duty;⁶⁴ a right exists if the rights holder’s interest is of such importance that it generates a legal obligation on the part of others not to violate that interest.

But what, then, is an interest? It has been pointed out that the concept is rather vague.⁶⁵ In her reflection upon the concept “interest” in Dutch law, *belang*, Wiggers-Rust takes a literal approach as she describes an interest as “something that affects somebody, because it

⁵⁹ See J.H. Nieuwenhuis, *Confrontatie en Compromis. Recht, Retoriek en Burgerlijke Moraal* 29 (1992).

⁶⁰ See Leonard Nelson, *A System of Ethics* 136–44 (1956); H.J. McCloskey, *Rights*, 15 PHIL. Q. 115, 126 (1965); Joel Feinberg, *The Rights of Animals and Unborn Generations*, in PHILOS. & ENV. CRISIS 43, 51, 57 (W. T. Blackstone ed., 1974); Joseph Raz, *The Morality of Freedom* 176 (1988).

⁶¹ See Feinberg, *supra* note 60, at 51.

⁶² Raz, *supra* note 60, at 166.

⁶³ See *id.* at 167.

⁶⁴ See also M.H. Kramer, *Rights without Trimming*, in *A Debate over Rights* 13 (M.H. Kramer et al. eds., 1998).

⁶⁵ See McCloskey, *supra* note 60, at 126; Lidy F. Wiggers-Rust, *Belang, Belanghebbende en Relativiteit in Bestuursrecht en Privaatrecht* 17 (2011).

affects his benefit, or his wellbeing.”⁶⁶ This definition captures what we speak of when describing the interests of the future child: The legislation that appeals to the future child’s interest is concerned with its wellbeing and the possible negative impact of physical or psychosocial harm. Wiggers-Rust’s definition can also be found in legal-philosophical literature. Raz, for example, describes it as “some aspect of one’s wellbeing.”⁶⁷ Feinberg⁶⁸ and Kramer⁶⁹ also relate interest to the entity’s wellbeing.⁷⁰ Following this definition, it must be concluded that the concept of interest is a very broad category—some aspect of one’s wellbeing or benefit can refer to almost anything, especially when considering that wellbeing has several components, such as physical, emotional, social, and psychological components.

Wiggers-Rust emphasizes that “interest” is indeed a much broader category than that of a “right,” and therefore, “interest” and “right” are not interchangeable concepts.⁷¹ Although there is no right without an interest, not every interest may be translated into a right, thereby raising the question: Why not? An answer to this question can be found in the interest theory of rights as defended by Raz and Kramer. Both claim that having an interest is not enough to constitute a right. Kramer states that someone—an interest-holder—holds a legal right only if “at least one minimally sufficient set of facts include the undergoing of detriment by some person Q at the hands of some other person R who bears a duty under contract or norm.”⁷² According to Raz, an interest can be translated into a right “only where one’s interest is a reason for another to behave in a way which protects or promotes it, and only when this reason has the peremptory character of a duty, and finally, only when the duty for conduct which makes a significant difference for the promotion or protection of that interest.”⁷³ In short, the interest can be translated into a right only if there is a legal duty not to violate the holder’s interest. Here the difference between rights and interests becomes visible—something can be in the subject’s interest, even though the subject does not have a right to it.

⁶⁶ Wiggers-Rust, *supra* note 65, at 18.

⁶⁷ Raz, *supra* note 60, at 166.

⁶⁸ See Feinberg, *supra* note 60, at 49–50.

⁶⁹ See M.H. Kramer, *Refining the Interest Theory of Rights*, 55 AM. J. JURIS. 31, 33 (2010).

⁷⁰ Regan distinguishes two definitions of “having an interest.” The first is a more subjective interpretation and can be understood as “taking an interest in.” What is in the subject’s interest is then defined by the subject’s desires and wishes. The second interpretation takes a more objective approach; to say that someone has an interest in X means that X benefits this person, connecting interest to the subject’s wellbeing. The second approach is similar to the definition of interest used here. See T. Regan, *McCloskey on Why Animals Cannot Have Rights*, 26 PHIL. Q. 251, 253–54 (1976).

⁷¹ See Wiggers-Rust, *supra* note 65, at 37–38.

⁷² Kramer, *supra* note 69, at 36–37.

⁷³ Raz, *supra* note 60, at 183.

It is, legally speaking, incorrect to assume that all interests acknowledged and incorporated by a legal system are automatically translated into rights and those interests not translated into rights have no significance in the law whatsoever. For this reason, not everything that is protected by law constitutes a right.⁷⁴ It is possible for a legal system to recognize an interest as being valid or significant without labeling it a right. Reflecting upon the relation between right and interest in Dutch law, Wiggers-Rust points out that law (*recht*) is more than a collection of rights, because it also includes interests acknowledged and protected by the law (*rechtsbelang*).⁷⁵ There are also interests, however, that gain no legal protection as they bear no significance for legal reasoning.⁷⁶ In general, we can distinguish three categories that are important for determining one's legal status: Legally irrelevant interests—mere interests that have no legal protection; legally relevant interests—interests that are acknowledged by law; and subjective rights.

2. *Having a Legal Interest*

With this trichotomy in mind, the question of what it means to have an interest must be refined. To understand what the subjectivity of interest entails, we need to compare the concept of rights to the second category, the legally relevant interest or legal interest. This section explores the difference between having a legal interest and a legal right. Notably, not only is the status of the future child articulated in terms of interests—the “interests holder” makes an appearance in several other places in Dutch law.⁷⁷ In other legal systems the concept of interests holder is also no stranger, one example being Section 13.5 of the British Human Fertilisation and Embryology Act, which refers explicitly to the interests of the future child, or the “best interest” principle codified in Article 3 of the Convention on Rights of the Child.

The Dutch wrongful life case, also known as the *Baby Kelly* case, presents an interesting example to understand a legally relevant interest.⁷⁸ Here, the Dutch Supreme Court made an explicit distinction between a right and an interest. Namely, it declared that although the claimant did not have a right to her own non-existence, she did have an interest in her own non-existence, which was the legal basis for granting damages. The girl Kelly was born with a severe genetic condition. Had this condition been discovered during the pregnancy with

⁷⁴ See Nieuwenhuis, *supra* note 59, at 134.

⁷⁵ See Wiggers-Rust, *supra* note 65, at 38.

⁷⁶ See HR October 9, 1998, *NJ* 1998, 853 (Neth.) (*Jeffrey*).

⁷⁷ See Wiggers-Rust, *supra* note 65 (explaining the concept of interests in Dutch administrative and private law in general).

⁷⁸ See HR March 18, 2005, *NJ* 2006, 606 (Neth.) (*Baby Kelly*).

the help of a prenatal test, which the obstetrician considered unnecessary, Kelly's parents would have terminated the pregnancy and Kelly would never have been born. Consequently, Kelly claimed that she was harmed by the fact that she was born into a handicapped existence while she should not have been born at all, and in her name the hospital where her mother was treated was sued. In considering whether and in what way Kelly was harmed, the Dutch Supreme Court concluded that the hospital did not violate Kelly's rights, because she has no "right to her own abortion," for only the mother can decide whether or not to terminate a pregnancy.⁷⁹ Granting the child its own, independent right to non-existence would interfere with the mother's right and possibly result in children suing their own parents for being born into a disadvantaged position. Instead, the Court granted Kelly damages to be paid by the hospital because of the violation of her interest. Because the Court not only granted compensation for her handicaps, but for her whole existence, it is implied that Kelly had an interest—but not a right—in her own non-existence.⁸⁰

Even though Kelly did not have a right to her own non-existence, she did have legal standing as an interest-holder. After all, as an interest-holder, Kelly had a relevant claim now that her interest in non-existence had been interfered with, and she could therefore claim damages for the fact that she was born handicapped. As a result, as an interest-holder, Kelly became a legal subject.

To understand what it means to be the subject of legal interests, particularly in Dutch law, it is not enough to have a general definition of interests. It is important to understand that law explicitly recognizes some interests as relevant and others as not legally relevant, even though these are not necessarily translated into rights. Although Dutch law refers to interests and interest-holders at several points, little has been written about what it means to be the holder of a legally relevant interest and how this affects the interest-holder's legal status. Nevertheless, analysis of the little fragments we do have may give us some clue as to what the implications for the attribution of interests may be.

One of the places in which Dutch law refers explicitly to interests is in administrative law; the concept "interest holder"⁸¹ is an important notion in this field, because only the interest-holder can object against decisions from a public authority. According to legal theorist Bergamin, being a holder of an interest in administrative law means that one is a subject of

⁷⁹ See *id.* para. 4.13, 4.16. As a result of this, Dutch legal doctrine does not allow a child to bring a wrongful life claim against the parents. After all, Kelly's interest in non-existence depends on her mother's intention to abort her if she had all the information. Without the mother's intention to abort Kelly, Kelly would not have an interest in her own existence.

⁸⁰ See Van Beers, *supra* note 21, at 317.

⁸¹ See "Belanghebbende," Art. 1:2 Awb.

administrative law.⁸² Only those with a relevant interest can participate in Dutch administrative law, and thus become an actor or subject. A similar construction exists in Dutch criminal procedural law: Interest-holders can file a complaint if the public prosecutor decides not to take a case to court.⁸³ An interest-holder can be the victim of a crime, but it can also be a third party.⁸⁴ Through this construction, the subject of an interest can, to a certain extent, participate in a criminal procedure. Put differently, the law opens up to the interest-holder. Interestingly, the law does not refer to these subjects as right-holders because it is the allocation of an interest that gives them legal standing, making them a subject in law—to the extent of that case or field of law.

Although the attribution or acknowledgement of interests creates some form of standing and therefore allows an entity to be a subject in law, it does not offer such a strong claim as having a right does.⁸⁵ Nieuwenhuis states that a right has a “mysterious preponderance” compared to an interest.⁸⁶ According to Bergamin, rights have a symbolic value due to their great argumentative value because they are a solid element of the law. In a legal dispute, arguments based on rights are usually considered stronger than arguments that do not appeal to rights.⁸⁷ Dutch authors are not the only ones who have noted this difference between rights and interests. Elliot likewise emphasizes the importance of rights when he says, “the pattern of rights determines not what it would be good to do or bad to do but what in the *strongest sense* must be done or must not be done.”⁸⁸ Dworkin also believes rights offer a special benefit as he uses the well-known metaphor, “rights as ‘trumps.’”⁸⁹ He says, “If someone has a right . . . this means that it is for some reason wrong for officials to act in violation of that right, even if they (correctly) believe that the community as a whole would be better off if they did.”⁹⁰ Nevertheless, in Dutch legal doctrine, it is not clear why there is such a difference in weight. Once again, an explanation can be found in the interests theory of rights. Rights have such a strong position because they create actual legal duties, whereas “mere” interests do not. As Raz puts it,

⁸² See R.J.B. Bergamin, *De persoon in het recht* 44 (2000).

⁸³ See Art 12 Sv (Dutch Criminal Procedural Code).

⁸⁴ See G.J.M. Corstens, *Het Nederlandse strafprocesrecht* 520–21 (2005).

⁸⁵ See Wiggers-Rust, *supra* note 65, at 38–39.

⁸⁶ See Nieuwenhuis, *supra* note 59, at 29.

⁸⁷ See P.W. Brouwer et al., *Recht, een introductie* 303–04 (2004).

⁸⁸ R. Elliot, *The Rights of Future People*, 6 J. APPLIED PHIL. 159, 159 (1989) (emphasis supplied).

⁸⁹ See Ronald Dworkin, *Taking Rights Seriously* xi (1977); Ronald Dworkin, *Rights as Trumps*, in THEORIES OF RIGHTS 153, 153 (Jeremy Waldron ed., 1984).

⁹⁰ Dworkin, *supra* note 89, at 153.

Only where one's interest is a reason for another to behave in a way which protects or promotes it, and only when this reason has the peremptory character of a duty, and, finally, only when the duty is for conduct which makes a significant difference for the promotion or the protection of that interests does the interest give rise to a right.⁹¹

Clearly, interest can be an important motivation to behave a certain way, or to endorse legal rules that protect these interests. Nonetheless, that does not mean that they constitute a duty to do so. Interests need to be balanced against other interests and can therefore more easily be overruled.⁹² Rights, on the contrary, do not only provide a reason to behave a certain way but, according to Raz, they constitute a duty to honor that specific right. Of course, rights are not absolute; for example, the European Convention on Human Rights shows that breaches of fundamental rights can be considered legitimate. Nevertheless, a legitimate breach needs to meet specific conditions defined in the convention, which makes it much more difficult to overrule a right. In sum, the concept of interests does offer some form of legal standing, and consequently legal protection, but the subject of interests can more easily be overruled because an interest does not have a corresponding duty, while a right does have such a duty. In a way, legally relevant interests can be understood as a "lite" version of rights.

3. *Final Remarks on the Subject of Interests*

The main advantage the subject of interests has over the subject of rights is that the former is a more flexible concept. The concept of interests is flexible in two ways. First, because interests do not have an immediate corresponding duty, law is not forced to respond in a certain way. Interests are easier to overrule than are rights because they do not have to offer the same strong position. To interfere with a right, one needs a strong justification. Therefore, offering legal protection through the subjectivity of interests puts less pressure on the law to respond a certain way. Second, the open concept of interests also adds to its flexibility. As discussed above, "interest" is a broader concept than "right," and for this reason, it can cover more aspects important to entities. Interests can also cover aspects that are not easily articulated into individual rights, such as societal or moral aspects.

Because the subjectivity of interests is a less defined and more open concept than legal personality, it does not have the problem of over inclusiveness, which played a role in the case of the unborn child and resulted in a restriction based on weak arguments. Because of its flexibility, the subjectivity of interests is preferable to the expansion of legal personality

⁹¹ Raz, *supra* note 60, at 183.

⁹² See Nieuwenhuis, *supra* note 59, at 42.

to offer non-human entities legal protection. Especially in the case of protecting the unborn child from maternal harm, the subjectivity of interests offers extra benefits. Considering the fact that excessive drinking and drug abuse have an even larger impact in the first stages of the fetus's development, the need for protection is most urgent in the case of the early, non-viable fetus. This makes it undesirable to restrict legal protection to only independently viable fetuses. Whereas the expansion of legal personality may cause a clash between the rights of the unborn child and the rights of the mother, and the stronger legal status of the unborn child may have unwanted consequences for other fields of law, the subjectivity of interests can avoid these problems. Because an interest does not create a legal duty, different interests can be balanced against each other, offering the legislator more freedom in responding to these interests.

The subjectivity of interests may also face some challenges. For example, it can be argued that this flexibility also has a downside. The concept is rather complex because of its openness: It can be said that anything could be in the interest of the future child. Particularly in those cases in which the interests of the entity are determined by third parties and not the entity itself, a large number of interests can be attributed to an entity. As a result, law needs to address these different interests. The most interesting challenge, however, pertains to the subject itself. It is a common notion that not everything can have interests; for example, we can take interest in a car, a house, or art, but these lifeless things themselves have no interests of their own. Therefore, we must ask ourselves the question of whether the future child can have interests before we can apply this strategy to offer this entity legal protection.

III. The Capacity to Have Interests

With regard to legal protection of the future child, not only is it important to understand what the subjectivity of interest implies for the future child's legal status, but one must also ask whether the future child can be the subject of legally relevant interests. Little has been written in Dutch legal doctrine on who can be the subject of interests. Nieuwenhuis argues that future generations can have interests—and that in their case, he thinks it is preferable to use the vocabulary of interest instead of rights.⁹³ Wiggers-Rust states that entities that have no legal personality can also have legally relevant interests.⁹⁴ Regarding the future child, it seems that Dutch law follows this reasoning and simply assumes that the future child can have interests without further objection. This approach, however, does not consider a key characteristic of this entity; the future child is treated as an existent and a non-existent

⁹³ See *id.* at 134.

⁹⁴ See Wiggers-Rust, *supra* note 65, at 21, 49.

entity at the same time.⁹⁵ To understand whether the future child can have interests, we must further elaborate on the subjectivity of interests and answer the question: Which entities can have interests? Addressing this question from a legal-philosophical angle shows that the assumption of the future child's interests is not as self-evident as has been presented. The following section explores the account of various philosophers on the requirements for interests. These accounts share a common thread in that they connect this capacity to a conscious existence or a future conscious existence. The distinction between potential and actual people is of particular importance for this account.

1. *Interests and Existence*

It is a quite common notion that not all entities are capable of having interests. For example, Feinberg, McCloskey, and Dworkin have stated that mere things cannot have interest.⁹⁶ According to Feinberg, interests spring from desires, wishes, and hopes, and consequently, the ability to have interests presupposes "cognitive awareness."⁹⁷ Warren uses "sentience" as the defining criterion. "A being that lacks the capacity to have experiences, and/or to prefer some experiences to others, cannot coherently be said to have moral rights, because it has no interests to be respected."⁹⁸ Dworkin uses the term consciousness, which he defines as "some mental as well as physical life."⁹⁹ Although there might be some minor differences between the proposed criteria, what they have in common is that the ability to have interests presupposes awareness to feel pain or to have preferences, or as Feinberg puts it, "conative life."¹⁰⁰ Of course, it is evident that the future child does not meet these requirements; it lacks not only the capacity to feel or think or form preferences, but it is not even a form of life. If we follow these criteria strictly, the future child could never be the subject of interests.

If "conative life" were indeed a strict criterion for having interests, it would imply that we, as present beings, would never consider the interests of future entities. As a result, not only the future child, but also future generations and embryos would be irrelevant for our normative thinking. It is, nonetheless, not that controversial to assume that we do have some obligations towards our future descendants. After all, our actions in the present can

⁹⁵ See Lisette ten Haaf, *Future Persons and Legal Persons: The Problematic Representation of the Future Child in the Regulation of Reproduction*, 5 *LAWS* 10 (2016).

⁹⁶ See Feinberg, *supra* note 60, at 52; Ronald Dworkin, *Life's Dominion: An Argument about Abortion, Euthanasia and Individual Freedom* 16 (1993); McCloskey, *supra* note 60, at 126.

⁹⁷ See Feinberg, *supra* note 60, at 52.

⁹⁸ M.A. Warren, *Do Potential People Have Moral Rights?*, 7 *CAN. J. PHIL.* 275, 283 (1977).

⁹⁹ Dworkin, *supra* note 96, at 16.

¹⁰⁰ See Feinberg, *supra* note 60, at 49.

have a large impact, both negatively and positively, on their lives.¹⁰¹ Although the identity of those who will exist in the future is unknown, it is reasonable to assume that once they exist, they will meet the requirements for having interests. Therefore, knowing that in the future, entities will exist that are capable of having interests and will have interests in, for example, a clean environment and a stable economy, people in the present arguably have at least a moral obligation to take these future interests into account.

2. *Actual and Potential*

Importantly, according to the theory of conative life, whether an entity—be it an embryo, a future generation, or a future child—will have interests depends on whether it will come into existence in the first place. For this reason, a distinction must be made between actual future people and merely potential future people.¹⁰² Actual future people, on the one hand, are those who, in the normal course of events, will come into existence one day. For this reason, their interests should be taken into account. Merely potential future people, on the other hand, are those who hypothetically could have come into existence, but will not, because their parents did not procreate at the right time, or with the right person, or both. Because a merely potential person will never come into existence, that potential person will never have the ability to have interests. Consequently, there will never be future interests of this entity that we can anticipate. For this reason, as Dworkin points out, smoking during the pregnancy is more harmful than abortion from the perspective of the child—in the case of smoking, a child will be born whose interests are violated, while in the case of abortion, there will be no child and therefore no subject of interests.¹⁰³ In short, only the interests of future entities that will come into existence—or of who we at least can expect they will most likely come into existence—need to be taken into account.

This exception seems to offer little solace for the future child with an assumed interest in non-existence. After all, due to interference, the future child will not come into existence. Importantly, the future child in this case is not just a merely potential person. It is not just one of the many options that could have been realized, had its prospective parents procreated at the right time. It is not just a possibility that would have come into existence had another child not been born. Initially, the future child starts as an actual future person. Its prospective parents intend to bring it into existence, and without interference, it can be assumed that it would have come into existence, and probably have suffered from the poor living conditions it would have been born into in this scenario. The fact that it initially is an

¹⁰¹ See Warren, *supra* note 98, at 159; Feinberg, *supra* note 60, at 64.

¹⁰² This distinction is made among others. See C. Hare, *Voices from Another World: Must we Respect the Interests of People who Do Not, and Will Never, Exist?*, 117 *ETHICS* 498, 498 (2007); Dworkin, *supra* note 96, at 19; A.J. Karnein, *A Theory of Unborn Life: From Abortion to Genetic Manipulation* 28 (2012); Warren, *supra* note 98, at 288–89; Feinberg, *supra* note 60, at 63.

¹⁰³ See Dworkin, *supra* note 96, at 19.

actual person is the exact reason why there is a need for protection and why its interests are taken into account. If we do not prevent the child's conception, it is likely to be harmed because of the poor conditions under which it comes into existence. Yet, because the harm to the future child is inherent to its conception, taking its interests into account and protecting it from harm implies the prevention of its existence. This means that the future child will never come into existence, so it would become a merely potential person. Nonetheless, the future child also cannot be seen as merely a potential person. After all, because the interests of the future child are seen as the only reason preventing its existence, then, without another justification, ignoring the future child's interests means that the child will come into existence. Consequently, its future existence would mean that the future child's interests are relevant. As a result, a strange loop is created—by interfering and consequently preventing the future child from coming into existence, the future child enters the domain of merely potential people. This would imply that its interests cannot serve as a justification, as the justification for interference disappears. Consequently, the future child's existence is not prevented, and so it enters the domain of actual future people. As an actual person, it faces an actual risk of being harmed, and anticipating this risk starts the loop all over again. In short, the future child does not fall into one of these categories, but flows between them. Put differently, the actual-potential distinction cannot be applied to the future child in a way that offers a solid answer to the question of whether law can appeal to the interests of the future child to justify the prevention of its existence.

IV. Final Remarks on the Future Child

Although the vocabulary of interests seems to evade some of the problems of the expansion of legal personality, it does not offer a clear and solid justification for the legal protection of the future child. The main problem is that the legal protection of the future child fundamentally differs from the legal protection of other future entities. Because the risk for harm is inherently connected with the future child's conception, preventing the risk implies preventing the subject who runs the risk. Using conative life as a criterion for having interests and distinguishing between potential and actual future persons seems to be unable to capture this entity because of its hybrid status. To conclude, although the subject of interests may be a useful concept to represent several non-human entities within law, it does not seem to offer the same benefit for the future child.

D. Conclusion

Increasing possibilities of influencing and controlling human reproduction have made future life an urgent topic for legal thinking. Now that having children has become a matter of choice rather than chance, we have to take responsibility for our reproductive choices. This means that we cannot ignore the unborn and future child together with the fact that we already can estimate the possible harm they face. As Savulescu has pointed out, the

knowledge we gain on biotechnology and reproduction comes with an imperative to act.¹⁰⁴ Nevertheless, if we want to develop legal measures that can protect these entities from harm, these entities need to be somehow incorporated into the legal system. The question is: How should this incorporation be framed?

Because the unborn and future child are rather new entities, law has to be creative in addressing these entities. Two examples of this creativity can be identified in the Dutch legal system, as it employs two different strategies to respond to this call. What these strategies have in common is that they are both subject-oriented; both strategies seek the justification for interference in the rights or interests of an individual subject—the unborn child and future child respectively. The first strategy is the expansion of legal personality by including these entities in existing categories, as is done in case of the unborn child. Importantly, with regard to the unborn child, this strategy faces the risk of becoming over inclusive; it would not only protect the fetus in the final stages of its development, but also the embryo in its earlier stage. Judges have attempted to prevent unwanted consequences of too much expansion by distinguishing between the viable and the non-viable fetus; only the viable fetus qualifies for this form of legal protection. Although the attempt to set some boundaries is understandable, the legal reasoning behind it is not convincing. It gives the impression that only the viable fetus is worthy of protection and that the *nasciturus* fiction can only be applied to the viable fetus.

The second strategy, treating these entities as subjects of legally relevant interests, may be a better solution. Because “interest” is a broader concept than “right” and because it does not create immediate duties, treating an entity as a subject of interests offers law more flexibility to respond than attributing legal personality. As interests do not offer the same strong position as rights do, they can be overruled more easily and set aside when other interests or rights prevail. For this reason, there is less risk of unwanted overinclusion and unwanted consequences; protecting the unborn child as a subject of interests rather than a legal person, similarly in the stadium before viability, is less likely to clash with abortion legislation.

Yet, although the concept of a subject of interests may be a useful tool to offer legal protection to non-human entities such as unborn children, animals, and future generations, it is still unclear how this strategy can be used to protect the future child from harm. The fact that legal protection affects the core of the future child’s existence rather than the circumstances under which it could come into existence, poses an important complication for the attribution of interests. Considering conative life as the requirement fails to solve this complication. This theory distinguishes between actual future people, who come into existence and have conative life, and merely potential people, who will never come into

¹⁰⁴ See J. Savulescu, *Future People, Involuntary Medical Treatment in Pregnancy and the Duty of Easy Rescue*, 19 UTILITAS 1, 18 (2007).

existence. The future child, however, seems to escape this distinction as it transcends this dichotomy. So, although the conative life-account provides useful insights and helps us to better understand the problematic nature of the future child, it also raises more questions to be answered in order to determine whether this theory can be applied to the future child. More importantly, now that both strategies remain problematic, and considering the appeal to the future child's interests has been highly criticized in the non-identity problem debate,¹⁰⁵ we are confronted with a more fundamental question: Should we keep trying to justify regulation of reproduction and selection by appealing to the unborn or future child's subjective interests?

¹⁰⁵ See *supra* notes 56 and 58.

Special Issue
Traditions, Myths, and Utopias of Personhood

**Approaches for Dealing with the “Natural Person” in the
Chinese Legal System: A Statutory Way and a Principled Way**

*By Tuo Yu**

Abstract

Along with numerous ethical and legal questions prompted by advancements in technology, there is a strong call for protection of “persons” in a broad sense. This Article discusses how such developments emerge in China. Chinese courts are often confronted with disputes concerning prenatal injuries, the disposition of frozen embryos, and infringements on the reputation of the deceased. After examining these cases, their underlying tensions, and the upcoming Chinese Civil Code, this Article reflects on the evolving concept of a natural person within the Chinese civil law context. The Article further asks how law deals with new problems while at the same time maintaining stability and coherence when viewed against a rapidly evolving biotechnological background.

* Master Candidate at the China University of Political Science and Law, yu.tuo@foxmail.com. I greatly thank Toni Selkälä, Mikko Rajavuori, and the editors of the German Law Journal for their helpful comments and suggestions on the content and language of earlier drafts of this Article. I would like to further thank all the participants of the Persons/Things workshop held at the University of Turku in May 2016.

A. Introduction

As natural persons, we exist in three stages: Unborn, living, and deceased. In Chinese law, only the living command rights. This principle is embodied in Article 9 of the General Principles of Civil Law of the People's Republic of China (2009 Amendment), which stipulates that: "[A] citizen shall have the capacity for civil rights from birth to death and shall enjoy civil rights and assume civil obligations in accordance with the law."¹ Comparatively, the other two stages—unborn and deceased—deserve greater scrutiny, recognition, and respect in Chinese law and legal scholarship. Operating at the porous borders of natural and legal personhood, this Article discusses the ways contemporary Chinese law and jurisprudence come to terms with the unborn and the deceased.

As discussed elsewhere in this Special Issue,² advances in technology, especially human biotechnology, enable us to alter and discern life in profoundly new ways. Like other jurisdictions, the Chinese legal system has also encountered numerous conceptual, doctrinal, and ethical questions spurred on by technological changes. In this context, numerous cases have emerged concerning unborn children and dead people. The commonality in these cases is a call for added protection for those forms of human existence beyond the living. Without existing rules to reference, judges have struggled to find plausible grounds to decide cases. At the same time, both plaintiffs and respondents have established multifarious arguments to justify protection or non-protection of the unborn and the deceased. Legislatures have only recently been able to respond to this moving target.

This Article documents the premises, the doctrine, and the future implications of Chinese law as it applies to the unborn and the deceased. The Article articulates the contribution of these solutions to the concept of legal personality as it emerges from case law and legal scholarship. In particular, the Article introduces three prominent Chinese cases that dwell at the borders of legal personhood. Moreover, the Article discusses the new Chinese legislation, the recently adopted General Rules on Civil Law of the People's Republic of China (GRCL),³ assessing its

¹ Zhonghua Renmin Gongheguo Minfa Tongze (中华人民共和国民法通则 (2009 年修订版)) [General Principles of the Civil Law of the People's Republic of China (2009 Amendment)] (promulgated by the Nat'l People's Cong., Apr. 12, 1986, effective Jan. 1, 1987, amended Aug. 27, 2009) ch. II, § 1, art. 9, *translated at* http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383941.htm [hereinafter GPCL]. China only issued the General Principles of the Civil Law of the People's Republic of China as general law within the civil legal system.

² See Toni Selkälä & Mikko Rajavuori chapter in this volume, 18 GERMAN L.J. (2017); Lisette ten Haaf chapter in this volume, 18 GERMAN L. J. ## (2017).

³ Zhonghua Renmin Gongheguo Minfa Zongze (中华人民共和国民法总则) [General Rules on the Civil Law of the People's Republic of China] (promulgated by Nat'l People's Cong., Mar. 15, 2017, effective Oct. 1, 2017), *translated at* <http://en.pkulaw.cn/display.aspx?cgid=291593&lib=law> [hereinafter GRCL]. The GRCL is deemed the most important and difficult part of drafting the Chinese Civil Code. China previously tried compiling a code three times, but failed to reach a general consensus. Now that the GRL has been adopted, it is promising that the first Civil Code will be issued by 2020.

contribution to how Chinese law should respond to evolving notions of natural and legal personhood as they relate to claims associated with the unborn and the deceased.

The Article is structured as follows. First, the Article will elaborate on the current statutes. Then, through an analysis of three cases, the Article assesses the legal argumentation when statutory provisions on liminal personhood remain silent or ambiguous. In order to identify what a fetus or a frozen embryo is, the upcoming civil code, as well as difficult cases and problems encountered in the Occidental legal order, are discussed. The Article concludes by exploring, using biotechnology as an example, how Chinese law deals with new problems, while at the same time maintaining its stability and coherence.

B. Status of the Unborn and the Deceased in Chinese Civil Law

In the Chinese legal system, a natural person has a capacity for civil rights from the moment of birth to her eventual death. The statutory ground for this principle—a loan from a continental European legal tradition and, more specifically, German Civil Law—is Article 9 of the GPCL, according to which “a citizen shall have the capacity for civil rights from birth to death and shall enjoy civil rights and assume civil obligations in accordance with the law.”⁴ This Section discusses the two conditions—the status of the unborn and deceased—not captured by the general principle of Chinese civil law.

In Chinese civil law, one needs to be alive after birth in order to be a right-holder. The completion of the birth is considered the primary marker indicating whether a person is alive or not—the so-called born alive criteria. Therefore, dozens of conditions for recognizing a completed birth have been proposed. These include criteria such as baby being partially out of the womb, entirely out of the womb, and a first, independent breath. In order to gain the capacity for civil rights, it is commonly believed that an individual must possess two elements, “out” and “live.” This translates to being entirely out of the mother’s body and having the capacity to breathe independently.⁵

As a corollary to the above, the capacity for holding civil rights is generally withheld from the unborn. This legislative style is closely related to the traditional treatment of a fetus that runs throughout Western philosophy. The Stoics, for example, believed that the unborn child is simply a part of the mother’s body, akin to a fruit as a part of a tree, and thus they did not recognize the

⁴ GPCL, *supra* note 1.

⁵ See, e.g., LIANG HUIXING (梁慧星), MINFA ZONG LUN (民法总论) [GENERAL INTRODUCTION TO CIVIL LAW] 88 (4th ed. 2011); MA JUNJU & YU YANMAN (马俊驹 & 余延满), MINFA YUAN LUN (民法原论) [THE THEORY OF CIVIL LAW] 76 (4th ed. 2010); WANG LIMING (王利明), MINFA ZONG LUN (民法总论) [THE GENERAL THEORY OF CIVIL LAW] 136–137 (2009); WANG WEIGUO (王卫国), MINFA XUE (民法学) [CIVIL LAW] 58 (2007).

independent value of the unborn child.⁶ Similarly, Roman Law regarded the fetus as an organ of its mother.⁷ Beyond that, science considered a child *en ventre sa mere* a part of the mother for a very long time. Some think that a just-conceived fetus is merely a collection of cells under the command not of a brain, but of only a genetic code, no more a child, yet, than a just-fertilized egg is a chicken.⁸ In this regard, China is not alone. In most countries, an unborn child does not have a legal personality and is incapable of exercising legal rights and obligations.⁹

Modern medical science, however, permits us to understand life in a way that we never could before.¹⁰ As an example, medical imaging technologies enable us to view a human body or any part of it independently, scan it, enlarge it, rotate it, adjust its transparency so that we can view inside a living being, and light it from any angle.¹¹ As a result, by the end of the second week of pregnancy, we can ensure a distinct embryo presence and that the fetus has a developing brain and a rudimentary heart. By the end of third week of pregnancy, the fetus has the beginning of a vertebrae, it develops eyes and ears, a closed circulatory system (separate from the mother's), and a working heart. By the eighth week, the fetus has forearms distinguishable from arms, thighs distinguishable from legs, and a developing nervous system with sympathetic nerves—meaning the fetus can feel pain. From the twenty-second week onwards, the fetus has the capacity to survive outside the womb.¹² Based on these changes in biotechnology and the enhanced abilities to discern the development of the fetus, every single developed jurisdiction has some limitations on conducting abortions. There are jurisdictions, such as some in the United States, that criminalize certain actions against the fetus in some

⁶ Liu Zhaocheng (刘召成), *Taier de Zhun Renge Goucheng* (胎儿的准人格构成) [*On the Quasi-Personality Construction of Fetus*], 6 JURIST 66, 67 (2011). See also BERNHARD WINDSCHEID, *LEHRBUCH DES PANDEKTENRECHTS* (8 Auflage) [TEXTBOOK OF PANDECTS (8th ed.)] 198 (1900).

⁷ *Id.*

⁸ RONALD DWORKIN, *LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION AND EUTHANASIA* 10 (1993).

⁹ Zhaocheng, *supra* note 6.

¹⁰ See Selkälä & Rajavuori, *supra* note 2; ten Haaf, *supra* note 2.

¹¹ J. Madeleine Nash, *Inside the Womb*, TIME, Nov. 11, 2002, at 68. See generally ALEXANDER TSIARAS, *FROM CONCEPTION TO BIRTH: A LIFE UNFOLDS* (2002).

¹² Charles I. Lugosi, *Respecting Human Life in 21st Century America: A Moral Perspective to Extend Civil Rights to The Unborn from Creation to Natural Death*, 48 ST. LOUIS U. L.J. 425, 435 n.61 (2004). See also HENRY GRAY, *THE FORM OF THE EMBRYO AT DIFFERENT STAGES OF ITS GROWTH, IN ANATOMY OF THE HUMAN BODY* 74 (1918), https://ia600500.us.archive.org/15/items/anatomyofhumanbo1918gray/anatomyofhumanbo1918gray_bw.pdf.

manner.¹³ There are countries that recognize a right to limit the mother’s self-harming actions, such as predominant alcohol consumption or the use of narcotics, to protect the fetus.¹⁴

Differently, in the Chinese civil law system, a provision concerning protections for the unborn can only be found in Article 28 of the Law of Succession of the People’s Republic of China, which stipulates the following: “[A]t the time of the partitioning of the estate, reservation shall be made for the share of an unborn child. The share reserved shall, if the baby is stillborn, be dealt with in accordance with statutory succession.”¹⁵ With regard to whether Article 28 reveals recognition of a partial capacity of civil rights, prominent Chinese scholars maintain that it merely involves matters of inheritance allocation and has nothing to do with the capacity for civil rights.¹⁶ Even when there is a profound understanding of the growth of the fetus and also strong intentions to protect the unborn better, Chinese scholars, when discussing the unborn, avoid using terms like rights or full capacity for civil rights—let alone admitting that a fetus is a person.

The general thrust of the argument that precludes rights or a capacity for enjoying rights from the fetus aside, courts often face tough questions that impinge upon protections of the fetus in the civil law sphere. The three cases discussed below illustrate how Chinese judges and academics construe the legal doctrine in a manner that is, at least *prima facie*, consistent with the whole legal system. Moreover, it’s worth noting that the Chinese Civil Code is still in its drafting phase. The adoption of the new GRCL will be discussed, as it makes remarkable progress for the protection of the unborn.

Besides the fetus, the deceased as the last stage of life, is completely neglected by Chinese legislators. A logical deduction from Article 9 of the GPCL,¹⁷ however, seems to suggest that a death leads to the termination of the capacity for civil rights. Hence, a natural person loses her civil status of being a person in civil law at the moment of her death. Thus, the death of a natural person extinguishes its capacity as a subject of civil law, and further personality.¹⁸ This seemingly logical deduction, however, is challenged by judicial practice. As no rule with

¹³ Sandra L. Smith, Note, *Fetal Homicide: Woman or Fetus as Victim? A Survey of Current State Approaches and Recommendations for Future State Application*, 41 WM. & MARY L. REV. 1845, 1851 (2000).

¹⁴ See, e.g., ten Haaf, *supra* note 2.

¹⁵ Zhonghua Renmin Gongheguo Jicheng Fa (中华人民共和国继承法) [Law of Succession of the People’s Republic of China] (promulgated by the Nat’l People’s Cong., Apr. 10, 1985, effective Oct. 1, 1985), translated at http://www.npc.gov.cn/englishnpc/Law/2007-12/13/content_1383956.htm.

¹⁶ See, e.g., LI YONGJUN (李永军), MINFA ZONG LUN (民法总论) [GENERAL THEORY OF CIVIL LAW] 69 (2008); Huixing, *supra* note 5, at 89; Liming, *supra* note 5, at 136–37.

¹⁷ GPCL, *supra* note 1.

¹⁸ ZHANG JUNHAO (张俊浩), MINFA XUE YUANLI (民法学原理) [PRINCIPLES OF CIVIL LAW] 153 (2000).

respect to protections for the deceased can be found within the Chinese civil code, decisions that support a dead person's interest have led to widespread controversies in the public sphere.

C. Three Prominent Cases

This Section introduces three prominent cases that explore the structure of legal personality when Chinese civil law remains silent. Subsequent discussions in the Article build on the tensions contained in these cases.

I. A Case Concerning a Fetus—Wang Deqin v. Yang Desheng

*Wang Deqin v. Yang Desheng*¹⁹ concerned compensation for living and educational expenses of a child whose father was killed in a car accident. Wang, a one-year-old plaintiff, sued in the People's Court of Jiangyang District to seek damages from Yang and the No. 2 Automobile Team for running over his father. Wang alleged that according to Article 119 of the GPCL²⁰ and Article 28 of the Succession Law, Yang was responsible for the plaintiff's living and educational expenses. On the contrary, Yang argued that according to Article 9 of the GPCL, Wang was unborn at the time Wang's father died and thus did not have a capacity for civil rights, including the right to petition the court. As for Article 119, Wang was not the victim's dependent when he was alive and thus the plaintiff had no right to ask for any compensation.

Sympathetic to the plaintiff's argument, the court held that "the deceased dependent" in Article 119 includes not only the persons actually raised by the victim, but also the children that would have been raised, but had not yet been raised by the victim. The infliction imposed by Yang directly led to the victim's death before Wang's birth and thus effectively precluded Wang from receiving his father's upbringing. Therefore, Wang's claim was in compliance with

¹⁹ Sup. People's Ct., Wangdeqin su Yangdesheng, Luzhou Shi Qiche Er Dui Jiatong Shigu Sunhai Peichang Jiufen An (王德钦诉杨德胜、泸州市汽车二队交通事故损害赔偿纠纷案) [Wang v. Yang Desheng and the No. 2 Automobile Team of Luzhou City Traffic Accident Damage Compensation Dispute Case] (May 28, 2003), <http://en.pkulaw.cn/display.aspx?cgid=1970324837041987&lib=case>.

²⁰ GPCL, *supra* note 1, art. 119:

[A]nyone who infringes upon a citizen's person and causes him physical injury shall pay his medical expenses and his loss in income due to missed working time and shall pay him living subsidies if he is disabled; if the victim dies, the infringer shall also pay the funeral expenses, the necessary living expenses of the deceased's dependents and other such expenses.

In Chinese: "侵害公民身体造成伤害的, 应当赔偿医疗费、因误工减少的收入、残废者生活补助费等费用; 造成死亡的, 并应当支付丧葬费、死者生前扶养的人必要的生活费等费用。"

the prescribed GPCL provisions. Moreover, the court acknowledged a child’s capacity to bring an action for damages, even though injuries occurred before its birth. In doing so, however, the court circumvented the question of whether an unborn child had the capacity for civil rights.

The case highlights the lacunae of law and the interpretation of judges. Obviously, the focus of this case is on whether the offender is liable for compensation to the victim’s unborn offspring. Legislation remains silent on this point, and law must instead function through interpretations of judges. As judges are adjudicators, not legislators, they have a duty to adjudicate according to law, not create new law. In this case, the court interpreted the conception of “the deceased dependent” to include children that would have been raised by the deceased. We can hardly say that the court explained it as a strict literal interpretation. More accurately, it falls within the scope of an extensive interpretation, which would probably construe the rule to include not only the core, but also all “periphery” of the rule’s application. Such a generosity may seem strange, but it is linguistically possible.²¹ An extensive interpretation is a way of construing a rule in a linguistic perspective. It is generally regarded as precise interpretation of the statutory provision.²² But, some criticize extensive interpretations as a method of statute innovation or legal analogy, rather than a method of legal interpretation. Moreover, it relies on other essential or authoritative bases of arguments, and accordingly, it cannot be classified as an interpretive method which is relatively independent.²³ If improperly scrutinized, it can potentially distort or destroy law by wrongly extending norms while holding the flag of literal interpretation. Although subject to some scholarly criticism, its results are generally approved for showing concern for the unborn without trampling existing rules.

II. A Case Concerning Frozen Embryos—Shen & Shao v. Liu & Hu

*Shen & Shao v. Liu & Hu*²⁴ concerned a dispute over custody and the disposition of frozen embryos. An infertile couple created fifteen embryos through IVF and froze four embryos at Nanjing Gulou Hospital in 2012. The couple died in a car accident before the embryo implantation. The plaintiffs, Shen and Shao, and the defendants, Liu and Hu, were the parents of the dead husband and wife, respectively. Shen and Shao sued Liu and Hu, and the Gulou

²¹ ALEKSANDER PECZENIK, ON LAW AND REASON 318 (Springer 2d ed. 2008).

²² *Id.* at 319.

²³ Jiang Fudong (姜福东), *Kuozhang Jieshi Yu Xian Suo Jieshi de Fansi* (扩张解释与限缩解释的反思) [A Rethinking of Extensive Interpretation & Restrictive Interpretation], in ZHEJIANG SOCIAL SCIENCES 127 (2010).

²⁴ Chenxinnan, Shaoyumei su Liu Jinfa, Huxingxian Jianguan, Chuzhi Quan Jiufen An—Renti Lengdong Peitai Jianguan, Chuzhi Quan Guishu de Sifa Rending (沈新南、邵玉妹诉刘金法、胡杏仙监管、处置权纠纷案—人体冷冻胚胎监管、处置权归属的司法认定) [Shen Xinnan, Shao Yumei v. Liu Jinfa, Hu Xingxian Supervision, Dispute Cases—Judicial Determination of Human Embryo Supervision and Disposition of Ownership], Sept. 17, 2014, http://www.pkulaw.cn/case/pfml_1970324845293374.html?keywords=沈新南、邵玉妹诉刘金法、胡杏仙监管、处置权纠纷案&match=Exact (China) [hereinafter Shen & Shao v. Liu & Hu].

Hospital as the third party, for the right of custody and disposition of frozen embryos in the People's Court of Yixing City. The plaintiffs and defendants both argued that the four frozen embryos were the property of their children and should be turned over to them. The Gulou Hospital, in turn, insisted that frozen embryos were not property and therefore could not be objects of a succession. As gestational surrogacy is prohibited in China, neither party to the case could use the embryos to conceive a child. Furthermore, there was a contract between the Gulou Hospital and the deceased couple stipulating that the retention period of the four frozen embryos was one year, after which the frozen embryos were to be discarded.

The People's Court of Yixing City dismissed the plaintiffs' claim by reasoning that a frozen embryo was a special thing containing future life characteristics, and therefore could not be transferred or inherited like other ordinary things. Moreover, it is impossible to achieve the reproductive purpose of the dead couple because surrogacy is illegal in China. Hence, the deceased couple's rights in the frozen embryos cannot be inherited because the couple had no means to implant the embryos if they would not carry them by themselves.

Both parties refused to accept the trial court's decision of the first instance and the case eventually reached the appellate court, the Intermediate People's Court of Wuxi City. By that time, the case gained great public attention. The Intermediate People's Court of the second instance held that even though there was an agreement over the disposition of the frozen embryos, the Gulou Hospital still had no right to dispose of them unilaterally, as the couple had died by accident, which made the contract unenforceable. In the absence of settled rules, the court emphasized that a pre-implantation embryo was a one of a kind entity, a being in-between a person and a thing. It had the potential to become a person and therefore it deserved a higher moral status than non-life objects. For this reason, it should also be respected and protected in a special way. Accordingly, the appellate court held that the four non-transferred embryos would be placed under the custody and disposition of the four elders, but in a way that would not violate public order, good customs, or harm the interests of others. As for how and which kinds of uses they could have for the embryos, the presiding judge simply held that the court bore an open mind. He further pointed out that it was possible that with the developments of the society and changes in people's values, gestational surrogacy could be legitimate one day, and anyway, cryopreservation technology left plenty of room for imagination.²⁵

²⁵ Fu Jin & Su Zhen (付金, 苏振), *Quanguo Shou Li Lengong Peitai Quan Shu Jiufen An Luomu: Peitai de Falu Shuxing Gai "Hequhecong"* (全国首例冷冻胚胎权属纠纷案落幕: 胚胎的法律属性该“何去何从”) [*The First Dispute concerning Frozen Embryos in China Has Finally Brought down to Curtain: What is the Legal Nature of Embryos?*], PEOPLE'S COURT DAILY 1 (Sept. 23, 2014).

III. A Case Concerning the Deceased—Chen Xiuqin v. Wei Xilin

The two previous cases focused on the conditions of the unborn. At the other end of personhood, the deceased deserve similar attention. The following case attracted substantial attention due to the challenges it poses to the archetypal model of a natural person in Chinese civil law. The case has contributed immensely to what we consider death to entail in the field of Chinese civil law.

Chen Xiuqin v. Wei Xilin,²⁶ also known as the *Lotus Girl* case, is the first case referring to protection of the reputation of the dead. The plaintiff, Chen, filed a suit against the defendants before the Tianjin Municipality Intermediate People's Court in 1987 arguing that Wei damaged the right to reputation of her and her deceased daughter, Ji Wenzhen. Ji was a folk actress whose stage name was Lotus Girl. Wei had written a novel, entitled *Lotus Girl*, in which Ji's real and stage names were used. The novel described Ji's affairs, her relationships with the leaders of Tianjin's underworld and local tyrants, and hinted that she suffered from a venereal disease and died from a mistaken injection. The defendant argued that Ji's right to reputation was not violated because Ji already died.

Experiencing great difficulties in rendering a proper verdict, the Tianjin Municipality Intermediate People's Court wrote a letter to the Supreme People's Court asking for instructions. The Supreme People's Court issued its reply in the 1989 document entitled, “A Letter of Legal Protections of Right to Reputation of the Deceased.” The letter provided that, although Ji was dead, her reputation should be protected by law and her mother retained the right to initiate a suit.²⁷ After receiving the letter, the Tianjin Municipality Intermediate People's Court upheld the plaintiff's request, reasoning that the GCPL entitled citizens to protections of reputation that apply after death.

Conceding that the deceased enjoys the reputational protection rights raises an essential question: Why does a “person” still enjoy rights after death? Furthermore, is recognizing that the deceased enjoys rights equivalent to granting a capacity for civil rights to the deceased? If so, the system of traditional Chinese civil law *viz.* the capacity for civil rights is destabilized. Instead of providing a clear-cut settlement, the *Lotus Girl* case provoked widespread controversies over the deceased's rights. Most Chinese scholars continue

²⁶ Chenxiuqin su Weixilin, Jin Wan Baoshe (陈秀琴诉魏锡林、今晚报社) [Chen Xiuqin v. Wei Xilin and Tonight Newspaper Office], June 21, 1989, <http://en.pkulaw.cn/display.aspx?cgid=1970324837041272&lib=case> [hereinafter *Xiugin v. Wei Xilin*] (China).

²⁷ Zuigao Renmin Fayuan Guanyu Siwang Ren de Mingyu Quan Ying Shou Falu Baohu de Han (最高人民法院关于死亡人的名誉权应受法律保护的函) [A Letter of Legal Protections of Right to Reputation], Apr. 12, 1989, http://www.pkulaw.cn/fulltext_form.aspx?Db=chl&Gid=4278&keyword=死者名誉权的法律保护&EncodingName=&Search_Mode=like. The letter provides: “吉文贞（艺名荷花女）死亡后，其名誉权应依法保护，其母陈秀琴亦有权向人民法院提起诉讼。”

to maintain that the deceased cannot have civil rights.²⁸ But, the refusal to provide protections of personality interests to the deceased, however, will encourage others to slander the deceased, thus harming the reputation of the dead. This is also an unpalatable situation.

To maintain consistency in the model of the natural person, as it emerges consistent, the Supreme People's Court later adopted a more elastic strategy. Avoiding terms like "the deceased's right of reputation," the Supreme People's Court held, in a later Interpretation,²⁹ that a close relative is entitled to claim emotional damages. These infringements must run contrary to public order and good customs, and they include actions upon the name, portrait, reputation, or honor by insulting, libeling and disparaging, or disclosure or use of the privacy, use or damage to the remains of a deceased person, and so forth. Plaintiffs who can successfully link these actions with public order and good customs will likely receive support before the court.

IV. Summary

The three cases discussed above have several things in common. Most significantly, they are all decisions that show deep concern for life under no settled rule. Judges struggled to deal with those entities that escaped traditional civil law categories. The unborn were protected with the help of an extensive interpretation of the phrase of "the deceased dependent." In the cases of the pre-embryos and the deceased, public order and good customs arguments were utilized to explain the outcomes that expand the scope of legal protections for the unborn and the deceased.

The extensive interpretation pursued by the courts, however, bypasses hard, but important questions, such as the vexing nature of the unborn. Are the unborn people or things? What would broad legal protections for the unborn look like? Should the unborn enjoy rights from

²⁸ WANG LIMING (王利明), RENG QUAN YANJIU (人格权研究) [STUDY ON PERSONALITY RIGHTS] 188 (2d ed. 2012); JUNJU & YANMAN, *supra* note 5, at 86.

²⁹ Zuigao Renmin Fayuan Guanyu Queding Minshi Qinquan Jingshen Sunhai Peichang Zeren Ruogan Wenti de Jieshi (最高人民法院关于确定民事侵权精神损害赔偿责任若干问题的解释) [Interpretation of the Supreme People's Court on Problems Regarding the Ascertainment of Compensation Liability for Emotional Damages in Civil Torts], (promulgated by Sup. People's Ct., Mar. 8, 2010, effective Mar. 10, 2010), art. 3 (China), *translated at* <http://en.pkulaw.cn/display.aspx?cgid=34937&lib=law>. In Chinese:

自然人死亡后，其近亲属因下列侵权行为遭受精神痛苦，向人民法院起诉请求赔偿精神损害的，人民法院应当依法予以受理：（一）以侮辱、诽谤、贬损、丑化或者违反社会公共利益、社会公德的其他方式，侵害死者姓名、肖像、名誉、荣誉；（二）非法披露、利用死者隐私，或者以违反社会公共利益、社会公德的其他方式侵害死者隐私；（三）非法利用、损害遗体、遗骨，或者以违反社会公共利益、社会公德的其他方式侵害遗体、遗骨

the moment of conception? How can we reconcile the interests of the unborn when they conflict with the rights of others, especially the rights of the mother? How do we translate nebulous concepts like public order and good customs into practical legal principles? What are the risks associated with having multiple and distinct readings? How can we tackle the numerous tricky legal problems posed by technology? Which way should we proceed and how should the Chinese legal system respond? The subsequent Section examines some of these questions in the context of forthcoming Chinese legislation and legal scholarship.

D. Two Approaches: A Statutory Way and A Principled Way

This Section discusses the recent adoption of the GRCL as a legislative solution to questions and tensions arising from the three cases discussed above. First, the Section deals with the new protections of the fetus introduced in the GRCL. Second, the Section extends the new legislative rationale to frozen embryos and the deceased.

I. Legal Protections for a Fetus

1. Is a Fetus a Person?

When does a human life start? Is a fetus a person from the moment of conception? Is abortion murder or homicide? As has been the case for many years, abortion is an issue central to discussions about the legal status of the unborn. And yet, this is not the case in China.

As is well known, questions concerning the rights of the unborn and, relatedly, a woman's control over her own body and reproduction has been fiercely debated for decades. In the United States, for example, *Roe v. Wade* declared decades ago that unborn human beings were not persons and, accordingly, did not have constitutional rights to life and liberty. This result was in line with the Supreme Court's review of history that disclosed, “the unborn have never been recognized in the law as persons in the whole sense.”³⁰ In other jurisdictions, it is hotly debated whether abortion ought to be made permissible when the birth of a fetus would have a detrimental effect on the child's quality of life or the life of the mother and other family members.³¹

Furthermore, the tension between the fetus and its mother becomes more acute when it comes to questions of maternal harm. In this context, the Congenital Disabilities (Civil Liability) Bill of 1976 considered that—only the father could be responsible for the damage while the mother was considered free of blame. A subsequent report, which based on research of the Royal Commission on Civil Liability and Compensation for Personal Injury established in 1973, stated that neither the father nor the mother are liable for prenatal

³⁰ *Roe v. Wade*, 410 U.S. 113, 162 (1973).

³¹ DWORKIN, *supra* note 8, at 97–98.

injuries.³² Yet, there is an English case, *R v. Sarah Louise Catt*,³³ where a woman who ordered abortion medication online and unilaterally induced an abortion at a very last stages of pregnancy was sentenced to eight years in prison. Moreover, the rule of immunity setting in interfamilial tort immunity is now being abrogated by many states in the U.S.³⁴ The question of whether a cause of action for prenatal injuries should be brought by a child against its mother might no longer be remote. The problem is balancing the pregnant woman's right to unfettered use of her body against the unborn child's interest to begin life with a sound mind and body. It is remarkable that courts in the Netherlands give great weight on the point of viability when considering the interests of an unborn child. It is from that point that the unborn child counts as a person and renders abortion no longer legal.³⁵ Therefore, it is reasonable to prohibit the expectant mother from smoking, taking drugs, or excessively drinking in order to protect a viable fetus.

In China, however, this important viability demarcation point does not exist. Chinese abortion legislation operates very differently from that of most European or American countries. While it's interesting to note that China criminalized abortion in the Criminal Law Draft of Qing Dynasty because of Western influence, the implications turned out to be unpleasant.³⁶ Elevating abortion to criminal law codes did not reduce the abortion rate. Instead, women risked their lives to keep abortions secret. Traditionally, China has never had a dominant religion analogous to the role that Catholicism served in Europe, and thus lacks a strong belief system that would consider abortion murder. Moreover, China's family planning policy has

³² Royal Commission on Civil Liability and Compensation for Personal Injury (Pearson Commission): Report, Cmnd. 7054-1, at 71 (Gr. Brit.):

It can be argued that, as a child retains full right of action against its parents in respect of any injury inflicted after birth, he should be able to sue her or both parents in respect of ante-natal injury. We believe, however, that the social argument which has impressed so many of our witnesses should prevail. The argument is particularly strong in the case of the mother, but the danger of disrupting family life applies also to the father. We recommend that a child should not have a right of action for damages against either parent for ante-natal injury.

³³ Sentencing Remarks, *R. v. Catt (Sarah Louise)*, Sept. 17, 2012, <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Judgments/sarah-louise-catt-sentencing-remarks-17092012.pdf> (Eng.); *R. v. Catt (Sarah Louise)*, 2013 WL 3550521 (Ct. of App. 2013).

³⁴ Beverly I. Chernaik, *Recover for Prenatal Injuries: The Right of a Child against its Mother*, 10 SUFFOLK U. L. REV. 582 (1976).

³⁵ District Court Amsterdam Feb. 21, 2006, Bj 2007/6.

³⁶ HUANG YUANSHEG (黄源盛), WAN QING MINGUO XINGFA SHILIAO BIANZHU (晚清民国刑法史料编著) [ARCHIVES OF CRIMINAL LAW IN THE LATE QING DYNASTY AND THE REPUBLIC OF CHINA] 171 (2010).

made it impossible to consider abortion a crime.³⁷ Despite a universal two-child policy that allows couples to have two children so as to address low fertility rates and problems stemming from an aging population, it seems unlikely that the Chinese government would change its basic attitude towards abortion.³⁸

Thus, until now, China has not had a national law concerning abortion. As many prospective parents still have a preference for the future child’s gender, there is only a rule issued on March 28, 2016, for the purpose of controlling the gender balance of the newborn.³⁹ Generally, Rules of Preventions on Non-Medical Fetal Sex Identification and Gender Selective Termination of Pregnancy (Rules) permits four types of gender selective abortion.⁴⁰ According to Article 9 of

³⁷ China has been carrying out its family planning policy since the 1970s in order to limit population growth. XIANFA art. 53, § 3 (China) (1978) provides that “[t]he State promotes and implements a family planning policy” [国家提倡和推行计划生育]. Article 25 of the present Constitution of the People’s Republic of China (2004 Amendment) also clearly states that “[t]he State promotes the family planning policy, so that the population growth may fit the plans for economic and social development” [国家推行计划生育, 使人口增长同经济和社会发展计划相适应]. XIANFA art. 25 (China) (1982), *translated at* http://www.npc.gov.cn/englishnpc/Law/2007-12/05/content_1381903.htm. Similarly, Section 2 of Article 49 of the present Constitution provides that “[b]oth husband and wife have the duty to practice family planning” [夫妻双方有实行计划生育的义务]. Xianfa art. 49, § 2 (China) (1982), *translated at* http://www.npc.gov.cn/englishnpc/Law/2007-12/05/content_1381903.htm.

³⁸ In fact, China’s one-child policy has gradually loosened since a selective two-child policy was issued in November 2013. Article 2 of the Resolution of the Standing Committee of the National People’s Congress on Adjusting and Improving the Family Planning Policy states that “we approve the launching and implementation of the policy of allowing couples to have two children if either parent is an only child” [同意启动一方是独生子女的夫妇可生育两个孩子的政策]. Quanguo Renda Changwei Hui Guanyu Tiaozheng Wanshan Shengyu Zhengce de Jueyi (全国人大常委会关于调整完善生育政策的决议) [Resolution of the Standing Committee of the National People’s Congress on Adjusting and Improving the Family Planning Policy] (promulgated by the Standing Comm. Nat’l People’s Cong., Dec. 28, 2014, effective Dec. 28, 2013), art. 2, *translated at* <http://en.pkulaw.cn/display.aspx?cgid=215349&lib=law>. Starting on January 1, 2016, and although family planning policy remains a basic national policy in China, the universal two-child policy came into effect. Article 18 of the Law of the People’s Republic of China on Population and Family Planning (2015 Amendment) stipulates that “[t]he State advocates that one couple bear two children” [国家提倡一对夫妻生育两个子女]. Zhonghua Renmin Gongheguo Renkou Yu Jihua Shengyu Fa (2015 Xiuzheng) (中华人民共和国人口与计划生育法(2015修正)) [Law of the People’s Republic of China on Population and Family Planning (2015 Amendment)] (promulgated by the Standing Comm. Nat’l People’s Cong., Dec. 29, 2001, effective Sept. 1, 2002, amended Dec. 27, 2015), art. 18, *translated at* <http://en.pkulaw.cn/display.aspx?cgid=261790&lib=law>.

³⁹ It is important to note that Chinese regulations exist in a hierarchy. Zhonghua Renmin Gongheguo Lifa Fa (2015 Nia Xiuzheng) (中华人民共和国立法法 (2015年修正)) [Legislation Law of People’s Republic of China (2015 Amendment)] (promulgated by the Nat’l People’s Cong., Mar. 15, 2000, effective July 1, 2000, amended Mar. 15, 2015), *translated at* http://www.npc.gov.cn/englishnpc/Law/2007-12/11/content_1383554.htm. The hierarchy of regulations are: (1) the Constitution of the People’s Republic of China; (2) national Laws issued by the National People’s Congress; (3) administrative regulations issued by the State Council; (4) local decrees issued by local People’s Congresses; and (5) administrative and local rules issued by ministries or commissions of the States Council or local People’s Governments.

⁴⁰ The Rules of Preventions on Non-Medical Fetal Sex Identification and Gender Selective Termination of Pregnancy were jointly issued by the National Health and Family Planning Commission of the People’s Republic of China, State Administration for Industry & Commerce of the People’s Republic of China and China Food and Drug Administration.

the Rules, barring circumstances such as serious genetic diseases of the fetus, grave deformities of the fetus, conditions that seriously threaten or endanger the pregnant woman's health and other necessary situations as prescribed by law or administrative regulations or based on medical science apply, one shall not artificially discontinue gestation on the basis of sex selection.⁴¹ With regard to the limit in terms of gestational weeks for terminations of pregnancy, the Rules do not provide any reference. Actually, the Rules only deal with sex selective termination of pregnancy, by which situations like abortions after rape, incest, or unexpected pregnancy are not governed. Because of the special conditions of family planning policy, abortion is basically unlimited in China.⁴²

Considering the Chinese situation, I think Dworkin's conclusion, pointing out that whether a fetus is a person is not the central issue of abortion or other protections of the unborn, is correct.⁴³ As almost everyone shares the belief that human life has value in itself, the unborn deserves protections even without admitting that it is a person. That is why it makes sense that China has struggled to protect the unborn, while paradoxically remaining quite tolerant of abortion.

2. A Statutory Way: Legal Fiction

The GRCL, a new law approved on March 15, 2017, which will come into force in October 2017, includes provisions that alter the Chinese legal landscape. In particular, the general part of the upcoming legislation seeks to give a response to the call for greater protection of nasciturus interests. While the code generally sticks to the natural person model whereby "only the living command rights," the new Article 16 refers directly to the status of the fetus. According to

Jinzhì Fēi Yìxué Xuyào de Tàier Xìngbié Jiāndìng Hé Xuānzé Xìngbié Rēngōng Zhōngzhì Rénshēn de Guīdìng (禁止非医学需要的胎儿性别鉴定和选择性别人工终止妊娠的规定) [Rules of Preventions on Non-Medical Fetal Sex Identification and Gender Selective Termination of Pregnancy] (promulgated by the Nat'l Health & Fam. Plan. Comm'n, the State Admin. for Indus. & Com., the State Food & Drug Admin., Mar. 28, 2016, effective May 1, 2016), http://www.pkulaw.cn/fulltext_form.aspx?Db=chl&Gid=268852&keyword=禁止非医学需要的胎儿性别鉴定和选择性别人&EncodingName=&Search_Mode=accurate [hereinafter Rules of Preventions on Non-Medical Fetal Sex Identification and Gender Selective Termination of Pregnancy].

⁴¹ Rules of Preventions on Non-Medical Fetal Sex Identification and Gender Selective Termination of Pregnancy, *supra* note 41, art. 9. Article 9 provides in Chinese:

符合法定生育条件，除下列情形外，不得实施选择性别人工终止妊娠：（一）胎儿患严重遗传性疾病的；（二）胎儿有严重缺陷的；（三）因患严重疾病，继续妊娠可能危及孕妇生命安全或者严重危害孕妇健康的；（四）法律法规规定的或医学上认为确有必要终止妊娠的其他情形。

⁴² WANG XIUZHE, ABORTION AND ABORTION REGULATIONS IN CHINA (2014), <https://www.jus.uio.no/english/research/news-and-events/events/conferences/2014/wccl-cmdc/wccl/papers/ws7/w7-xiuzhe.pdf>.

⁴³ DWORKIN, *supra* note 8, at 67.

Article 16, where the protection of the interests of a fetus is involved, among others, a succession or acceptance of a gift, the fetus shall be presumed to have the capacity for civil rights; however, in the case of a stillborn, the fetus’s capacity for civil rights never existed.⁴⁴

With respect to protections of the unborn, there are two general legislative patterns around the continental law system: Generalized protectionism and individualized protectionism. Countries that adopt generalized protectionism, such as Taiwan which, in Article 7 of its Civil Code, maintains that an unborn is considered as if it was already born with regard to its interests, except if it was subsequently born dead.⁴⁵ Individualized protectionism, however, is an enumerative legislative style which can be found in German and Japanese Civil Codes.⁴⁶ These codes enumerate a number of cases are that merit special consideration. Article 16 of the GRCL obviously belongs to the realm of individualized protectionism. Nevertheless, it only explicitly enumerates two types of circumstances, succession and receiving gifts, both of which are pertinent to property. It seems illogical that the unborn child’s property interests are protected while setting aside its health interests. With regard to the question of when does the capacity for civil rights of an unborn begin, it is evident that Article 16 follows the legal release conditions theory,⁴⁷ which means that an unborn child enjoys the capacity for civil rights from the moment of conception, but,

⁴⁴ GRCL, *supra* note 3, art. 16. Article 16 provides in Chinese:

涉及遗产继承、接受赠与等胎儿利益保护的，胎儿视为具有民事权利能力。但是胎儿娩出时为死体的，其民事权利能力自始不存在。

⁴⁵ Other examples, such as the Swiss Civil Code in Article 31, provide that an unborn child has legal capacity provided that it survives birth. Article 1.2 of the Dutch Civil Code provides as follows: “[I]f it is in the interest of the child of whom the woman is pregnant, it will be regarded as already born. If it is born dead, it is considered never to have existed at all.”

⁴⁶ Section 844 of the German Civil Code provides that liability for damages also arises where the third party at the time of injury had been conceived, but not yet born. BÜRGERLICHES GESETZBUCH [BGB] [Civil Code], § 844, para. 2, *translation at* http://www.gesetze-im-internet.de/englisch_bgb/index.html (Ger.). Comparatively, the German Civil Code in Article 1923 prescribes that a person who is not yet alive at the time of the devolution of an inheritance, but has already been conceived, is deemed to have been born before the devolution of an inheritance. BÜRGERLICHES GESETZBUCH [BGB] [Civil Code], § 1923, para. 2, *translation at* http://www.gesetze-im-internet.de/englisch_bgb/index.html (Ger.). The Japanese Civil Code in Article 721 provides that to demand damages, a child in the womb is deemed to have been born. MINPŌ [MINPŌ] [Civ. C.] art. 721 (Japan). Article 886 and Article 965 acknowledge that the unborn child has the right of inheritance and the right of legacy respectively. MINPŌ [MINPŌ] [Civ. C.] art. 866, 965 (Japan).

⁴⁷ There is another theory called the legal termination condition theory. In the opinion of scholars who support the legal termination condition theory, an unborn child does not have a capacity for civil rights. Furthermore, the capacity for civil rights of the child are retroactively effective and start at the moment when inheritance begins or the right of action for the recovery of damages is established. This capacity holds so long as the unborn survives birth. WANG ZEJIAN (王泽鉴), MINFA XUEXHUO YU PANLI YANJIU (4) (民法学说与判例研究(4)) [CIVIL LAW THEORIES AND PRECEDENTS STUDY] (4) 272 (1998).

in the case of a stillborn, its capacity for civil rights extinguishes retroactively at the moment it was conceived.

II. Legal Protections for Embryos and the Deceased

1. What is a Frozen Embryo?

If it is reasonable, Article 16 of the GRCL suggests that an unborn child is considered a person and thus has the capacity for civil rights at the instant of conception, but the situation for frozen embryos seems different.

We are living in an era of rapid technological changes that has a profound effect on our everyday lives. Following law's nature, human beings dominate the nature on the one hand, while on the other hand natural environments have been changed by technology to serve human desires. Within the field of biotechnology, the biological facet of a human being becomes the object of the intervention of biotechnology, and the results of this intervention, in turn, have strongly influenced the non-biological facet—social or ethical—of human beings. Artificial reproductive technologies (ARTs) enable infertile couples to have their own biological children; genetic engineering could reedit inherited genes in human embryos. Gene cloning technologies are able to produce the same exact genetic copies of persons. It is probably fair to say that no technology could compare to biotechnology in terms of the degree of potential for changing a human's life. Other technologies could destroy human life at most, while biotechnology, is—or will be soon able to create human life out of nothing. This is very close to the role of God.⁴⁸ As biotechnology directly interferes with the process of creation and the development of life, it reaches the deepest question of what it means to be a human, which then has ethical ramifications that have been often answered by religion. Taking the example of frozen embryos, this has raised a plethora of ethical and legal problems: What are these cryopreserved embryos? Are they persons or things? Who should have custody and dispose of them in the event of the death or divorce of the couple?

When it comes to the status of frozen embryos, the two courts in *Shen and Shao v. Liu and Hu* held subtly different opinions. On the one hand, the court of first instance believed that a non-transferred embryo was a special thing containing future life characteristics. On the other hand, the appellate court maintained that a cryopreserved embryo is an entity between a person and a thing. Comparatively, some scholars, however, insist that an *in vitro* fertilized embryo is a thing. They divide things into three different categories: Ethical things, special things, and ordinary things. A preimplantation embryo fits within the scope of ethical things.⁴⁹

⁴⁸ YAN JUE'AN (严厥安), *FA YU SHIJIAN LIXING (法与实践理性)* [LAW AND PRACTICAL REASON] 320 (2003).

⁴⁹ Additionally, organs and tissues separated from the human body, corpses, and medical waste are ethical things as well. Yang Lixin (杨立新), *Ren de Lengdong Peitai de Falu Shuxing Ji Qi Jicheng Wenti (人的冷冻胚胎的法律属性及其继承问题)* [*The Legal Nature of Frozen Embryo and its inheritance*], 13 *THE PEOPLE'S JUDICATURE* 25 (2014).

Other scholars argue that this potential offspring is neither a person nor a thing, but rather occupies some position in-between.⁵⁰ Having challenged traditional *persona/res* distinction, this view is supported by few. Generally speaking, most Chinese jurists still maintain that frozen embryos are within the realm of things.⁵¹

Yet, no matter where we put them, no one denies the value of frozen embryos. As we can see, the GRCL does not confront the issue. It seems that the legislature has not been ready to directly deal with frozen embryos.⁵² In an era of rapid changes in society, law must find a balance between maintaining consistency in existing law and political practice, and adapting itself to new circumstances.⁵³ Law would lose its integrity if it failed to maintain consistent ties with the past. Indeed, this is not a uniquely Chinese problem. At the very least, the whole world is facing this problem caused, at least in part, by biotechnology such as ART and CRISPR. Each country may have its own way to tackle it.

In China, in the cases of frozen embryos and the deceased, instead of codifying protections of the unborn child leading to a statutory article in the upcoming civil code, the legislature and judiciary resort to the concepts of public order and good customs. This concept, called “*gong xu liang su*,” is drafted into Chinese laws. Maintaining public order and adhering to good

⁵⁰ Xu Guodong (徐国栋), *Tiwai Shoujing Lengdong Peitai de Falu Diwei Yanjiu* (体外受精冷冻胚胎的法律地位研究) [*The Legal Position of Externally Fertilized Embryo*], 5 L. & SOC. DEV. 65 (2005).

⁵¹ This conclusion can be drawn from propositional versions for the Civil Code Draft. There are three propositional versions for the Civil Code Draft of China: The versions written by Liang Huixing, Wang Liming, and Yang Lixin respectively. See, for example, a propositional version for the Civil Code Draft of China written by Wang Liming that provides in Article 128 that except when violating public orders and good customs, organs, blood, marrow, tissues, sperms, oocytes (or eggs) of a natural person can be considered things. Wang Liming (王利明), *Minfa Zongze Caoan Zhuanjia Jianyi Gao* (民法总则草案专家建议稿) [Civil Code Draft], art. 128 (China). Article 94 of a propositional version written by Liang Huixing prescribes that in limitation of not violating public orders and good customs, organs, blood, marrow, tissues, sperms, oocytes (or eggs) of a natural person can be treated as if they were objects of civil rights. Liang Huixing (梁彗星), *Minfa Zongze Caoan Zhuanjia Yijian Gao* (民法总则草案专家意见稿) [Civil Code Draft], art. 94 ##### (China). Although both of these Articles do not refer to frozen embryos, a number of scholars believe that an in vitro fertilized embryo can be considered as a thing. These scholars reason that these Articles are quasi-rules concerned with the civil status of pre-implantation embryos. Zhang Shengbin, Fan Li & Zhuang Xulong (张圣斌, 范莉, 庄绪龙), *Renti Lengdong Peitai Jianguan, Chuzhi Quan Guishu de Renshi* (人体冷冻胚胎监管、处置权归属的认识) [*Recognition of the Right to Custody and Disposition of Human Frozen Embryo*], 11 J. L. APPLICATION 44 (2014).

⁵² All three propositional versions for the Civil Code Draft are silent with regards to the thorny question of the civil status of externally fertilized embryos. Surprisingly, the propositional Version for the General Rules of Civil Code of the People’s Republic of China (Draft for Comments), specifically Article 18 of Chapter 2 Natural Person, provides that the preservation and disposition of an in vitro fertilized embryo shall not violate social morality or damage public interests. Even though Article 18 does not explicitly define the nature of an in vitro fertilized embryo, the Draft for Comments nonetheless seems to give greater recognition to frozen embryos akin to a person to under the systematic interpretation.

⁵³ RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY 1* (Xin Chunying & Wu Yuzhang trans., Chinese ed. 1998).

customs are principles of capital importance in Chinese civil law,⁵⁴ especially for those difficult cases that are not resolved by explicit rules. These overarching concepts are, more or less, similar to the role of dignity (Würde) in the German constitutional system, which can be found from the first article of its Basic Law, providing—in English translation)—“the dignity of man is inviolable . . . [t]o respect and to protect it shall be the duty of all public authority”⁵⁵, and in some other countries, like notably Hungary and Israel.⁵⁶

In Germany, the Federal Constitutional Court held that “human dignity means not only the individual dignity of the person but the dignity of man as a species. Dignity is therefore not at the disposal of the individual.”⁵⁷ Dignity has played an especially significant role in protecting entities that are at the margins of legal personality, where there might not be too many direct rights to utilize. For example, in cases regarding abortion, in which the German Constitutional Court “used the human dignity clause to underline the constitutional requirement for protection of unborn life.”⁵⁸ Similarly, in a case dealing with the use of force by security forces, in which the German Federal Constitutional Court voided provisions of the Aviation Security Act that authorized the armed forces to shoot down aircraft that were intended to be used as weapons in crimes against human lives.⁵⁹ Finally, there are also examples and cases concerning the dead where the German Federal Constitutional Court has protected the posthumous deceased’s reputation.⁶⁰

With no existing rules, the court in the case of frozen embryos supported the claims of the deceased couple’s parents, and the court in the deceased *Lotus Girl* case condemned the defendant’s acts, both by referring to public order and good customs, which served as safety valves to prevent complicated situations from running amok. Human community developed

⁵⁴ Article 10 of Chapter I Basic Provisions of the GRCL states that “[c]ivil disputes shall be resolved in accordance with the law; or, if the law is silent, customs may apply, but as long as they are not contrary to public order and good morals” [处理民事纠纷, 应当依照法律; 法律没有规定的, 可以适用习惯, 但是不得违背公序良俗]. GRCL, *supra* note 3, art. 10.

⁵⁵ GRUNDGESETZ [GG] [BASIC LAW] art. 1, para. 1, *translation at* http://www.gesetze-im-internet.de/englisch_gg/ (Ger.).

⁵⁶ Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT’L L. 694 (2008).

⁵⁷ DAVID KRETZMER & ECKART KLEIN, THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE 148 (2002).

⁵⁸ Christian Walter, *Human Dignity in German Constitutional Law*, in EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW: THE PRINCIPLE OF RESPECT FOR HUMAN DIGNITY (PROCEEDINGS OF THE UNIDEM SEMINAR, MONTPELLIER JULY 2-6, 1998) 15, 28 (1998), [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-STD\(1998\)026-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-STD(1998)026-e).

⁵⁹ Bundesverfassungsgericht [BVerfG], 1 BvR 357/05, Feb. 15, 2006, http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2006/02/rs20060215_1bvr035705en.html; see also MCCRUDDEN, *supra* note 57, at 692.

⁶⁰ DONALD P. KOMMOERS & RUSSELL A. MILLER, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 301 (3d ed. 2012).

with rapid changes in values and technologies since around the first industrial revolution. There is a question that seems paradoxical when technology is always moving forward pursuing innovations, while law always tries its best to keep stability. Undeniably, to a certain degree, technologies influence law and even sometimes come to define law. Questions become much harder to reconcile when both of them are dealing with a “human.” We do not know exactly what we will discover or invent in the future, and accordingly, it is unrealistic to draft laws with clear details on everything. In order to keep pace with technology, law sometimes resorts to principles rather than simply expanding categories, creating exceptions, or making more rules.

2. A Principled Way: Public Order and Good Customs

Appealing to general principles might be an expediency in the legislature for maintaining the logical integrity of the whole legal system, and tempering or mitigating the rigor of rules. Public order and good customs are basic principles stipulated in Chapter 1 of the GRCL.⁶¹ It is true that statutory rules with a high degree of accuracy and certainty are the fundamental form in guiding private or official behaviors in a legal system, but some basic principles with a vague and flexible wording are also an indispensable feature of legal systems. Taking the example of the three cases discussed above, the law-makers of the GRCL who have undoubtedly noticed strong calls for protections of the unborn and the dead, create legal fictions to protect unborn children, but deliberately keep silent with respect to frozen embryos and the deceased. Given so many intellectual and social limitations, the legislators may not be able to foresee them when articulating provisions of law. It is necessary to leave room for judges to resort to guiding principles in the application of law to counter the rigidities or inadequacies of positive rules.

In the context of rapid changes in society, weighing principles is an inescapable part of the work of everyone participating in the execution of law, as excluding principles from the execution of law may mean refusing justice.⁶² The court, in the case of the frozen embryos, found that it is an injustice not to allow the custody and disposition of the remaining embryos to the four elder parents who lost their children. The court reached this conclusion even though it was unable to substantiate such injustice by citing a settled rule. Principles like public order and good customs have played a prominent role in settling controversies where existing rules offer judges no guidance and advice. There are a substantial amount of cases available to illustrate the significance of relying on principles in deciding disputes where the positive resources do not provide an answer for the point of law to be adjudicated, especially under the Anglo-

⁶¹ GRCL, *supra* note 3.

⁶² JUE'AN, *supra* note 48, at 67.

American common law system.⁶³ For example, in *Bonbrest v. Kotz*,⁶⁴ the Court for the District of Columbia held that a cause of action existed for prenatal injuries to a viable child subsequently born alive even without a precedent supporting such a reading. In *Davis v. Davis*,⁶⁵ the Tennessee Supreme Court addressed the validity of written agreements regarding the disposition of frozen embryos in the event of divorce when there was no legislation concerning such situations. Where the existing rule left the problem adjudicated before the court entirely unsettled, a principled sense of appropriateness should play a decisive role in bringing about a satisfactory solution to the dispute. Public order and good customs reveal a sense of appropriateness. In examining the facts of controversies, the party that can demonstrate that its claims are in accordance with public order and good customs would receive support before a Chinese court.

In a system of separation of powers, a non-elected judge is but an instrument—"Organ"—of the legislative will.⁶⁶ Nevertheless, it is undeniable that the positive system established by a state is incomplete, fragmentary, and full of ambiguities. These defects must be overcome by resorting to ideas, principles, and standards which are presumably not as well articulated as the formalized sources of the law, but nevertheless provide some normative direction to the court's findings.⁶⁷ Public order and good customs principles exist within the deep structure of Chinese laws and are connected to the more general ethical order. In circumstances where statutes or rules of law are vaguely worded or kept silent, to a greater or lesser extent, judges would consider or weigh principles in order to better achieve justice in a case. Naturally, public order and good customs as typical principles in Chinese civil law are, by definition, vague, nebulous, and amount to a number of different interpretations. Judges, on the one hand, are limited to applying the legislative will, while on the other hand, inescapably exercise their discretion. It is by no means an easy task for judges to arrive at an objective standard to interpret principles and to also achieve a reconciliation and synthesis of the needs of stability of law. That is the reason why a judge must apply the positive and unambiguous mandates of the existing law, even though she is firmly convinced that these mandates are not, or are no longer, consonant with basic contemporary notions of justice. Therefore, appealing to public order and good customs should be limited to those very rare situations where there is no settled rule or any other solutions. For example, in *Wang Deqin v. Yang Desheng*, the court did not set aside existing rules or resort to public order and good customs, but, instead, the court interpreted the phrase "the deceased dependent" in Article 119 of the GPCL to include not only the person actually raised by the deceased, but also virtually all potential future

⁶³ EDGAR BODERHEIMER, JURISPRUDENCE: THE PHILOSOPHY AND METHOD OF THE LAW 350–51 (rev. ed. 1981).

⁶⁴ *Bonbrest v. Kotz*, 65 F.Supp. 138 (D.D.C. 1946).

⁶⁵ *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992).

⁶⁶ FRIEDRICH K. JUENGER, CHOICE OF LAW AND MULTISTATE JUSTICE 33 (spec. ed. 2005).

⁶⁷ BODERHEIMER, *supra* note 63, at 349.

dependents. This was done to achieve a sense of appropriateness while conforming to principled and tolerable legal techniques.

Public order and good customs connect law to society at large.⁶⁸ As Edgar Boderheimer points out, it is one of the cardinal errors of legal positivism that it limits its theory of the sources of law exclusively, or almost exclusively, to formal sources of law.⁶⁹ Public order and good customs favor a prerequisite of recognition bringing good social customs to the field of law. Boderheimer concluded that public policies, moral convictions, and social trends constitute non-formal sources of law. In the case of *In re Liberman*,⁷⁰ public policy served as an independent source of adjudication without the support of controlling precedent. Loosely, public order could be understood as general social interests, and good customs could be envisaged as general moral convictions.⁷¹ It, with the natures of the vague, variable, and uncertain, mitigates strict law, but also gives rise to difficulties in identifying its content. According to Mengyong, a judge, in adjudicating based on public order and social customs—when elevating public interests, moral convictions, or social trends to the status of a controlling rule, of judicial decision—should abandon her own biases, and take into account the nation as well as the region that the litigants belong to, and consider both the public feeling and comments of experts.⁷² In balancing a strong and dominant moral conviction or social trend with an equally forceful opposing one, a court should account for differences of opinion as to what constitutes the foundations of justice, and to not resist social progress by stubbornly clinging to antiquated notions of justice—which may be those of a dying epoch.⁷³

In the frozen embryo case, although gestational surrogacy is forbidden at present in China, the court still supported the custody and disposition of the cryopreserved embryos of the four elders. The court kept an open mind to public opinions on gestational surrogacy and even other currently more controversial questions relating to the development of technology and moral convictions. This Article takes the position that, while resorting to public order and good customs when devising protections for the deceased is roughly acceptable, doing the same when it comes to frozen embryos might lead to difficult issues. Developments in human

⁶⁸ Yi Jun (易军), *Lun Sifa Shang Gongxuliangsu Tiaokuan de Jiben Gongneng* (论司法上公序良俗条款的基本功能) [*The Basic Functions of Public Order and Good Customs in Private Law*], 5 J. COMP. L. 32 (2006).

⁶⁹ BODERHEIMER, *supra* note 63, at 346.

⁷⁰ *In re Liberman*, 18 N.E.2d 658, 279 N.Y. 458 (N.Y. 1939). The New York Court of Appeals held that the beneficiary should lose her right to the trust fund if she entered a marriage contract without the consent of the trustees, because retaining her right in these circumstances would have run contrary to public policy.

⁷¹ Dai Mengyong (戴孟勇), *Lun Gongxuliangsu de Panduan Biaozhun* (论公序良俗的判断标准) [*On the Criterion to Judge Public Order and Good Custom*], 3 L. & Soc. DEV. 47 (2006).

⁷² *Id.* at 47.

⁷³ BODERHEIMER, *supra* note 63, at 372.

biotechnology are likely to continue to cause countless ethical and legal problems. Within the Chinese context, certain questions are likely to emerge. For instance, questions—such as what should happen if one party demands use of the frozen embryos and the other refuses consent?; would gestational surrogacy remain illegal despite a public’s increasingly large demands?; could the mother-in-law voluntarily be the surrogate for her daughter-in-law in the case that gestational surrogacy is not forbidden? Siding with the judges in *Shen and Shao v. Liu and Hu*, I consider that gestational surrogacy will one day be legitimate in China.

Some jurisdictions, such as the Netherlands and several American states, allow children resulting from ARTs to sue for what is called a wrongful life. This concept caused law to encounter questions of non-existence.⁷⁴ Reflecting on the sociocultural position of Chinese law, this Article submits that the interest in non-existence is a strange notion for Chinese society. Being a person—no matter what condition it is—in this world is generally considered to be an occurrence to be thankful for, although we know sometimes it is not. We should thank our parents, the doctor, and even God for bringing us to this real world despite our external and inherent conditions. Every innocent life deserves to be respected and protected despite how severely disabled it is. This Article further takes the position that cases of wrongful life against its parents or cases advocating an interest in non-existence would only rarely be allowable in China. Considering the Baby Kelly case before the Dutch Supreme Court,⁷⁵ this Article concedes that, in cases of wrongful life, it would be possible to claim damages to compensate the parents if the condition was caused by a third party or due to her negligence, while it might be impossible to sue against parents or in the name of an interest in non-existence. It is true that rules tackling these questions could be a difficult task for legislators to properly designate. These questions need to be discussed further along with the changing social trends. The legislature and judiciary should not always indiscriminately resort to public order and good customs when faced with such intricate ethical questions.

III. Summary

Regarding the nature of the unborn (*in vivo* or *in vitro*) and the deceased, neither the Chinese legal system nor Chinese legal academics acknowledge any of them as persons. Although some controversies do exist, the legislators and major scholars maintain the original Roman structure of *persona/res* and the natural person model, and hence, deny positions that

⁷⁴ ten Haaf, *supra* note 2; Britta van Beers, *The Changing Nature of Law’s Natural Person: The Impact of Emerging Technologies on the Legal Concept of Person*, 18 GERMAN L.J. 559, 584 (2017). Wrongful life is a legal action in which a severely disabled child sues someone for failing to prevent the child’s birth. For example, in the *Baby Kelly case* (see *infra* note 76), a Dutch girl named Kelly was born severely handicapped. The 1990 Human Fertilisation and Embryology Act (HFEA) provides standing to pursue a cause of action where a child’s disability results from ARTs, including pre-implantation genetic diagnosis (PGD), etc. For an overview of wrongful life actions in several jurisdictions see Ivo Giesen, *The Use and Influence of Comparative Law in “Wrongful Life” Cases*, 8 UTRECHT L. REV. 35 (2012) and Ronen Perry, *It’s a Wonderful Life*, 93 CORNELL L. REV. 329 (2007).

⁷⁵ H.R. 18 Maart 2005, NJ 2006, 606 m.nt. JBMV (Neth.) [hereinafter Baby Kelly].

advocate legal personality for frozen embryos or the deceased. When considering protections for the unborn, many jurisdictions made strong efforts to balance the interests of the unborn child and the ability of the woman to control her own body. While these debates have not emerged in China—largely because of China’s family planning policy—it makes sense that China struggles to protect the unborn regardless of its tolerant attitude towards abortion. Consequently, as a recent affirmation, the new GRCL recognizes the capacity for civil rights of an unborn with respect to certain property interests, such as succession and receiving gifts. This limited capacity is contingent on the unborn surviving birth. With respect to embryos and the deceased, Chinese scholars divide things into three categories: Ethical things, special things, and ordinary things. Both frozen embryos and remains of the deceased fall into the realm of ethical things, meaning that disposition or other acts on them shall not be contrary to public order or good customs.

E. Conclusion

Chinese civil law has, in the past, drawn heavily on the continental tradition. At the same time, China’s particular policies, such as the family planning policy and the lenient position towards abortion, separate the contemporary Chinese tradition from the rest of the world. In these circumstances, and particularly when considering the rapid technological change, the Chinese civil law system displays both familiar and original solutions when compared to other jurisdictions, particularly those in Europe and the United States. Is a fetus a person? Is a frozen embryo a person? These questions are treacherous because the concept of a “person” has a great many uses and senses that can be easily confused⁷⁶—or tainted.⁷⁷ With rapid changes in technology, numerous ethical and legal questions concerning these new entities have emerged. To maintain the coherence of the Chinese civil law system, the traditional *persona/res* structure and natural person model have remained mostly intact. Whether fetus, frozen embryo, or the remains of the dead, none are recognized as a new “person.” At the same time, however, Chinese courts have recognized that these entities undoubtedly deserve extra protections. Operating without statutory support, judges have upheld the claims of plaintiffs by referring to an extensive interpretations of existing rules or referring to public order and good customs.

The forthcoming Chinese Civil Code recognizes that in certain instances the unborn will be considered as if they were already born. In dealing with protections for the unborn, the internal civil code system operates in a roughly coherent manner under the legal fictions afforded by the legal release condition theory. This theory provides that an unborn child’s capacity for civil rights exists from the moment of conception, but may be retroactively extinguished if the child is stillborn. While the efforts of the Chinese legislature clearly recognize a need to address rapid changes in values and technology, legislators will nonetheless need to resort at times to more

⁷⁶ DWORKIN, *supra* note 8, at 22.

⁷⁷ See Selkälä & Rajavuori, *supra* note 2.

open-ended principles like public order and good customs, rather than simply making more rules. Regarding protections for frozen embryos and the deceased, the forthcoming civil code seems unable to directly deal with them. Referring to public order and good customs plays a significant role within the Chinese legal system by mitigating strict rules, pursuing justice on a case-by-case basis, deciding disputes where existing rules are unclear or silent, and connecting positive rules with moral convictions and social trends.

A Posthuman Data Subject? The Right to Be Forgotten and Beyond

By Jannice Käll*

Abstract

The general assumption in the West is that there still is an inherent difference between persons and things. This divide informs how “the human” and human subjectivity are constructed as distinct from all others. Recently, the distinction has been challenged in posthumanist theory, where it has been argued that the divide between human and nonhuman agents—or rather, bodies—is always an effect of a differential set of powers. For this reason, the boundaries between human and nonhuman are always in flux. As posthumanist theorists have argued, this change in boundaries may be specifically visualized in relation to digital technology. Today, such technologies obfuscate the boundaries between persons and things, and the extensive utilization of smartphones, social media, and online search engines are just three common examples.

In parallel to the continuous expansion of digital technologies, critical understandings of how “data” and human personhood are produced are increasingly raised in legal theory. Recent developments establishing increased privacy online through EU law, including the new General Data Protection Regulation and the famous Right to Be Forgotten case could possibly be understood to have struck a balance between interests of the human—in the form of privacy—and the digital—in the form of information diffusion. In this Article, a posthumanist theoretical perspective is utilized to show how the new data protection legislation, with a focus on the Right to Be Forgotten, produces such protection yet continuously withdraws data as a separate body from human bodies. For this reason, it is argued that the construction of new human rights, such as those considering data protection, would benefit from understanding how the separation is, in itself, an effect of advanced capitalism.

* Dr. Jannice Käll holds an L.L.D. in Legal Theory from Gothenburg University, Sweden. Her doctoral thesis “Converging Human and Digital Bodies—Posthumanism, Property, Law” (2017) explores and develops posthumanist theory as a jurisprudential response to technological and capitalist advancements that obfuscate the boundaries between human and nonhuman bodies.

A. Introduction

It is now widely acknowledged that the idea of human existence faces a dramatic reconceptualization. This Special Issue is not the least proof of such change. These developments are mirrored in the way *human* rights, as a construction, now face a number of entirely new areas.¹ As Selkälä and Rajavuori write in the Introduction to this issue, “legal personhood has been extended past the sphere of persons commonly held to such standard in the West.” In this sense, an expansion of personhood has taken place to produce a “legal response” to different types of questions where a need for protection has been identified. Subsequent developments have included the granting of personhood to “nature.” New Zealand now recognizes a right to personhood for a river,² India acknowledges rights of waterfalls,³ and Ecuador grants rights to the environment as a whole.⁴ An additional but contested development in legal personhood concerns the scope of rights enjoyed by corporations.⁵

Another area of interest is how rights to communication and privacy, in their capacity as fundamental human rights, can be understood and developed in relation to the digital sphere.⁶ This article explores the specific right construct conceived with the concept of “the data subject” in the law of the European Union (EU). The data subject, articulated through the Data Protection Directive (DPD) that was adopted by the EU in 1995⁷ and reiterated in the recent General Data Protection Regulation⁸ (GDPR), has recently developed into what has commonly been referred to as the “Right to be Forgotten” (RTBF) online. These developments are also reflected in the new directive where such a right is made explicit in the Article 17 as a *right to erasure*. In brief, the legislation implies that “natural persons” as “data subjects” have, under certain conditions, the right to ask companies to remove links with personal data about them on the internet.

¹ See, e.g., UPENDRA BAXI, *HUMAN RIGHTS IN A POSTHUMAN WORLD* (2009).

² Abigail Hutchison, *The Whanganui River As a Legal Person*, 39 *ALTERN. L. J.* 179, 179–82 (2014).

³ Lalit Miglani v. State of Uttarakhand and others, Writ Petition No. 140 of 2015, High Court of Uttarakhand at Nainital (India), MCC 139/2017.

⁴ Rickard Lalander, *The Ecuadorian Resource Dilemma: Sumak Kawsay or Development?*, 42 *CRITICAL SOC.* 623 (2016).

⁵ Toni Selkälä & Mikko Rajavuori chapter in this volume, 18 *GERMAN L.J.* (2017).

⁶ See, e.g., J. Richardson, *The Changing Meaning of Privacy, Identity, and Contemporary Feminist Philosophy*, 21 *MIND MACH.* 517 (2011) (treating the link between online and offline identity in relation to a move towards a more relational understanding of privacy in general).

⁷ Council Directive 95/46, 1995 O.J. (L 281) 31 (EC) [hereinafter DPD].

⁸ Commission Regulation 2016/679, 2016 O.J. (L 119) 1 (EU) [hereinafter GDPR].

This right is also specifically aligned to the developments in the more recent practice of the European Court of Justice (ECJ), particularly in the *Google Spain* case (the RTBF case).⁹ Following that case, there has been much discussion on whether the right to have one's personal data erased from a digital setting can be understood as either too progressive or not radical enough.¹⁰ In this Article, I will, however, argue that in order to make such an evaluation of the "new" human rights, particularly in the digital setting, we first need to consider in greater depth who *the human* is. Such theorization has, in more recent times, been pursued specifically in what may be termed the posthumanist stream. In this line of theory, it has been suggested that humanity now stands before a posthuman condition and has, indeed, turned itself posthuman.¹¹

The development towards the posthuman condition may in turn be understood to capture a stage of crisis for the human. In this crisis, several of the assumptions in relation to the dominating concept of the human are challenged. In posthumanist theory, the crisis is captured partly in relation to what is referred to as "the anthropocene,"¹² as well as partly in relation to the "capitalocene"¹³ or "advanced capitalism."¹⁴ In short, the first concept captures the idea that the human species has affected the earth to a degree that is geologically irreversible.¹⁵ Thus, the centrality of "the human" has come to directly affect the place where humanity is supposed to reside. Second, the concepts of capitalocene and advanced capitalism are utilized to show that capitalism now informs and subordinates the possibility of thinking about what a human *is* to an excessive extent.¹⁶

Posthumanist theories aim to produce critiques of as well as counter-narratives to these developments. In relation to such critical interest, information and communication

⁹ Case C-131/12, *Google Spain v. Agencia Española de Protección de Datos (AEPD)*, (May 13, 2014) <http://curia.europa.eu/> [hereinafter *Google Spain*].

¹⁰ See, e.g., R. H. Weber, *The Right to Be Forgotten: More than a Pandora's Box?*, 2 JIPITEC 120, 121–22 (2011); Susanna Lindroos-Hovinheimo, *Legal Subjectivity and the 'Right to be Forgotten': A Rancièrean Analysis of Google*, 27 LAW & CRITIQUE 289 (2016).

¹¹ DONNA HARAWAY, *SIMIANS, CYBORGS, AND WOMEN: THE REINVENTION OF NATURE* 210 (1991); N. KATHRENE HAYLES, *HOW WE BECAME POSTHUMAN, VIRTUAL BODIES IN CYBERNETICS, LITERATURE, AND INFORMATICS* (1999); and ROSI BRAIDOTTI, *THE POSTHUMAN* (2013).

¹² DONNA HARAWAY, *STAYING WITH THE TROUBLE-MAKING KIN IN THE ANTHROPOCENE* 30, 36, 44 (2016); see also, e.g., Dipesh Chakrabarty, *The Climate Of History: Four Theses*, 35 NO. 2 CRITICAL INQUIRY (2009).

¹³ *Id.* at 47.

¹⁴ BRAIDOTTI, *supra* note 11, at 7.

¹⁵ *C.f.*, e.g., Andreas Philippopoulos-Mihalopoulos, *Lively Agency: Life and Law in the Anthropocene*, in *ANIMALS, BIOPOLITICS, LAW* (Irus Braverman ed., 2016).

¹⁶ BRAIDOTTI, *supra* note 11, at 7; HARAWAY, *supra* note 12, at 47.

technologies have given rise to a specific thread on how to think the human in new ways.¹⁷ Following such a thread, this Article aims to provide a critical narrative of “data subject” construed through EU data protection law, and also expose its potential.¹⁸ In this endeavor, it is argued that by understanding the data subject through the posthumanist theory, new ways to think about the need for privacy online emerge. Further, such reconsideration of privacy can be understood both as having reached beyond as well as having affirmed the humanist endeavor vested in treating privacy—on and offline—as a human right.

To structure the discussion, I will specifically align this aim with the concepts of dematerialization and rematerialization of human and digital technology, as proposed by Katherine Hayles in *How We Became Posthuman*. In this book, published already in 1999, Hayles argues that the terminology of dematerialization can be utilized to show a “change in the body (the material substrate)”¹⁹ as well as a “change in the message (the codes of representation).”²⁰ Thus, dematerialization can be understood as a concept for describing how the human body, as well as knowledge or information, undergoes shifts in materiality through specific narratives for objectifying information. In this way, she produces a theory for appraising in-depth how the construction of the human person, as well as of data, occurs in cybernetic discourses, for example. The larger aim when utilizing such a perspective is to follow the posthumanist thread to conceptualize how human, as well as nonhuman, bodies are continuously being composed, never forming a firm point from which to reflect the rights connected to the human.²¹ Here, this will be pursued specifically in relation to showing how the human body can be considered to have metamorphosed into a posthuman type of personhood. The focus on the changing materialities and connections of and between bodies aligns posthumanist theory with other theories in the new materialist stream. The aim here is also to steer away from entirely dystopic notions of potential posthuman bodies.²² Specifically, this potential is pursued as a way to produce theory able to assess the potential of human rights that relate to privacy online. Before embarking on such endeavor, I will shortly introduce posthumanist theories and in particular the stream of posthumanism as it is advanced here.

¹⁷ Possibly the most well-known example is Donna Haraway’s creation of the cyborg as a figure to think resistance in new ways. HARAWAY, *supra* note 12, at 149–81.

¹⁸ *C.f.* Selkälä & Rajavuori, *supra* note 5.

¹⁹ HAYLES, *supra* note 11, at 29.

²⁰ *Id.* at 29.

²¹ *See, e.g.*, JANNICE KÄLL, CONVERGING HUMAN AND DIGITAL BODIES, POSTHUMANISM, PROPERTY, LAW 98–108 (2017).

²² Compare with Mika Viljanen chapter in this volume, 18 GERMAN L. J., and his conception of the production of cyborg law. In his description of the cyborg, Viljanen points out that this concept has its roots “in our popular imagination, the cyborg typically emerges in apocalyptic dystopias. They are frightening things, evil man-machine hybrids . . . and [e]nmeshings of flesh and electronics are the best-known imaginaries for cyborg existence.” Such a modular perception of the human is also a strand of posthumanist theory.

B. A Brief Introduction to Posthumanist Theory

Posthumanism has recently become a subject of great interest in several fields spanning from philosophy to political theory, art, natural sciences, and law—or at least critical legal theory.²³ Yet, as Carey Wolfe points out, the terminology utilized to describe posthumanism is still ambiguous.²⁴ To set the bearings of this article clearly, it therefore needs to be noted that when posthumanism is engaged here, the theory will be built mainly on the works of Donna Haraway, Rosi Braidotti, and Katherine Hayles. This stream is furthermore affiliated with the critical insights into “the human” developed by philosophers such as Friedrich Nietzsche, Michel Foucault, Gilles Deleuze, and Félix Guattari, particularly their questioning of *Man*.²⁵ All these theorists may, further, largely be sorted under what has been called the “French” reading of the works of Baruch Spinoza.²⁶ What distinguishes Haraway, Braidotti, and Hayles from other posthumanist theorists is that they combine these philosophical commitments with an understanding of recent developments in technology. They also refine the theories of power identified already through the French readings of Spinoza.²⁷

Today, these posthumanist theorists are also explored under the slightly different theoretical stream of the so-called “new materialism(s).”²⁸ The posthumanist stream of the new materialist theory shares the belief that binary boundaries between matter such as subjects and objects are too rudimentary, and also directly harmful for the construction of radically sustainable worlds. Specific to the posthumanist theorists that I will utilize is, however, the way in which they align such commitment with convergences between matter, or bodies, in order to question the assumptions of humanism, which includes notions of legal objects, spaces, and legal subjects.²⁹

The focus on materiality also implies considering matter more profoundly as assemblages or entanglements of bodies rather than as humans or nonhumans divided into dichotomies

²³ CARY WOLFE, WHAT IS POSTHUMANISM? xi (2010).

²⁴ *Id.*

²⁵ An example of such a theory is the history of man pursued by Michel Foucault where he points out that “man is an invention of recent date. And one perhaps nearing its end.” MICHEL FOUCAULT, THE ORDER OF THINGS: AN ARCHEOLOGY OF HUMAN SCIENCES (1966) and WOLFE, *supra* note 23, at xii.

²⁶ For such readings of Spinoza, see, e.g., BRAIDOTTI, *supra* note 9, at 85–86.

²⁷ *Id.* at 55–56. See also HARAWAY, *supra* note 12, at 150 (making use of Foucault and, in latter works, Félix Guattari who worked closely with Gilles Deleuze); *id.* at 34.

²⁸ See, e.g., RICK DOLPHIJN & IRIS VAN DER TUIN, NEW MATERIALISM: INTERVIEWS & CARTOGRAPHIES (2011).

²⁹ *C.f.* WOLFE, *supra* note 23, at xiii.; Philippopoulos-Mihalopoulos, *supra* note 15.

such as those between humans and technology or subjects and objects.³⁰ The way to see matter as unified in this way aligns posthumanist theory with the more general stream of “object oriented ontologies” or OOOs. Rather than pursuing such a thread, the posthumanist stream used in this Article, however, follows more closely the Spinozan understanding of the body. The most significant implication of this is that the Spinozan understanding appears to give more precedence to theorizing power as separate regimes of affects whereas the OOO-stream leans more towards objectivist empiricism.³¹

This implies that the concept of the body in the posthumanist understanding is further used for explicating what exactly produces the connections and boundaries between bodies. These relations may furthermore be understood to give rise to very specific forms of desires that keep bodies fixed or moving in specific directions. In relation to this, Deleuze therefore argues that we need to ask: “Of what is a body capable? Of what affections, passive as well as active? How far does its power extend?”³² in order to understand the production of subjectivity beyond a humanist perception of capabilities built, for example, on divides between human and nonhuman subjects and objects. Through these questions, we subsequently begin to understand matter, including the “human” body, in new ways, which align with the understanding of matter in Spinoza as interpreted by Deleuze. The same understanding is obtained, for instance, in the connected analysis of bodies and power shared by posthumanist theorists. This trait is potentially the most significant in Braidotti’s theory, yet it seems pertinent to ascribe it to Donna Haraway as well, through their respective developments of Foucault’s theories on bio-power.³³ What unifies these positions is the understanding of the construction of bodies as always related to forms of power.

Posthumanist theories have identified “the capitocene”³⁴ or “advanced capitalism,”³⁵ a form of power regimes that has already been discussed. The idea of capitalism as a form of intense power that shapes and reshapes bodies is, furthermore, specifically linked to a view where the production of capital is increasingly connected to production of information as a commodity. Rosi Braidotti even argues that in the current forms of capitalism, “[l]ife itself” is the main capital.³⁶ Donna Haraway further develops, in the terminology of the informatics

³⁰ Philippopoulos-Mihalopoulos, *supra* note 15, at 193.

³¹ *C.f.* ANDREAS PHILIPPOPOULOS-MIHALOPOULOS, *SPATIAL JUSTICE: BODY, LAWSCAPE, ATMOSPHERE 3* (2016); BRUNO LATOUR, *REASSEMBLING THE SOCIAL, AN INTRODUCTION TO ACTOR-NETWORK-THEORY 1* (2005).

³² GILLES DELEUZE, *EXPRESSIONISM IN PHILOSOPHY: SPINOZA* 256 (1992).

³³ HARAWAY, *supra* note 12, at 150; BRAIDOTTI, *supra* note 11, at 26–27.

³⁴ HARAWAY, *supra* note 12, at 11.

³⁵ BRAIDOTTI, *supra* note 11, at 7.

³⁶ *Id.* at 61.

of domination, understanding of increased commodification of life under advanced capitalism as a machine of biopolitical control.³⁷ Both authors subsequently argue for the capitalization of information to imply that information is not only commoditized in order to produce economic value but also to control *bios* or life to a more intensified degree than previously done.³⁸ In relation to this view, it is interesting to note how Upendra Baxi argues that one could claim that “the law *invented* the posthuman which the contemporary discourse on the emergent posthuman now *discovers*” when capitalist interests were, from the beginning, combined with human rights.³⁹ Baxi also notes that we today witness a human rights paradigm of “trade-related, market-friendly human rights, in which the human rights of multinational corporations and other business entities begin to enjoy autonomy and priority over human rights of human beings.”⁴⁰

Here, this kind of power will, however, be specifically explored as a form of “dematerialization” of human bodies. This process will subsequently be understood as a force that reshapes both what we perceive as humans as well as what we perceive as data. Furthermore, dematerialization will be used to show how these processes are utilized in order to produce bodies as separable from each other. Thus, these narratives will be applied to consider, in more detail, the general societal processes through which the notion of the “data subject” may be contextualized from a posthumanist perspective.

C. Dematerialization of Human Bodies and Materialization of Digital Bodies

The point where humans appear to have become posthuman may, as discussed by Katherine Hayles, be significantly connected to processes of “dematerialization” of the human body. According to Hayles, such dematerialization processes have functioned as a means to materialize digital elements as independent matter through cybernetic discourse. Such narratives are, for example, formulated in a method where data is viewed as a pattern that may flow freely across time and space, or as extracted memories from human brains that may be downloaded on computer disks. As she expresses it, narratives of dematerialization may be summarized as follows: “[T]he great promise of information is that it can be free from the material constraints that govern the mortal world.”⁴¹

³⁷ HARAWAY, *supra* note 12, at 161–62.

³⁸ *Id.*

³⁹ BAXI, *supra* note 1, at 201.

⁴⁰ *Id.* at 199.

⁴¹ HAYLES, *supra* note 11, at 13.

As pointed out by Hayles, the rationale behind such a move is that the accumulation of data is needed in order to create “progress” in society.⁴² This is also mirrored in narratives that advocate the possibility and need for “flows of information” in society.⁴³ In a similar vein, both Lisa Nakamura and Danah Boyd have pointed out that there is a tendency in general to disconnect technology from human constraints.⁴⁴ Moreover, Ella Briens has also pointed out how cyberspace as a place narratively evolved as “a place where the user would be free of the material limits of the body, while also exercising an enhanced control over this virtual environment.”⁴⁵

Another example of dematerialization narratives and practices may be identified in the business models related to the so-called “harvesting” of *Big Data*.⁴⁶ Such harvesting of data implies that the goal is precisely the collection and aggregation of data, more or less “personal,” into big data pools.⁴⁷ A market actor may therefore automatically acquire personal data when private persons enter search terms into a search engine. This automatically transmitted data can include a great deal of information such as IP addresses, user preferences, language, and the search terms themselves, which, in the case of searches made by a user with his own name, easily reveal the user’s identity. Moreover, with regards to persons who have user accounts, their names, e-mail addresses, and telephone numbers almost invariably end up in the hands of the search engine service provider.⁴⁸ Thus, one can argue that persons—or at least the “traces” that can be dematerialized from persons—function as property in business models related to search engines and other digital platforms.

In relation to such narratives, it is interesting to note that the DPD as well as the GDPR also tells a particular story about the need for “the free movement of personal data.”⁴⁹ This

⁴² *Id.* at 8–12. See also Margaret Chon, *Postmodern Progress: Reconsidering the Copyright and Patent Power*, 43 DEPAUL L. REV. 97 (1993).

⁴³ HAYLES, *supra* note 11, at 1–24; Chon, *supra* note 42.

⁴⁴ Lisa Nakamura, *Head-hunting on the internet: Identity tourism, avatars and racial passing in textual and graphic chat spaces*, in LISA NAKAMURA, CYBERTYPES, RACE, ETHNICITY, AND IDENTITY ON THE INTERNET 31 (2002); Danah Boyd, *White Flight in Networked Publics? How Race and Class Shaped American Teen Engagement with MySpace and Facebook*, in RACE AFTER THE INTERNET 203 (Lisa Nakamura & Peter Chow-White eds., 2011).

⁴⁵ Ella Briens, *The “Virtual” Body and the Strange Persistence of the Flesh: Deleuze, Cyberspace and the Posthuman*, in DELEUZE & THE BODY, 121 (Laura Guillaume & Joe Hughes eds., 2011).

⁴⁶ Rob Kitchin, *Big Data, New Epistemologies and Paradigm Shifts*, BIG DATA & SOC., 1–2 (2014).

⁴⁷ *Id.* at 4.

⁴⁸ This was discussed directly by the Advocate General in the RTBF case, see Opinion of Advocate General Jääskinen in *Google Spain*, *supra* note 9.

⁴⁹ See, e.g., GDPR, *supra* note 8, at 4.

understanding is, however, also annexed to an idea that such a flow should be balanced against a high level of protection for the privacy of individuals. In the GDPR this is expressed strongly already in the preamble, which states that: “The protection of natural persons in relation to the processing of personal data is a fundamental right.”⁵⁰

In the DPD, as well as in the GDPR, it is, however, also directly pointed out that in accordance with fundamental commitments underpinning the EU, the free movement of goods, persons, services, and capital also requires that personal data should be able to flow freely from one Member State to another.⁵¹ As will be made visible below, the need for such a “flow” of information to be continuously sustained was also put forward as a defense from Google in the recent RTBF case. Yet, in the end, it was the personal interests of private persons that prevailed.

In light of this, the following discussion illustrates how data protection establishes a new form of human rights for data subjects while keeping up the narrative of a dematerialized conception of data as separate and separable from humans. Following posthumanist theory, this process creates an opening to argue that a form of double movement where dematerialization of persons to data and data to persons can be identified in the RTBF case and, as later effectuated, in the GDPR. Furthermore, possible rematerialization of personhood can create the potential to consider data protection as a new, or at least strengthened, human—or perhaps even cyborgian—right of EU citizens.

D. Rematerialization of the Human Through the Birth of the Data Subject?

While recognizing the need for personal data to flow freely, the previous data directive also clearly expressed the need to balance such flows so that “the fundamental rights of individuals should be safeguarded.”⁵² Thus, apart from sustaining the free flows of data as part of trade inside the EU, it was also recognized early on that at least some data is to some degree more connected to persons—or rather “data subjects”—than other types of data. This double purpose is expressed, for example, in the following manner:

“[P]ersonal data” shall mean any information relating to an identified or identifiable natural person (“data subject”); an identifiable person is one who can be identified, directly or indirectly, in particular by

⁵⁰ *Id.* at 1.

⁵¹ DPD, *supra* note 7, at 3. See also GDPR, *supra* note 8, Article 1 (assuring the free movement of data within the Union). *Cf., e.g.*, Commission to the European Parliament, the European Economic and Social Committee and the Committee of the Regions, *Building A European Data Economy*, COM/2017/09 final (Jan. 1, 2017).

⁵² DPD, *supra* note 7, at 3.

reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity . . .⁵³

In the GDPR, this subject construction is articulated in the following manner:

“[P]ersonal data” means any information relating to an identified or identifiable natural person (“data subject”); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person.

A subject construction is thus established through the possibility of claiming “personal data.” Furthermore, this possibility is based derivatively on the construction of data as an object, or more specifically “personal data,” and its entanglement with the so-called natural person. One aspect of this established connection between some data and some persons is furthermore sustained in the manner in which a data subject was given control over personal data in the sense that she could ask to have it erased. A “data subject could ask for such removal.”⁵⁴

For the purposes of this article, it is important that the RTBF proceedings spurred the possibility of making the DPD applicable to data that has been processed by market actors such as Google. In legal terms, this was a question of whether Google could be viewed as a controller of data and thus responsible for its use under the DPD, article 2(d).⁵⁵ This form of privacy online is generally understood to have been established through a series of developments at the EU level, where the Commission and the ECJ have proposed strengthened human rights with regards to privacy on the internet. At the end of January 2012, Viviane Reading, the European Commissioner for Justice, Fundamental Rights, and Citizenship, announced the Commission’s proposal to create a new privacy right as a

⁵³ DPD, *supra* note 7, Article 2; *c.f.* DPD, *supra* note 7, Article 1.

⁵⁴ DPD, *supra* note 7, Article 12; *c.f.* GDPR, *supra* note 8, Article 17.

⁵⁵ See European Commission, Factsheet on the Right to Be Forgotten (2012), available at: http://ec.europa.eu/justice/data-protection/files/factsheets/factsheet_data_protection_en.pdf. [hereinafter Factsheet].

consequence to this. This right was explicitly referred to as “the right to be forgotten” or the “right to erasure.”⁵⁶

Parallel to this development, the RTBF case was still being decided. The RTBF case, initiated in 2010, involved a Spanish citizen lodging a complaint with the national Data Protection Agency against a Spanish newspaper and Google Spain and Google, Inc. His complaint concerned an appearance of what he claimed to be private information in the Google search results. He requested Google Spain or Google, Inc. to remove the data related to him so that it would no longer appear in the search results. The personal information involved was related to an announcement for a real estate auction connected to attachment proceedings for the recovery of social debts and the Spanish Citizen had originally been in 1998.⁵⁷

On 13 May 2014, the ECJ settled on the RTBF case. The result was that the publication of data was considered to have interfered with the person’s right to privacy or data protection. In short, the court reasoned that the economic interest of a search engine was not enough to motivate side-stepping from the right to have personal data removed.⁵⁸ Thus, in order to settle the extent to which a person was entitled to the right to be forgotten, the ECJ argued that a case-by-case assessment had to take place. As expressed in the factsheet on the ruling,⁵⁹ this right subsequently applies where the information is inaccurate, inadequate, irrelevant, or excessive in relation to the data processing.⁶⁰ This assessment thus aims to consider the sensitivity for the individual’s private life and the interest of the public in having access to that information.

In this evaluation, it was further argued that the role played in public life by the person requesting the deletion might also be relevant.⁶¹ The notion of a right to one’s personal information as a form of rematerialization of “the human” as a subject separate from, yet in control over her data, could therefore be understood as conditioned by e.g. the public’s interest in certain types of information. In the case of public persons, such conditionality furthermore concerns not only the right of data controllers to keep data available but of a

⁵⁶ European Commission Press Release IP/12/46, Commission Proposes a Comprehensive Reform of Data Protection Rules to Increase Users' Control of their Data and to Cut Costs for Businesses (Jan. 25, 2012) available at http://europa.eu/rapid/press-release_IP-12-46_en.htm.

⁵⁷ *Google Spain*, *supra* note 9, at 14.

⁵⁸ *Id.* at 85.

⁵⁹ Factsheet, *supra* note 55.

⁶⁰ *Google Spain*, *supra* note 9, at 93.

⁶¹ Factsheet, *supra* note 55.

third party, or rather of a collective of humans in the form of a “public,”⁶² to exercise such a right.

This kind of an argument clearly aligns with the notion of the “persona” as a form of mask that may be disconnected from one’s body and treated as a form of intellectual property.⁶³ As Margaret Davies and Ngaire Naffine argue, this kind of construction may be understood to have introduced a connection between a human person and a thing in the form of the construction of property as in a person.⁶⁴ Thus, one may argue that in the cases where the human has already been partly rendered into a thing, as, for instance, in the form of a commercial persona, the need to have data subjectivity in accordance with the RTBF is less pressing than it otherwise would be. As a consequence, the fact that a representation of a human body has already had a marketable value in the sense of a persona is thus treated as an assumption for continuously portraying this “mask” as being dematerialized from the human. Where a person is not as explicitly dematerialized from her personal data, it is, as discussed with reference to the RTBF case and the RTBF guidelines, also made explicit that the right to have personal data erased needs to be assessed in relation to economic interests in general. More concretely, on the basis of an understanding of how advanced capitalism works, as explicated in posthumanist theory, one may also suspect that the boundary between a commercial persona and a private persona is not made as concrete and explicit as one may think.⁶⁵ Furthermore, as argued by Wendy Brown, capitalist logics today explicitly make private persons behave on market terms as if they themselves, including their personae, were market assets.⁶⁶

As further discussed by Selkälä and Rajavuori in line with Upendra Baxi, this implies that even if there is a blurring of the boundaries between the ontological constructions of biological humanity in science and technology, such blurring implies that both the body and mind are understood as coded programs of information. Personhood, subsequently, emerges in new ways, overlapping previous humanist boundaries between body and mind but also reinstating, and even reinforcing, the divide between personhood and thingness.⁶⁷ The question therefore becomes whether there is still potential in considering the development

⁶² Cf. Janice Richardson, *Spinoza, Feminism and Privacy: Exploring an Immanent Ethics of Privacy*, 22 FEM. LEG. STUD. 225 (addressing this perspective from a Spinozan perspective, which thus is very related to the stream of posthumanist theory pursued here).

⁶³ Compare with Selkälä & Rajavuori, *supra* note 5. See also Ukri Soirila chapter in this volume, 18 GERMAN L.J. (2017).

⁶⁴ MARGARET DAVIES & NGAIRE NAFFINE, *Are PERSONS PROPERTY? LEGAL DEBATES ABOUT PROPERTY AND PERSONALITY* 125–29 (2001).

⁶⁵ See *supra* Section B.

⁶⁶ WENDY BROWN, *UNDOING THE DEMOS: NEOLIBERALISM’S STEALTH REVOLUTION* 78 (2015).

⁶⁷ Selkälä & Rajavuori, *supra* note 5.

of data protection as human rights in the posthumanist sense. One needs to ask—even if it appears that the rematerialization of “the human” is conditioned on advanced capitalist terms—whether we can still understand the establishment of the “data subject” as a positive answer to such processes.

E. Entanglements Between Human and Digital Bodies: A Posthuman Subject?

Keeping in mind the different processes of materialization that occur when construing the data subject, we may now return to the posthumanist theory in greater depth. As discussed above, one of the main points with this theoretical framework is to conceive of “the body” in ways that bridge the dominant understandings of what constitutes a human. The aim with such processes, as discussed by Braidotti, is to contemplate more critically the material that could come to constitute a posthuman subject.⁶⁸ As such, the question for this part is whether the construction of data privacy and the RTBF may be perceived as a step towards such subjectivity. The question is rendered even more prevalent when considering the strong emphasis on human rights to personal privacy embedded in the new GDPR framework.⁶⁹

As a starting point in this inquiry, it needs to be affirmed that the construction of a right that pertains to data subjectivity itself disrupts the notion of a human person as basis for human rights. Following posthumanist theory in general, one could subsequently argue that the idea of a hybrid human subject is injected as a basis for human rights. This form of hybridity is, of course, visible already in the collapsed construct under the moniker of the “data subject.” Even if this construct is pursued in a fairly narrow manner so as to sustain personal information as “data” related to a “natural person” as a new body, the form of a right construct still recognizes the connection between data and the person. This connection—while at the same time a complex disconnection—may, in accordance with the posthumanist theoretical framework, be related to the continuous dematerialization processes of information as identified by Hayles.⁷⁰ Situating these narratives in this way makes visible the complexities at stake in producing an altered form of subjectivity as basis for human rights rather than simply injecting a collapsed perspective of “data” and “subject” or nonhuman-human bodies as a basis for constructing online personhood. For this reason, the rematerialization of the human—and of human rights online—may, to a degree, imply a step toward something “less human” than previously is recognized as entangled with the production of human subjectivity. This is so since the production of hybridity, as described by Hayles, is also embedded in the broader dematerialization of human bodies.

⁶⁸ BRAIDOTTI, *supra* note 11, at 12.

⁶⁹ *C.f.* GDPR, *supra* note 8, at 1.

⁷⁰ *Id.*; HAYLES, *supra* note 11, at 1–24.

From the perspective of posthumanist theory, the idea of sustaining a link between a person and information is particularly interesting because of its right construct, which applies to an online environment. These environments, closely following the idea of dematerialization narratives, have been considered spaces where there is no body. Thus, such spaces are entirely neutral areas beyond the material constraints of the offline world. Yet, as has been pointed out by others, embodiment also occurs online. This implies that race and gender, for instance, are continuously produced and reproduced online.⁷¹ In the RTBF case, one may see how establishment of a right to have one's information delinked increasingly sustains the linkage between the human body and the digital environment. In the RTBF case, this link was specifically pursued because the information available online was directly connected to the plaintiff's life offline. Thus, his difficulty with receiving job offers was limited due to the availability of online information. In the new GDPR, the link between online and offline materialities is directly emphasized with regard to data that may identify a specific "racial origin" which merits a specifically cautious treatment.⁷²

As discussed above, from a posthumanist perspective a further important aspect in reconsidering the divide between persons and things is informed by the role that market actors play in shaping the posthuman. Here, too, one may argue that the ECJ recognizes the significance of market actors in the transformation by attributing to them direct responsibility to remove information upon request. Imposing responsibility on companies like Google implies a step away from another existing narrative where these actors are seen as mere "mediators of information."⁷³ Considering how mediation of information implies the potential to collect and aggregate data into "Big Data," this move should be considered an important way to connect the human body to data—in other words, to rematerialize the human.

Yet, the rights construction leaves, of course, room for questioning, also from a posthumanist perspective. One significant and clear opening for critical inquiry of embodiment is the way in which the right is connected to a "natural person." Both nature as well as person are, of course, concepts to be wary of if one aims to bridge dualisms vested in the dominant idea of the subject.⁷⁴ The reason for such precaution is founded on the perception of nature as a fixed state of being.⁷⁵ Implicit in the posthumanist notion of the human is furthermore also a critique against understanding any human as an entirely individual person separate from other persons but also from other things and environments.

⁷¹ NAKAMURA, *supra* note 4; Boyd, *supra* note 42.

⁷² GDPR, *supra* note 8, at 51.

⁷³ *C.f.*, e.g., *Google Spain*, *supra* note 9, at 17.

⁷⁴ See Selkälä and Rajavuori, *supra* note 5.

⁷⁵ *C.f.*, e.g., DONNA HARAWAY, THE COMPANION SPECIES MANIFESTO (2003) (coining the term *nature cultures*).

In this case, the notion of a natural person is implausible because the entire cause of personality is related to a form of entangled subjectivity. “Data” is however also continuously understood as separable, to a large extent, from the person. This is also obvious in the way that public persons are perceived as distinguished from their “data” to a degree greater than other persons. Obviously, then, the kind of personhood emerging as data subjectivity cannot be perceived as natural nor as singular.

Furthermore, the construct of assigning rights of privacy to a person in general needs to be criticized because it individualizes the need for online privacy. This individuality is also expressed in the manner in which the court argues that the level of privacy that a data subject could claim should be decided on a case-by-case basis. Such individualist notion of “the human” stands in stark contrast to the way that subjectivity is constructed as an ethical response to power under posthumanist theoretical frameworks. As Braidotti, for instance, points out, the construction of a posthumanist subjectivity makes it possible to think in radically relational ways.⁷⁶ These deep relational concepts necessarily require further consideration of how various power regimes affect the kind of personal information that is made available on the internet but also the kind of posthuman subjectivities that are made possible.⁷⁷ The emphasis on sensitivity towards data that may point out “racial origin,” as expressed in the GDPR, may imply a better way to account for the non-abstract sense in which the human and nonhuman are produced as entangled with technology. Thus, the recognition and deterrence from registering race as “data” visualizes that technology, or “data” is not a neutral, entirely dematerialized body that just wants to flow. Instead, as pointed out in the GDPR,⁷⁸ some data collection requires specific protection. The GDPR also goes even further in recognizing this connection where the processing of data may cause damage to data subjects.⁷⁹ Very much in line with the critical interests of posthumanist theory, it makes explicit that physical, material, or non-material damage in particular could take place when personal data are processed, as detailed below:

[W]here personal data are processed which reveal racial or ethnic origin, political opinions, religion or philosophical beliefs, trade union membership, and the processing of genetic data, data concerning health or data concerning sex life or criminal convictions and offences or related security measures; where personal aspects are evaluated, in particular analysing or predicting aspects concerning performance at work,

⁷⁶ BRAIDOTTI, *supra* note 11, at 190–94.

⁷⁷ *Id.* at 26–27.

⁷⁸ GDPR, *supra* note 8, at 75.

⁷⁹ *Id.*

economic situation, health, personal preferences or interests, reliability or behavior, location or movements, in order to create or use personal profiles; where personal data of vulnerable natural persons, in particular children, are processed; or where processing involves a large amount of personal data and affects a large number of data subjects.⁸⁰

This linkage between data and what constitutes vulnerable data underscores the question of what kind of boundary should be drawn when constituting the human and nonhuman through “fundamental rights” to online privacy. The fundamental underpinnings of human rights are, however, not necessarily altered just because data protection is enforced.⁸¹ As argued by Janice Richardson in a more strictly Spinozan vein, a way to move forward beyond the individualist notions of rights in the online—and offline—sphere could be to distinguish communication supporting knowledge in a democratic society from communication that harms both communication and life in general. In this manner, she argues that revenge porn, for example, could be considered as a specific form of communication that has no form of democratic value as it reproduces power in a manner detrimental to a democratic society.⁸² This kind of understanding also appears to align at least to some degree with the more recent developments of data protection in the EU. As will be argued in the conclusion, however, from a posthumanist perspective one needs to align such understanding even further with the way subjectivity is produced offline.

F. Summary and Concluding Remarks

Posthumanist theory shows, to a significant degree, that in order to be able to think subjectively beyond the human one also needs to be able to consider new forms of materialities as connected to the human. As discussed by Selkälä and Rajavuori, the posthuman condition returns elements of legal personhood to its constitutive parts. In this condition, technological encounters with “the human,” for instance, give rise to new constructions of persons that may be perceived as both adjacent to and overlapping with the traditional legal person.⁸³ This includes treating the dematerialization as well as rematerialization of data as directly linked to the construction of a “posthuman” form of subjectivity. The posthumanist theory also stresses the need to think of these entangled subjectivities through a critical lens that has the capacity to make visible the power regimes that constitute the dominant understanding of the human and the posthuman. Within this

⁸⁰ *Id.*

⁸¹ *C.f.* Selkälä & Rajavuori, *supra* note 5.

⁸² Richardson, *supra* note 60.

⁸³ Selkälä & Rajavuori, *supra* note 5.

framework, it has been specifically argued that anthropocentric and capitalist regimes produce a notion of the human which naturalizes a very specific form of the human. This form could, in accordance with posthumanist theory, be countered by introducing deeper relational terms. This implies, for instance, the need to understand the human as more intensely related to “the nonhuman” than previously thought. With regard to the development of data subjectivity online, this could, for example, imply the need to consider the human as increasingly connected to an online identity. The rights to privacy online or the RTBF, in particular, may be understood as rights sustaining such understanding. Following posthumanist theorists, however, what remains in such a rights construction is a need to connect such rights beyond the dominant perception of the human.

From the perspective of posthumanist theory, this calls for a new understanding of responsibility related to all that lives in this world. To make the connection between the human and technological body in the sense increasingly made through data protection laws and cases, as well as to the specific degrees to which we become, or do not become, human, may be understood as first steps along such lines. In order to reach the ethical implications of pursuing a posthumanist perspective of subjectivity, a more radical deconstruction of subjectivity needs to be carried out. Subsequently, in order to be able to speak of data subject rights as posthumanist rights, or rights of cyborgs in the posthumanist vein, our notion of the body as always ready and non-individual needs to be enforced. Therefore, this understanding implies that a right of the body is directly linked to what a body can do. It will never be smaller or bigger than the actual movements that a body carries out. This, in turn, implies that a collapse between rights and bodies—as a right becomes the same, or possibly the drive of a body, to continuously exist.⁸⁴ The effectuation of rights also implies that forms of power that produce unsustainable possibilities for bodies to remain in their being need to be abolished. In relation to identifying which power regimes that produce in unsustainable power today, Braidotti, Haraway, and Hayles, have all singled out advanced capitalism, cybernetics and, or the capitolocene as unsustainable.⁸⁵

In order to produce “data subjectivity” as a form of posthumanist subjectivity, it is therefore argued that such construction needs to be able to link harmful regimes of power caused to “natural persons” to online environments as well. This also includes a continuous—general—delinkage of data as a dematerialized product solely controlled by information companies. The development, and subsequent discussions, of the RTBF both make visible and refute several assumptions of law and its engagement with the person or thing divide. Notably, it is perceived as a human right construction, which is vested in a “data subject” and made efficient only through compliance of companies rather than as directly through states. The potential to be a person, to be a “data subject,” both with regards to what one may express as well as what one might withdraw from, is in this way highly conditioned by

⁸⁴ DELEUZE, *supra* note 32, at 255–72.

⁸⁵ See *supra* Section B.

the “thing” holders. The divide between persons and things is clearly distorted in this sphere. The enforceable rights vested in the GDPR notwithstanding it becomes obvious that companies such as Google, as controllers of data, will have the prerogative to refuse delinking of personal data. In order to move towards a more radical understanding of data subject rights as potential posthumanist rights, it is therefore suggested that the control over data as a commodity controlled, to any extent, by market actors, needs to be continuously questioned and ultimately abolished.

Special Issue
Traditions, Myths, and Utopias of Personhood

Persons and Things in International Law and “Law of Humanity”

By Ukri Soirila*

Abstract

Drawing from Roberto Esposito’s recent work on persons and things, this Article studies recent attempts to rethink international legal personality. Esposito’s work resurrects the claim that personhood operates like a mask, splitting the legal and philosophical world into persons and things. International law differs from domestic law in that international legal personality has traditionally been the prerogative of states, not of (rational) individuals. Yet, this has not completely dismantled the persons/things logic, because the exclusive legal personality of states has continuously threatened to reduce individuals into things in the eyes of international law. It is perhaps for this reason that international legal theorists have long sought to extend international legal personality to individuals and other non-state actors. This Article addresses the most recent attempt, namely an attempt to shift international law towards a law of humanity. Without taking a stance on whether this project is a good idea or not, this Article raises some doubts about whether the concept of international legal personality can help in fulfilling the project’s aim, namely to help increase human freedom and well-being. This is especially relevant because, regardless of whether legal personality is attributed primarily to the state or the individual, we still remain—according to Esposito—within a theoretical framework in which the dispositif of person necessarily excludes some forms of life in protecting or empowering others.

* Doctoral candidate in law, University of Helsinki, The Erik Castrén Institute of International Law and Human Rights. The author wishes to thank Mikko Rajavuori and Toni Selkälä for their helpful comments on this piece.

A. Introduction

In his two recent works, Italian thinker Roberto Esposito has approached the history of Western philosophical and legal thought through the concept of the person, arguing that our conceptual world is based on a strict distinction between persons and things—a distinction that is the outcome of a long disciplinary process. As Esposito writes, “[a] watershed divides the world of life, cutting it into two areas defined by their mutual opposition. You either stand on this side of the divide, with the persons, or on the other side, with the thing: there is no segment in between to unite them.”¹ A thing is defined simply as that which is not a person and a person as a non-thing.² Further, and most disturbingly, the persons/things machine creates the assumption that things belong to persons.³

Perhaps even most interestingly, however, Esposito’s work reveals that the persons/things separation is not a fact that exists, but is actively produced by the “*dispositif*” of the person, which necessarily attributes subjectivity to some entities, while casting others as objects. There is no inherent logic to what entity is a person and what a thing, but this distinction—at least in the last instance—was produced politically. Thus, the apparatus of personhood operates even today like the mask of an actor, from which it derives its etymological meaning, in determining who has the right to act. Yet, and again just like the ancient theater mask, personhood tends to merge with the actor, making the end result seem almost natural and thus hiding its political origin.

The fact that personhood is always politically produced also means that not every human being is necessarily a person. This fact takes a completely new twist when it comes to international law. When Esposito writes about personhood, his starting point is obviously the human person. Certainly, personhood may be granted to other entities, such as corporations for example, and conversely, some human beings can be reduced to things—slaves, children, and women are only some historical examples, and the status of the fetus or a comatose patient are some contentious contemporary cases—but the rational human being is nevertheless the norm against which other persons are measured. Yet things are somewhat different in the case of international law. International legal personality has traditionally been enjoyed by states, whereas other entities have been viewed more or less as objects of international law.

It is therefore not surprising that international legal theorists have long sought to extend international legal personality to individuals and other non-state actors. This Article centers on the most recent such attempt, namely one of shifting international law towards a law of

¹ ROBERTO ESPOSITO, PERSONS AND THINGS: FROM THE BODY’S POINT OF VIEW 2 (2015).

² See *id.* at 16–17.

³ See *id.* at 81–85.

humanity and consequently positing the individual as the primary international legal person. This Article is not, however, that interested in a possible “discrepancy between the legal construction of the person and the natural reality of human individuality,” but rather focuses on attempts to draw borders between these two orders.⁴ In so doing, the Article seeks to perceive international legal personhood from the perspective of the two strands of persons/things discourse examined in Selkälä and Rajavuori’s Introduction to this special issue, namely the “multiple modes of existence” and “moral correctness” approaches.

As already mentioned—and as will be argued in more detail below—international law had for a long time a rather strong binary opposition between states, which enjoyed international legal personhood, and other entities. But international lawyers and scholars, of course, still saw individuals as persons in domestic law and in the philosophical sense, thus adopting subliminally a light form “multiple modes of existence” approach. Many contemporary critics of international law’s perceived state-centrism, approach the issue from the “moral correctness” viewpoint, deriving the international legal personality of individuals from their humanity, and making the legal personality of other entities dependent on their function to protect and serve that humanity. This present Article, however, is not particularly interested in the—admittedly important—topic of whether this or that entity falls into this or that category, but rather on the creation and use of the category itself, and in particular the outcomes of this use. While generally sympathetic to the law of humanity project, the Article suggests that simply changing the primary international legal person from the state to the individual might not achieve the desired result, for even in that case we still remain locked within the immunizing and exclusionary logic of personhood. Hence, the proponents of the law of humanity project should perhaps look elsewhere in their search for tools for change.

What follows in this article is divided into four sections. Section B provides a brief historical overview of legal personhood in international law. It introduces the traditional positivist conception, according to which individuals are objects (things) of international law, enjoying only a legal reflex, but also different attempts to change this conception. Section C focuses on the most recent and radical of such attempts, namely that of switching the focus of international law entirely from states to human persons, or what I call the “law of humanity project.” The section introduces different versions of this project and analyzes the role it gives to international legal personality in seeking to achieve the change towards “law of humanity,” that is to say a global legal order built around the human. I find that the contrast between the traditional state-centric notion of international law and the “law of humanity project” provides a fruitful variable into the discussion of international legal personality in the sense that most, if not all, other attempts to think about international legal personality are some sort of hybrid of these positions. Section D provides an immanent critique of the use of the concept of international legal personality as part of the “law of humanity” project.

⁴ See ALAIN POTTAGE & MARTHA MUNDY, *LAW, ANTHROPOLOGY, AND THE CONSTITUTION OF THE SOCIAL: MAKING PERSONS AND THINGS* 1–39 (2004).

Drawing from Esposito's philosophical work on the concept of the person in general, as well as from Jan Klabbers's remarks on the more specific concept of legal personality in international law,⁵ the section makes three points. First, any use of the *dispositif* of person necessarily entails exclusions, and the "law of humanity" project's use of the *dispositif* is no exception in this respect. Second, whilst international legal personality might be too valuable to be discarded in granting political recognition to various groups, it might not be necessary for furthering the well-being and freedom of individuals. Hence, and third, it might be better to seek for more direct ways of governing the relation between law and life, and to narrow the role of international legal personality to only regulating the status of human collectives under international law. Section E concludes.

B. The Traditional Approach to International Legal Personality

In contrast to the naturalist tradition preceding it, modern positivist international law has typically been defined as a discipline, which deals with the rights and obligations subsisting between states. Ever since it was separated from natural law, the law of nations became inter-state law, which was not interested in individuals but treated the state as its primary juridical entity, viewing it as if it had a will of its own, completely separable from that of its members.⁶ Law of nations was no longer seen as (natural) law, which applies to individuals but as (positive) law applicable only to the relations between sovereign states, imagined as moral persons.⁷ From this also followed that international legal personality (ILP) was made the exclusive prerogative of sovereign states—although it must immediately be added that there were also at this time international scholars—such as Bluntschli, Le Fur, Heilborn, Martens, Verdross, and Westlake who advocated for at least some kind of ILP for individuals as well.⁸ ILP is generally used in international law to refer to "the capacity to be the bearer of rights and duties under international law,"⁹ or to competences attributed to designated actors within a systemic legal order.¹⁰ As Jan Klabbers writes, "international legal personality is thought to be a *conditio sine qua non* for the possibility of acting within a given legal

⁵ See Jan Klabbers, *The Concept of Legal Personality*, 11 IUS GENTIUM 35–66 (2005).

⁶ See KATE PARLETT, *THE INDIVIDUAL IN THE INTERNATIONAL LEGAL SYSTEM: CONTINUITY AND CHANGE IN INTERNATIONAL LAW* 11–14 (2d ed. 2013); see generally EMER DE VATEL, *THE LAW OF NATIONS* (2008).

⁷ See JANNE ELISABETH NIJMAN, *THE CONCEPT OF INTERNATIONAL LEGAL PERSONALITY: AN INQUIRY INTO THE HISTORY AND THEORY OF INTERNATIONAL LAW* 83 (2004).

⁸ See Christopher Barbara, *International Legal Personality: Panacea or Pandemonium? Theorizing About the Individual and the State in the Era of Globalization*, 12 AUSTRIAN REV. INT'L EUR. L. 17, 33–35 (2007).

⁹ JAMES R. CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 28 (2d ed. 2007).

¹⁰ See Matthew Craven, *On Statehood, Self-determination, and Recognition*, in *INTERNATIONAL LAW* 201–47, 215 (Malcolm Evans ed., 4th ed. 2014).

situation. Personality is considered to be a threshold, which must be crossed. Without legal personality, those entities do not exist in law.”¹¹

Kate Parlett helpfully summarizes the classical international law approach, which became dominant and uniform by the end of the 19th century, with a reference to the First Edition of Lassa Oppenheim’s hugely influential textbook *International Law: A Treatise*, published in 1905.¹² The principles guiding that book are, according to Parlett, that international law is a body of law governing relations between states; that individuals are under no circumstances subjects, but only objects under international law, comparable for example to territories; and that the only link between international law and individuals was through nationality, in that while states could *choose* to protect the interests of its nationals abroad—it by no means had the duty to do so.¹³

More or less the same approach to international law remained in the early 20th century and in the inter-war period. Whilst first Bierly, Kelsen, and Scelle,¹⁴ and later Lauterpacht and some of his contemporaries,¹⁵ held the individual to be the ultimate international legal person, capable of holding rights and obligations, such views remained rather marginal when it came to international legal practice.¹⁶ This is reflected most clearly in the *Danzig* case,¹⁷ which dealt with the issue of whether a treaty could grant rights to individuals. In a complicated decision, the Permanent Court of International Justice (PCIJ) stated that a treaty could provide some such rights when the parties to the treaty so specifically intend, but was careful to emphasize that a treaty “cannot, as such, create direct rights” for individuals.¹⁸ Thus, as Parlett notes, the Court upheld states’ “monopoly on access to the international system and their status as gatekeepers of international rights and duties.”¹⁹

¹¹ Klabbers, *supra* note 5, at 37.

¹² See LASSA OPPENHEIM, 1 INTERNATIONAL LAW: A TREATISE (1905).

¹³ See PARLETT, *supra* note 6, at 13–16.

¹⁴ See Anne Peters, *Beyond Human Rights: The Legal Status of the Individual in International Law*, in THE CONCEPT OF INTERNATIONAL LEGAL PERSONALITY: AN INQUIRY INTO THE HISTORY AND THEORY OF INTERNATIONAL LAW 18–19 (2004).

¹⁵ See NIJMAN, *supra* note 7, at 297–325; PETERS, *supra* note 14, at 20–21.

¹⁶ See ROLAND PORTMANN, LEGAL PERSONALITY IN INTERNATIONAL LAW 126–72 (2010).

¹⁷ Jurisdiction of the Courts of Danzig (Pecuniary Claims of Danzig Railway Officials who have Passed into the Polish Service, Against the Polish Railways Administration), P.C.I.J. (Ser. B) no. 15 (Mar. 3, 1928).

¹⁸ See *id.* at 17–18.

¹⁹ PARLETT, *supra* note 6, at 25.

In this very classical conception of international law, legal personhood was made the exclusive prerogative of states. According to the so-called “object theory,” individuals could not be right-holders under international law, but only enjoy a legal reflex.²⁰ In this sense, the conception corresponded more or less to Esposito’s description of the persons/things dichotomy, with the curious twist that persons were not rational human beings but sorts of corporations—in this case the very complex corporations called states. As Janne Nijman writes, international legal personality “indeed functioned like a mask, a shield at times, or a façade at others, that divided the international from the internal situation.”²¹ It is not too huge a leap to argue that individuals were treated more or less as things from the perspective of international law. They had no rights or obligations under international law and could not access international courts. Even Lauterpacht’s 1955 version of Oppenheim’s *International Law* still answered the question about the position of individuals in international law by stating simply that “[t]he answer can only be that, generally speaking, they are objects of the Law of Nations.”²²

It would however be completely ludicrous to claim that international lawyers saw individuals as things. That was obviously not the case. Rather, I would argue that international lawyers approached—likely without conceiving it so—the personhood of individuals from the “multiple modes of existence” perspective, presented by Selkälä and Rajavuori in the Introduction to this special issue. As Selkälä and Rajavuori write, this approach gives several “modes of existence” for an entity, which seems to have only one such mode in the “empirically perceivable reality.” Thus, under this approach, an entity can be both a thing and a person, depending on the external mode of inquiry, possibly leading to a “layered narrative of thinghood,” which is free from making value-judgments based on the legal status of entities in various contexts. In other words, any international lawyer certainly understood that individuals are persons from the perspective of domestic law and philosophy. But this was not in conflict with the fact that individuals could have their cases heard in international tribunals only if their home state wished to represent their interests through the doctrine of diplomatic protection. Furthermore, even if a violation was found, the violated party was seen to be the representing state, not the represented individual—as if the individual were little more than the state’s damaged property. Indeed, even after the PCIJ decided that states could grant individuals rights in certain situations in the *Danzig* case, this was only when states so specifically intended.

Much has of course changed in international legal practice and theory since the First Edition of Oppenheim’s *International Law* or the *Danzig* case. It is now generally accepted that “to the extent that entities other than states ‘directly possess’ rights, powers and duties in

²⁰ George Manner, *The Object Theory of the Individual in International Law*, 46 AM. J. INT’L L. 428–49 (1952).

²¹ NIJMAN, *supra* note 7, at 469.

²² LASSA OPPENHEIM, INTERNATIONAL LAW 636, 639 (Lauterpacht 8th ed. 1955); *see also* GEORG SCHWARZENBERGER, A MANUAL OF INTERNATIONAL LAW 35, 53–54 (1947).

international law” they can be regarded as subjects of international law.²³ Furthermore, these rights and obligations are now endowed to individuals under human rights law, humanitarian law, international criminal law, as well as to different entities for example under international investment law,²⁴ international organizations law, and international environmental law. Thus, it is sometimes suggested that the old subjects/objects distinction within international law has collapsed as it has been accepted that international legal persons are not identical, but rather form a spectrum, starting from the state as a full subject of international law and leading to NGOs, which are recognized as subjects by some intergovernmental organizations.

Yet, discontent remains among many contemporary international lawyers about the way international law perceives legal personhood and treats individuals. While it is true that individuals and other actors now have some sort of legal personality in many areas of international law, there are also many important areas where they do not, including much of the UN system, most notably the International Court of Justice. Furthermore, confusion remains about how the increased inclusion of the non-state might be theorized and systematized. As Akerhurst remarked in his influential textbook, the practical extension of rights and duties to non-state actors during the Cold War period was conducted, in the attempt to avoid controversies, without much theoretical deliberation.²⁵ And indeed—as illustrated in this special issue in Rajavuori’s analysis of the porosity of international legal personality in investment treaty arbitration—international law seems to still lack a commonly accepted theory which would coherently describe the relation of a subject to the international legal system.

There are, nevertheless, several candidates for such a theory.²⁶ Some have argued that what should matter is the actual capacity of an entity to engage in the international legal system in a given context, and that we should therefore get rid of the problematic notion of legal personhood altogether.²⁷ According to the New Haven School, for example, there are no subjects and objects of international law, but only participants to it, this including individuals.²⁸ Others, drawing from Kelsen’s conception of legal personhood as the “personified unity of a set of legal norms,” insist on the importance of legal personhood, but

²³ See PARLETT, *supra* note 6, at 353–54.

²⁴ See Mikko Rajavuori’s chapter in this volume, 18 GERMAN L.J. (2017).

²⁵ See MICHAEL AKERHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 70 (rev. ed. 1987).

²⁶ For an overview, see PORTMANN, *supra* note 16, pt. II.

²⁷ See ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 50 (Clarendon Press ed. 1995).

²⁸ See MYRES S. MCDUGAL, HAROLD D. LASSWELL & LUNG-CHU CHEN, HUMAN RIGHTS AND WORLD PUBLIC ORDER: THE BASIC POLICIES OF AN INTERNATIONAL LAW OF HUMAN DIGNITY (1977).

argue that anyone can be a person, for personhood is acquired whenever an international norm grants rights or obligations to an entity.²⁹ Still others argue that human rights and humanitarian law have changed the interpretation of international law so that it now recognizes individuals as legal persons.³⁰

C. The Law of Humanity Project

In what remains of this Article, I am specifically interested in the latest and most radical attack on the old system of international law—one that has, as its goal, a completely humanized international law; or perhaps more fittingly a (global) law of humanity. The vision of a law of humanity draws from the aforementioned attempts to rethink international law, but is also distinguishable from them. Anne Peters argues, for example, that the aforementioned attempts to rethink international legal personhood are still insufficient because they have trouble recognizing the individual as a full international legal person. If ILP is taken to be enjoyed by those entities, which enjoy an adequate *amount or density* of rights to give them certain freedom of action under international law, then individuals would fall under a gray area: They might not yet have enough rights to meet the threshold of freedom, but on the other hand those rights are rapidly increasing. If, on the other hand, ILP were to require rights, which have the right *substance*, such as the right to conclude treaties or join international organizations, then individuals would not qualify at all. The same would be true if ILP were to require certain capacities, as individuals do not, at the moment, have the same capacities as states in the international sphere.³¹

Similarly, Christopher Barbara argues that graduated ILP and international capacity rely on state action and hence “differ mainly on nomenclature and on where to draw the line between being an international legal person and everything else.”³² While individuals and other non-state actors might be argued to enjoy ILP of some sort, in that they may, for example, appear in certain international courts, such as human rights courts,³³ these are, according to Barbara, “secondary grants of circumscribed ILP and not equivalent to the ‘full’ ILP exercised by States.”³⁴ Hence, “if individuals were granted full and formal ILP on the same

²⁹ See PORTMANN, *supra* note 16, pt. III.

³⁰ See ANTONIO AUGUSTO CANCADO TRINDADE, *INTERNATIONAL LAW FOR HUMANKIND* (2010); THEODOR MERON, *THE HUMANIZATION OF INTERNATIONAL LAW* (2006); ANTONIO CASSESE, *INTERNATIONAL LAW* 165–66 (2d ed. 2003).

³¹ See PETERS, *supra* note 14, at 36–38.

³² Barbara, *supra* note 8, at 25.

³³ See *id.* at 23.

³⁴ *Id.* at 23–24.

hierarchical level as the state, it would have to be one specially adapted for them – in other words, a new type of ILP.”³⁵

What unites the authors studied here is the idea that the individual should not only have personhood under international law—he or she should be *the* primary international legal person, the foundation of the system. Similarly, considerations of humanity should not only play an important part in interpretation of international law—humanity should be the leitmotif of international law. This also entails either diminishing, or at least radically rethinking, the role of the state, as sovereignty is derived from humanity.³⁶ According to Barbara, for example, the greatest problem of the international legal system is that the preeminent role is reserved for a legal fiction—the state—rather than the human person. This is doubly so when it comes to ILP for at that point we are “faced with a legal abstraction [ILP] centred upon yet another legal abstraction – the state!”³⁷ In Barbara’s mind, it is “extremely problematic to have at the centre of our legal order something which amounts to nothing more than a figment of our imagination.”³⁸

If international law has traditionally approached legal personhood from the “multiple modes of existing” perspective, the proponents of the global law of humanity seem to take, then, the “moral correctness” approach, which has indeed been commonly used to criticize and transform existing categories of law. As Selkälä and Rajavuori explain in their Introduction, this approach draws inspiration from the rules/principles distinction made first by Dworkin, and further developed by Alexy. According to Alexy, law always has two dimensions: A factual and an ideal one. The former corresponding more or less to rules as they are and the latter to the principles and aspirations behind those rules. The relation between the two is such that the ideal world of law allows the critique of existing rules, if they lead to outcomes differing from the principles behind them.³⁹ This approach therefore allows a critique of law’s borders by questioning the morality of existing rules. This is indeed more or less what authors, such as Domingo and Barbara, are doing, emphasizing the “perverse” outcomes of attributing international legal personality exclusively to states and invoking the underlying general principles of law. This approach radically changes how entities are divided into persons and things in international law. Yet in a way, as I will argue in more detail in the next section, it returns us (in good and bad) back to Esposito’s starting point where the human person acts as the model of legal personhood.

³⁵ *Id.* at 29.

³⁶ See Anne Peters, *Humanity as the A and Ω of Sovereignty*, 20 EUR. J. INT’L L. 513, 514 (2009).

³⁷ Barbara, *supra* note 8, at 45.

³⁸ See *id.* at 47.

³⁹ See ROBERT ALEXY, *A THEORY OF CONSTITUTIONAL RIGHTS* Chapter 44–111 (2010).

It is worth emphasizing, however, that there is no uniform vision or clearly defined project of a global law of humanity. Rather, it consists of different ideas and arguments, emerging here and there among academics, activists, and even some practitioners, but connected through the aforementioned common thread of replacing states with human persons as the primary subjects of global law. At least three well-developed approaches can be identified in academic literature. The first approach is abstract and prescriptive, imagining and advocating for a new global law of humanity as a system of systems, built around the human person. This approach is represented in its most detailed form in Domingo's *The New Global Law*.⁴⁰ Projecting his vision against the background of a world globalizing at a dizzying speed, Domingo argues that globalization has brought new threats that the current international legal system cannot answer, but also new possibilities for overcoming that system. Domingo's project is therefore one of actively changing the world in the face of new threats. Law must be changed, or else it might become "hostage to outmoded, transient paragons." This is, for Domingo, "a moral obligation," which can be accomplished only by creating a system of global law,⁴¹ as sovereign nations—which, Domingo admits, were once useful—become incapable of taking care of humanity's needs in a globalized world. Instead of states, the new global law of humanity would be built around the human person. The human person constitutes the normative foundation of the new global legal order. As Domingo writes, "[t]he global order rests on the human being, specifically on the unique dignity of the individual and collective human person, the true spring of liberty and equality among all human beings."⁴² If state sovereignty was the foundation of international law, the person is the foundation of the new global law. In the new system, it is the individual, and certainly not the state, which should hold primary legal personhood.

Barbara takes a similar approach, deriving the need for radical changes in international law from globalization. Unlike Domingo, however, Barbara does not highlight the new threats generated by globalization, but rather the possibilities it creates for communication. A state-centric international legal system may have made sense in a time when people could not communicate directly with each other, making ambassadors and other state officials the most efficient way to handle international relations. This is however no longer the case because individuals can exercise directly their "innate interest in interacting with other human beings."⁴³ The time has therefore come to shift the focus of international law from the legal fiction—called the state—to the source and end of all law, the human being. As Barbara writes, "[t]he very name 'international legal personality' portrays remarkable irony as the original 'prototype' legal person – the human being – is only accorded a minor rank in

⁴⁰ See RAFAEL DOMINGO, *THE NEW GLOBAL LAW* (reprinted ed. 2011).

⁴¹ See *id.* at xiv.

⁴² *Id.* at xxi.

⁴³ Barbara, *supra* note 8, at 55.

the dominant definition of ILP.”⁴⁴ Hence, “[b]uilding a system based on the human being was, and remains, an obvious and relevant basis around which to order the discipline of international law.”⁴⁵

The second approach, by contrast, does not necessarily seek to replace the traditional system of international law with a completely new system. It does, however, open another way of thinking about the relation between the individual and the state, while nevertheless retaining close relations with the global law of humanity idea. This approach aims at the humanization of the existing international law by shifting the system’s fundamental source of the legitimacy to humanity and the human person. The argument is made perhaps most famously by Anne Peters who states that sovereignty has been ousted from its position at the helm of international law and replaced by humanity. As she writes, sovereignty is now “derived from humanity, understood as the legal principle that human rights, interests, needs, and security must be respected and promoted, and that this humanistic principle is also the telos of the international legal system.”⁴⁶ This change is, according to Peters, reflected in international practice and *opinio juris*, which has crystallized “an original [primary] international legal personality of the human being.”⁴⁷ As Peters argues, “[i]ndividuals, not States, have become the natural persons under international law.”⁴⁸ This does not deprive states of their international legal personhood, but it does make it dependent on the state fulfilling its duty to act as a trustee,⁴⁹ official,⁵⁰ or fiduciary⁵¹ of humanity.

Janne Nijman, too, connects her rethinking of ILP to the more general rethinking of state sovereignty. According to Nijman, “we should embrace ILP as a locus of change in our

⁴⁴ *Id.* at 17–18.

⁴⁵ *Id.* at 37.

⁴⁶ Peters, *supra* note 36, at 514.

⁴⁷ *Id.* at 551.

⁴⁸ *Id.* at 552.

⁴⁹ See Eyal Benvenisti, *Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders*, 107 AM. J. INT’L L. 295 (2013).

⁵⁰ See Jeremy Waldron, *Are Sovereigns Entitled to the Benefit of the International Rule of Law?*, 22 EUR. J. INT’L L. 315–43 (2011).

⁵¹ See EVAN J. CRIDDLE & EVAN FOX-DECENT, *FIDUCIARIES OF HUMANITY: HOW INTERNATIONAL LAW CONSTITUTES AUTHORITY* (2016). On the fiduciary turn in law, see *CONTRACT, STATUS, AND FIDUCIARY LAW*, (Paul B. Miller & Andrew S. Gold eds., 2016); Ethan J. Leib & Stephen R. Galoob, *Fiduciary Political Theory: A Critique Essay*, 125 YALE L.J. 1820–879 (2015); *PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW*, (Andrew S. Gold & Paul B. Miller eds., 2014); D. Theodore Rave, *Politicians as Fiduciaries*, 126 HARV. L. REV. 671–739 (2012).

thinking about international law and its identity today.”⁵² More specifically, ILP “can help us turn the fundamental relationship between the individual, the state, and the international community around.” According to Nijman, legal personality is necessary for a humane life, for it guarantees the possibility to participate in common political life. As such, it is a natural right of every human being.⁵³ As a consequence of globalization, however, the political is as much international as national. Hence, the human person has to be a “citizen” of the international community as well, meaning that he or she must be granted international legal personality. If states fail to protect this right of an individual, then the international community must take responsibility and “transform him back from thing to person.” Not unlike Peters, Nijman derives then from this a kind a ILP version of “sovereignty as responsibility” or “responsibility to protect,” according to which the state derives its ILP from that of its citizens, and has it only as long as it “functions well and its citizens are represented properly by the government.” Conversely, the state loses this ILP if it “fails, collapses or falls victim of civil war or the oppression of minorities,”⁵⁴ at which point the correlative responsibility to protect the legal personality of the individual falls on the “institutionalized international community.”⁵⁵

Finally, there is a sort of hybrid of the aforementioned approaches. This final approach starts from empirically observable trends in current international and domestic law, and tries to combine these so that they form a new spontaneously created global law. This vision is developed furthest in Ruti Teitel’s *Humanity’s Law*. According to Teitel, “[a]cross a broad swathe of areas—including politics, law, economics, ethics, and public health—a vital vision is emerging, which depends on a threshold consensus on the need to guarantee the humane treatment of persons and peoples, and ensure their preservation.”⁵⁶ This vision, according to Teitel, is humanity’s law, which can be defined quite simply as “the law of persons and peoples.”⁵⁷ In other words, humanity’s law entails a shift away from international law, dominated by state-centric, territorialized rule of law values, and toward a global legal vision focused on the protection of individuals and peoples. Humanity’s law therefore has three key features. First, humanity’s law operates largely on individuals, granting them rights, but also giving them obligations. In other words, it sees the individual as the primary international legal person. Second, humanity law “implies a standard of treatment that is

⁵² NIJMAN, *supra* note 7, at 456–57.

⁵³ *See id.* at 467.

⁵⁴ *Id.* at 468.

⁵⁵ *Id.* at 468.

⁵⁶ RUTI TEITEL, *HUMANITY’S LAW* 17 (2011).

⁵⁷ *Id.* at x.

based on humanity as both the subject and object of action.” Finally, “humanity law’s orientation or telos is the preservation of humanity.”⁵⁸

To conclude this description of the global law of humanity approach to ILP, I want to make explicit the role that the authors studied above attribute to ILP. As has been hinted here and there above, the proponents of this approach do not argue so much that recognizing the ILP of the individual is important because a certain set of rights could be derived from (although this might certainly be part of it), rather, they argue the importance of the recognition lies in the change it can bring. As mentioned above, Nijman argues that ILP can turn the relations between the state, the individual, and the international community around,⁵⁹ and according to Barbara, we have to alter the way we perceive ILP for its current state-centric definition hinders international law’s development of a more human-centric direction.⁶⁰ Peters is perhaps the most precise in this regard. According to Peters, the importance of the recognition of the individual’s primary legal personality lies in that it would help to organize the law and bring about change.⁶¹ Once we stop looking at the qualities of states and drawing distinctions between them and all other international legal entities, and thus pointing out the deficiencies of those other actors, we might start to perceive international law, or perhaps rather global law, differently. For Peters, the recognition of the ILP of the human being “is an expression of normative individualism,” with which she means, “that politics and law ultimately should be guided and justified by the concerns of the persons affected by them.” Whilst individuals might live in communities and have collective goals, these goals must “ultimately be measured by the needs and interests of the persons affected and are not an end in themselves.” The project furthermore “presupposes that the welfare of the human being is a universal concern and a task of the entire international community.”⁶² ILP would not therefore have to generate some set of rights and duties. Instead, ILP is a capacity, which precedes any ownership of rights. The attribution of rights therefore merely confirms that an actor is a person under international law, but does not constitute it. As Peters writes, ILP “can in theory be entirely empty or without function if no specific rights are granted”: It is a *potential*—“but one that is essential to the emancipation of the human being.”⁶³

⁵⁸ *Id.* at 19.

⁵⁹ See NIJMAN, *supra* note 7, at 456–57.

⁶⁰ See Barbara, *supra* note 8, at 18.

⁶¹ See PETERS, *supra* note 36, at 40–41.

⁶² *Id.* at 553–54.

⁶³ *Id.* at 58–59.

**D. International Legal Personality as a Tool for Change in the Law of Humanity Project:
Some Critical Remarks**

Much could be said both in favor, and against, the projects of global law of humanity and normative individualism, about their potential and their imminent dangers, but I do not have the possibility to engage in such analysis within the scope of this article. I will, in what follows, restrict myself to making some remarks on the usefulness of ILP as a catalyst for or tool of the projects. In so doing, I take the aim of the projects to be human freedom (emancipation) and well-being. I will therefore assess ILP against these aims.

To begin with, I would like to delve a little bit deeper into Esposito's critique of the concept of person, which I started with in this Article, as well as the more general thought behind it. The moral, humanity-based critique is certainly correct to point out that the traditional approach to ILP tended to reduce human beings to things, at least on the theoretical level. Yet, what Esposito's critique of personhood reveals is that even the moral approach to ILP remains within the same conceptual framework as the previous one, and therefore raises some doubts about the usefulness of the concept of ILP as part of the law of humanity project. In fact, Esposito's critique becomes even more apt in this new paradigm. As was mentioned in the Introduction, Esposito's work on personhood is tailored especially for the domestic context—where the rational human being is the quintessential person. Whereas international law traditionally provided an exception to this framework by replacing the individual with the state in that role, the humanization of international law movement is shifting that position, bringing international law closer to its domestic version and thus making Esposito's work increasingly relevant also from the perspective of international law scholarship. Moreover, Esposito's work deals with conceptual themes such as sovereignty, community, individualization, and globalization, which are at the heart of the humanization of international law literature and the moral approaches to ILP.

Esposito's work on personhood builds on his more general work on the dynamics of community and immunity in philosophy, political theory, and law. In *Communitas*,⁶⁴ Esposito studies the simultaneous necessity and impossibility of community. Community is necessary in that we have always existed, and will always exist, in common, but impossible in the sense that it can never be fully realized. Not unlike Jean-Luc Nancy—whose work Susanna Lindroos-Hovinheimo discusses at length in her article in this special issue⁶⁵—Esposito argues that community is not some definable thing, but rather a no-thing, an unpayable debt or lack. As such, it always threatens to sweep away individual life and difference, to sacrifice the self for the common. For these reasons, at the heart of modern philosophy and political theory is the attempt to immunize life against the negative effects of community. These

⁶⁴ ROBERTO ESPOSITO, *COMMUNITAS: THE ORIGIN AND DESTINY OF COMMUNITY* (2010).

⁶⁵ See Susanna Lindroos-Hovinheimo's chapter in this volume, 18 *GERMAN L.J.* (2017).

attempts are the topic of Esposito's *Immunitas*.⁶⁶ Immunization divides the community, protecting individuals from the demands of community. This logic of immunity is behind concepts such as sovereignty, property, rights, and even personhood. But while the aim of immunity is to protect individuals by negating the community's most dangerous effects, it tends to go too far and ends up negating both community and life itself. At the heart of Esposito's philosophy is the attempt to find a reciprocal relation between community and immunity, where community refers to difference and immunity helps to produce life and protect it from too much protection.⁶⁷

Whether we attribute legal personality to the sovereign state or to the individual, we remain within the same conceptual framework in Esposito's theory. ILP of course protects the individual from being reduced to a thing by the state-centric international order. But it also protects states (and consequently its citizens) against the negative effects arising from globalization. The sovereign state is an immunizing mechanism of its own, protecting its citizens from each other by centralizing power, but it also needs an immunizing mechanism, ILP, to protect itself—or rather its population—against dangers from globalization and the larger international community. As was mentioned above, globalization is an important theme in the literature on humanization of international law and moral approaches to ILP. For some authors, globalization entails new risks that the state cannot answer and therefore increases the pressure of recognizing the ILP of the individual, whereas others come to the same conclusion by emphasizing the increased possibilities of human beings to communicate with each other. Esposito's thought has some links to both perspectives, without fully agreeing with either. While acknowledging the new possibilities of pluralization and communication opened by globalization, he nevertheless also sees a threat of further immunization: Globalization is "immunization driven to the sole principle of the regulation of individual and collective life in a world made identical with itself—made 'global.'"⁶⁸ Indeed, globalization is in many ways normalizing. It is "a planetary power that meets no resistance or difference that it doesn't make a part of itself or subsume within its own model." Globalization certainly facilitates new ways of being in common by allowing the exchange of ideas, languages, and technologies. But the stronger these processes are, the more necessary preventive immunization also becomes. "The more the 'self' tends to make itself 'global,' the more the self must struggle to include inside what is outside: The more the self tries to introject every form of negativity, the more negativity is reproduced."⁶⁹

⁶⁶ See ROBERTO ESPOSITO, *IMMUNITAS: THE PROTECTION AND NEGATION OF LIFE* (2011).

⁶⁷ See e.g., ROBERTO ESPOSITO, *BÍOS: BIOPOLITICS AND PHILOSOPHY* (2008).

⁶⁸ ROBERTO ESPOSITO & RHIANNON NOEL WELCH, *TERMS OF THE POLITICAL: COMMUNITY, IMMUNITY, BIOPOLITICS* 46 (2013).

⁶⁹ *Id.* at 60.

The need to immunize ourselves against the adverse effects of globalization is an almost natural and necessary reaction. But to recap, the problem is that in protecting life, the modern immunity mechanisms also end up negating it. Personhood is one such mechanism, protecting some forms of life at the expense of others. According to Esposito, the concept of person “is born negatively from its presumed difference from men and women who are not persons, or who are only partially and temporarily persons and as such always at risk of falling into the status of thing.” As Esposito points out, no one was a person all their life in ancient Rome. And since then, too, some groups of people throughout history have been excluded from full personhood, be they slaves, women, colored people, children, or something else.⁷⁰ This is also true in the case of contemporary international law. As Barbara notes ILP is in fact,

a regulatory concept; its *raison d'être* is essentially to limit participation in a legal system. In fulfilling its role as regulator, legal personality engages in a process of selective personification. This is merely the flip-side of the technical mandate of legal personality: to empower one must necessarily exclude as capacity can only exist as a correlative to incapacity.⁷¹

Moreover, the history of the concept of person is not only about “the distinction among persons, semipersons, and nonpersons” but also about “elaborations of intermediate situations, zones of indistinction, and exceptions that regulate the movement, or the oscillation, from one status to another.”⁷² To be sure, many of these movements have been welcomed in the sense that more and more entities have been included within the category of the person. But the apparatus of person also always necessarily excludes some entities. This is true when it comes to distinctions between states versus the rest, or between some individuals or corporations and others, but also within individuals themselves, “between the status of the person and the body of the human being into which it is implanted.” Personhood relies on “a sort of excess, of a spiritual or moral character, that makes more of the ‘person’, yet without letting it coincide completely with the self-sufficient individual of the liberal tradition.”⁷³ As Esposito explains,

⁷⁰ See Joseph Vining, *Dignity as Perception: Recognition of the Human Individual and the Individual Animal in Legal Thought*, in UNDERSTANDING HUMAN DIGNITY 573, 581 (Christopher McCrudden ed., 2013).

⁷¹ Barbara, *supra* note 8, at 23.

⁷² ROBERTO ESPOSITO, THIRD PERSON: POLITICS OF LIFE AND PHILOSOPHY OF THE IMPERSONAL 115 (2012).

⁷³ *Id.* at 70–71.

[o]nly a nonperson, or a living material that is not personal, can give rise to something like a person as the background and the object of another's sovereignty. Over time, however, the person is such only if he or she reduces a part, or the whole, of his or her body to the thing.⁷⁴

Considering the inherently exclusionary nature of the concept of personhood, including ILP, it is worth asking how necessary is ILP for the project of humanizing international law? As previously mentioned, the proponents of the project do not seek to derive any specific set of rights from the status. Yet, where they do think ILP still plays a crucial role is as a kind of pre-existing empty platform on which the rights can be attached and which enables the participation of the individual in international law and politics. But is even this kind of empty notion of ILP really necessary for participation in international law? Is ILP really a threshold, which has to be crossed for an entity to be able to act in a given legal situation? Jan Klabbers would argue that it is not. Klabbers points out that an entity does not in reality need ILP at all for most international legal acts, such as to make unilateral promises, impose conditions on others, or even violate international law. In fact, the reality is that all kinds of entities tend to act on the international plane irrespective of whether they are endowed with ILP or not.⁷⁵ The obvious counterargument against this is of course the possibility to appear in courts, and Klabbers does indeed admit that something like legal personality is needed to be able to sue. Nevertheless, he argues that this derives more from rules on standing than from legal personality and can therefore be altered one way or the other by tweaking these rules. Klabbers therefore concludes that ILP does not in fact constitute a threshold for performing legal acts.

This neither makes ILP useless, however, nor does Klabbers argue so. Klabbers argues instead that the true relevance of legal personhood is more political than legal and has to do mostly with groups. Where legal personality really matters is in that it signals that a group is worthy of recognition. Human beings tend to live and act in groups, be it football clubs, trade unions, churches, universities, associations, or something else. Legal personality is important for these groups in two ways. First, it entails that the group is taken seriously, not only in the symbolic sense, but also more concretely in struggles over scarce resources. Second, in a rather immunitary vein, the group is shielded, at least to some extent, from outside interference, granting it some amount of self-determination.⁷⁶ In sum, "by allowing groups to band together for what purpose and under whatever banner, the law facilitates the conduct of politics [as well as commerce] in a stylized form."⁷⁷

⁷⁴ *Id.* at 116.

⁷⁵ See Klabbers, *supra* note 5, at 37, 56–57.

⁷⁶ See *id.* at 61–64.

⁷⁷ *Id.* at 65–66.

These remarks cast some shadows over the use of ILP as part of the law of humanity project. Esposito's work demonstrates that, philosophically, any approach, which relies on the concept of person remains within the same immunitary framework, irrespective of whether legal personality is granted primarily to the individual, the state, or some other actor. Esposito's critique certainly admits the importance of the concept of the person, but emphasizes that personality of some is gained only by casting other into things. Esposito therefore seeks to find alternative ways to conceptualize our philosophical, political, and legal world, drawing, for example, from Simone Weil's work on the impersonal,⁷⁸ and on Gilles Deleuze's and Felix Guattari's notion of "becoming-animal,"⁷⁹ in the hope of loosening "the metaphysical knot that is bound by the idea, and practice, of the person in favor of a way of being human that no longer moves toward the thing but finally coincides with only itself."⁸⁰

It is worth emphasizing, however, that even Esposito himself admits that these alternatives are extremely difficult (and possibly impossible) to turn into the practice of law and politics. Indeed, there are always dangers in making overly far-reaching conclusions on the basis of philosophical musings and theories, as important as they might be to shedding light on the problem of concepts and practices we tend to take for granted. It is therefore important to always pose the question of what do we lose by letting go of this, or that, established concept. In the case of ILP, however, the answer might actually be "not that much"—at least legally speaking. As Klabbers's analysis of legal personhood shows, the true relevance of the concept lies in granting recognition and certain form to human groups; even though it is not really necessary for participation in the legal sense. As such, legal personhood might be important for groups, but not necessarily so much for individuals. In fact, Jens David Ohlin's analysis of human rights cases suggests that "[r]ather than illuminating human rights claims, the concept of the person often obscures them," causing Ohlin to conclude that the concept is not necessary or even useful in these cases.⁸¹ By contrast, Ohlin, too, identifies some of those problems emphasized in Esposito's work (without drawing in any way from Esposito). In most situations the problems of the concept of personhood remain safely hidden as we use the concept simply to identify "people." Yet, in those situations when decision-makers are put under real pressure and the concept is supposed to do the most work, it tends to

⁷⁸ See SIMONE WEIL, SIMONE WEIL: AN ANTHOLOGY 49–79 (Sian Miles ed., First Grove Press ed. 2000).

⁷⁹ See GILLES DELEUZE & FÉLIX GUATTARI, 1730: Becoming-Intense, Becoming-Animal, Becoming-Imperceptible..., in A THOUSAND PLATEAUS CAPITALISM AND SCHIZOPHRENIA at 232 (Brian Massumi trans., 2008).

⁸⁰ ESPOSITO AND WELCH, *supra* note 68, at 122.

⁸¹ See Jens David Ohlin, *Is the Concept of the Person Necessary for Human Rights*, 105 COLUM. L. REV. 209, 212 (2005).

become exclusionary and ambiguous as we do not know whether it refers to bodies, minds, or agents.⁸²

What the above analysis suggests is that the proponents of the global law of humanity project should perhaps seek to achieve their aims—that is to say, human emancipation and well-being—through some means other than ILP. While it is probably not wise to let go of the concept of ILP altogether, as Esposito might suggest, it could be beneficial to give it only a secondary role in international law, more precisely the role of helping groups of various kinds to gain political recognition. But the status of the individual should perhaps be furthered in some other way so as to avoid the exclusionary, potentially dangerous effects of the apparatus of person as much as possible. Indeed, although authors such as Nijman are correct to state that “[t]he human subject precedes the state in its existence and has not become a person by social contract,” this only poses the question of why should we then make such an issue of their legal personality. Does this not only confuse the protection of their freedom and equality? Why argue that there is “a natural right to be a person?”⁸³ Should we not rather seek to establish a more direct link between life and law—without the mediator “person”—if we want to achieve human freedom and well-being?

E. Conclusion

This Article started with Roberto Esposito’s note that the *dispositif* of person divides our philosophical and legal world into two camps: Either an entity is a person or it is a thing. Drawing from this notion, the article has studied legal personality in international law, and in particular its usage by the law of humanity project, which seeks to challenge the way international lawyers have typically theorized ILP. In contrast to domestic law, which acts as Esposito’s reference point, international law traditionally attributed legal personality not to the rational human person, but to a corporation—namely the state. Employing a form of the “multiple modes of existence” approach, international lawyers reduced the individual more or less to a thing in the eyes of international law, even though these lawyers have certainly not seen the human as a thing in the more philosophical sense. The proponents of the law of humanity project, by contrast, have employed the “moral correctness” approach to argue that the individual should be the primary international legal person, whereas states enjoy ILP only to the extent that they fulfill their function of protecting human life, rights, and well-being. In particular, these authors sought to harness ILP as a tool for producing change and transforming international law into a law of humanity.

This Article has not taken a stance on whether a shift from international law to law of humanity is a good idea or not. Rather, it focused on the question of whether ILP can fulfill the hopes of the project’s proponents, that is to say, on whether ILP can help to increase

⁸² See *id.* at 231.

⁸³ NIJMAN, *supra* note 7, at 466.

human freedom and well-being. My fear is that it cannot. This is so especially because whether we attribute ILP to the state or the individual, we still remain within the same theoretical framework in which the *dispositif* of person necessarily excludes some forms of life while protecting or empowering others. In fact, the *dispositif* of person is especially problematic when it comes to human beings, for it tends to create a *caesura* within the human, between the rational side, to which personality is attributed, and the “animal” side, which is then reduced to a thing, thus ignoring the “body’s point of view.” This Article suggests therefore that while we should not discard ILP entirely—for its role of granting political recognition to various groups might be too valuable to lose—the proponents of law of humanity should perhaps seek more direct ways of governing the relation between law and life when it comes to individuals. A good starting point for such a search could perhaps be found in this special issue in Susanna Lindroos-Hovinheimo’s rethinking of subjectivity and community in the EU through Jean-Luc Nancy’s conception of singular plurality.⁸⁴

⁸⁴ See Lindroos-Hovinheimo, *supra* note 65.

Special Issue
Traditions, Myths, and Utopias of Personhood

Making International Legal Persons in Investment Treaty Arbitration: State-owned Enterprises along the Person/Thing Distinction

By Mikko Rajavuori*

Abstract

Investment treaty arbitration (ITA) has emerged as a space where the international legal personality of states and foreign investors is continuously created, maintained, and redefined. Focusing on treatment of state-owned enterprises (SOEs), this Article juxtaposes investment law's doctrinal foundations with Roberto Esposito's political philosophy to explore the dynamics, porosity, and ramifications of international legal personality in ITA. Skeptical of gradual conceptualizations of legal personality, this Article frames investment law in terms of Esposito's person/thing distinction and argues for SOEs to form a liminal category that exposes malleability of legal doctrines when ITA tribunals make or break international legal persons. Ultimately, the ITA cases seem to open a distinct dispositif of a SOE that both delineates the exact normative demarcation of the state as international legal person and creates pockets of indistinguishability and politics at its borders—often to the detriment of the Global South. This insight provides a new perspective on the creation of international legal persons in ITA and international law more generally but, at the same time, also adds a new dimension to Esposito's overarching framework resting on the asymmetric relationship between persons and things.

* PhD Candidate, LL.M. (University of Turku), B.A. (University of Helsinki). I would like to thank Toni Selkälä, Ukri Soirila, Jaakko Salminen, and Emanuel V. Towfigh for commenting on an earlier version of this Article. Further thanks go to Joshua Barkan and other participants of the Persons/Things workshop held at the University of Turku in May 2016. Email: mijora@utu.fi.

A. Introduction: Persons/Things in Investment Treaty Arbitration

International legal personality has traditionally been one of the most jealously guarded judicial categories. Once available only to states, contemporary international legal personality is increasingly viewed as flexible and functional.¹ According to the former president of the International Court of Justice (ICJ) Rosalyn Higgins, for example, it makes more sense to talk about international law as a “dynamic” process where “there are a variety of participants, making claims across state lines, with the object of maximizing various values” than to cling to crude doctrinal divisions between subjects and objects²—persons and things.³

Over the past decades, investment treaty arbitration (ITA) has emerged as an important site where the erosion of strict binary categories between international legal personality and non-personality has been acutely felt. Following investment law’s journey from margins of international law to its mainstream,⁴ the conception of international legal personality as porous, gradual, and context-sensitive has resonated strongly with the ITA system which, as a general matter, allows foreign investors to challenge state action on neutral international fora.⁵ Two important outcomes for international legal personality flow from this basic premise. On the one hand, the extensive rights and protections investment law assigns on foreign investors are often considered to render them “partial subjects” under international law.⁶ On the other hand, ITA is also viewed as the systematic erosion of governmental policy space and, as such, pervasive emasculation of the state as a sovereign subject.⁷ Both developments impinge on fundamental concepts of international legal personhood. Together they suggest—as argued in the Introduction to this Special Issue—that contemporary liberal law, international law included, has come to adopt a mode of

¹ Jan Klabbers, *The Concept of Legal Personality*, 11 *IUS GENTIUM* 35 (2005).

² ROSALYN HIGGINS, *PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT* 49–50 (1994).

³ Toni Selkälä & Mikko Rajavuori chapter in this volume, 18 *GERMAN L. J.* (2017).

⁴ See, e.g., Stephan W. Schill, *W(h)ither Fragmentation? On the Literature and Sociology of International Investment Law*, 22 *EUR. J. INT’L L.* 875 (2011).

⁵ RUDOLF DOLZER & CHRISTOPH SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* 8–11 (2008).

⁶ Tillmann Rudolf Braun, *Globalization-driven Innovation: The Investor as a Partial Subject in Public International Law - An Inquiry into the Nature and Limits of Investors Rights*, 15 *J. WORLD INV. & TRADE* 73, 96–106 (2014). For ITA practice, see especially *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, para. 141 (Feb. 8, 2005).

⁷ See, e.g., A. Claire Cutler, *Transformations in Statehood, the Investor-State Regime, and the New Constitutionalism*, 23 *IND. J. GLOBAL LEGAL STUD.* 95 (2016).

construing legal persons where international legal personality comes across in varying grades and intensities.⁸

This Article presents a case study that problematizes the prevailing conception of gradual international legal personality in ITA and in international law more generally. To this end, the Article uses ITA practice involving state-owned enterprises (SOEs) as descriptive and analytical lenses to investigate dynamics and ramifications of international legal personality. Methodically, the Article operates on two levels. First, it provides a doctrinal account on the general framework of investment law in an SOE-context and identifies the law of state responsibility and doctrines of attribution as crucial gatekeepers of international legal personality. Against this backdrop, the Article embeds legal techniques used by ITA tribunals in the wider theoretical debate over legal personality as developed in the Introduction to this Special Issue. In doing so, the Article frames the discussion in the light of Roberto Esposito's contemporary political philosophy, particularly the person/thing distinction, which is used as a stepping stone to discuss politics, porosity, and ramifications of personhood as they emerge from legal doctrines when deciding cases that involve SOE. As an undergirding argument, the Article maintains that the treatment of SOEs in ITA reproduces strict binary structures of international legal personality and non-personality, and that upholding these categories yields outcomes of exclusion and domination that are particularly visible in the North/South relations.

SOEs provide promising ground for investigating dynamics and consequences of international legal personality for conceptual, doctrinal, historical, and theoretical reasons. First, SOEs epitomize how corporations lead double lives as independent legal persons and proxies of governmental policy under state control. Occasionally, these tensions lead SOEs to assume sovereign qualities and effectively merge with their owner—the state.⁹ Second, as the high number of SOE-related investment disputes suggests, delineation between states and SOEs carries significant economic consequences both for host states and foreign investors. For this reason, argumentative and doctrinal practices used to mark boundaries of the state are highly developed and well-rehearsed, allowing in-depth examination of the creation and maintenance of international legal personality on the transnational plane.¹⁰ Third, SOEs sit comfortably on the complex historical trajectory of personhood. They straddle the ancient *imperium/dominium* and the more recent public/private distinction, they enmesh with the emergence of aggregate corporate personality and they reveal

⁸ Selkälä & Rajavuori, *supra* note 3.

⁹ As such, SOEs complicate the common taxonomy where companies are treated simultaneously as things whose stock is owned by their shareholders and as persons capable of owning property and representing themselves in legal proceedings. See, e.g., Katsuhito Iwai, *Persons, Things and Corporations: The Corporate Personality Controversy and Comparative Corporate Governance*, 47 AM. J. COMP. L. 583 (1999).

¹⁰ Selkälä & Rajavuori, *supra* note 3.

tensions in the ways legal personality frames the North/South relations.¹¹ Fourth, the recent emergence of SOEs as important players in the world economy may provide a backdrop that indicates a shift from gradual to monist conceptualization of SOE personhood, both in ITA and in broader international law theorization.

The Article proceeds as follows. Section B provides a concise introduction to political philosophy of Roberto Esposito whose notions of politics, porosity, and ramifications of personhood illustrate the dynamics of personhood. Section C uses the recent case of *Tulip v. Turkey* as a narrative device to introduce the basic framework of investment law and state responsibility, which serve as building blocks for the broader argument. Following Esposito's notions, the section suggests contemporary investment law system to rest on sharp asymmetric relationship between host states (persons) and foreign investors (things) which, however, struggles to include hybrid entities such as SOEs. Against this setting, Section D focuses on the politics and porosity of a person/thing distinction in ITA. The section opens with an exposition of three ITA cases revolving around the status of a single SOE, Petrobangla of Bangladesh. Pursuing both a bottom-up approach focusing on instability of attribution doctrines and a top-down approach where merger of sovereignty and international legal personality is viewed from the perspective of postcolonial theory, the section documents ramifications of SOEs being cast either as persons or things in ITA, particularly from the perspective of the Global South. As a form of conclusion, Section E summarizes the argument and hypothesizes the value of Esposito's political philosophy for examining creation and maintenance of international legal persons.

B. Esposito on Politics, Porosity, and Ramifications of Personhood

This Section introduces Roberto Esposito's political philosophy as it applies to politics, porosity, and ramifications of personhood. The section briefly discusses two elements of Esposito's philosophy: The person/thing distinction and the *dispositif* of the person that structure the analytical lens through which contemporary SOE-related ITA proceedings can be gleaned. Moreover, the section draws attention to a crucial conceptual category of the slave—a concept that is later related with that of a SOE—that undergirds much of Esposito's writings.

I. The Person/Thing Distinction and the Dispositif

Over the past decade, Esposito has argued that the person/thing distinction forms a conceptual building block for much of Western political and legal thought.¹² Tracing

¹¹ *Id.*

¹² ROBERTO ESPOSITO, PERSONS AND THINGS: FROM THE BODY'S POINT OF VIEW 35 (2015). For broader discussion, see Selkälä & Rajavuori, *supra* note 3.

genealogies of persons and things from ancient Roman law to the emergence of human rights, Esposito suggests that the world is continuously divided into these mutually opposite categories: At a given time, one is either a person or a thing.¹³ While one's status as a person or a thing may change over time,¹⁴ the distinction emphasizes asymmetry between the two categories.

Originating in Roman law and Gaius' *Institutes*,¹⁵ but reproduced in Christian theology, modern philosophy, and most Western codifications of law,¹⁶ the relation between persons and things "is one of instrumental domination, in the sense that the role of things is to serve or at least to belong to persons."¹⁷ Moreover, the distinction doubles as a demarcation line separating persons from one another. Writing with a Marxist undertone, Esposito views, "things [to] serve to secure the relations between persons, dividing them into different categories . . . and roles."¹⁸ In sum, Esposito argues that the person/thing distinction forms the bedrock for all Western legal systems¹⁹ and that the concept of person, in particular, exhibits "lexical richness, semantic flexibility, and power to evoke" in a way that only a few other judicial concepts can.²⁰ Thus, in Esposito's scheme, personhood appears as a privilege and power that enables appropriation of the common.²¹

Against this backdrop, it is no wonder that the person/thing distinction does not cast some entities as persons and others as things per some inherent logic.²² Instead, application of the distinction is contingent on essential political process which takes place through the

¹³ ESPOSITO, *supra* note 12 at 16–17.

¹⁴ Here, Esposito points out that in ancient Rome, for instance, "nobody stayed a person for their whole life, from birth to death—everybody, for at least some period of time, passed through a condition not far removed from that of a possessed thing." *Id.* at 29. Thus, even an adult male Roman citizen, the quintessential person, "entered into the regime of personhood after a long internship in the entirely subordinate realm of sonship." See ROBERTO ESPOSITO, *THIRD PERSON: POLITICS OF LIFE AND PHILOSOPHY OF THE IMPERSONAL* 10 (2012).

¹⁵ Gaius, *INSTITUTIONES OR INSTITUTES OF ROMAN LAW* (c. 170), (trans. Edward Poste, 4th ed. 1904).

¹⁶ ESPOSITO, *supra* note 12 at 1–2, 16.

¹⁷ *Id.* at 17.

¹⁸ *Id.* at 69.

¹⁹ *Id.* at 16.

²⁰ Roberto Esposito, *The Dispositif of the Person*, 8 L. CULTURE & HUMAN. 17–18 (2012).

²¹ Roberto Esposito & Zakiya Hanafi, *Community, Immunity, Biopolitics*, 18 ANGELAKI 83, 88 (2013).

²² See also Ukri Soirila chapter in this volume, 18 GERMAN L. J. (2017).

dispositif of the person.²³ The role of the *dispositif*, in short, is to divide beings into two categories made up of different qualities and to “create subjectivity through a process of subjection or objectivization.”²⁴ Best exemplified by treatment of slaves in Roman law, where a living human being was, in general, situated in the category of *res*, the *dispositif* emerges as a continuous performative process where persons are separated from things.²⁵ The example of the Roman slave highlights how abstract conceptual differentiation between persons and things has potential to lead to concrete procedures of exclusion and domination.²⁶

Here, Esposito notes that the constitutive power of the *dispositif* “lies not so much in the normative demarcation it carves out between the different categories as in the zones of indistinguishability it creates at their boundaries.”²⁷ Thus, Esposito suggests that the *dispositif* exposes the porosity of personality and the ease with which a person can slip into a thing, and vice versa.²⁸ Moreover, the *dispositif* illustrates how personhood essentially feeds on “thinghood”: “[T]o experience personhood fully means to keep, or push, other living individuals to the edge of thingness.”²⁹ While illustrative, the condition of a slave is only the most visible tip of an “entire mechanism of social discipline, which works specifically by continuously shifting the categorial thresholds that define, or create, the status of all living beings” along the person/thing distinction.³⁰ A key theme running through his philosophy, then, attempts to tease out view of a third—whether a third person,³¹ a body’s point of view³² or the common,³³ that resists domination and subjugation stemming from

²³ Esposito, *supra* note 20.

²⁴ *Id.* at 21. See also ESPOSITO, *supra* note 12 at 27.

²⁵ ESPOSITO, *supra* note 14 at 9. Similar distinctions appear also in the context of children (*fili in potestate*) and married women (*uxores in matrimonio*). See Esposito, *supra* note 20 at 23–24.

²⁶ ESPOSITO, *supra* note 14 at 9.

²⁷ *Id.* at 9.

²⁸ ESPOSITO, *supra* note 12 at 26.

²⁹ ESPOSITO, *supra* note 14 at 10.

³⁰ *Id.* at 9.

³¹ ESPOSITO, *supra* note 14.

³² ESPOSITO, *supra* note 12.

³³ ROBERTO ESPOSITO, *COMMUNITAS. THE ORIGIN AND DESTINY OF COMMUNITY* (2010).

the person/thing distinction which runs a risk of contaminating person with qualities of things and vice versa.³⁴

II. Esposito Embedded

Evidently, Esposito's work is extremely anthropocentric. Operating in biopolitical tradition, he is primarily interested in human life.³⁵ Regardless of Esposito's affinity with the person/thing distinction as it applies to human subjects, flesh and blood, neither economic institutions in general nor state ownership in particular, is alien to his political philosophy. Writing on property, for instance, he frames globalization and ownership as woven together with major implications for human life:

For a long period of time, yet to end, the concept of government property, as public property of the state, was not the opposite of private property but a complementary aspect of it. With what we usually define as globalization, this kind of "making public" [publicizzazione] of the private is increasingly intertwined with the inverse phenomenon of the privatization of the public in a manner that seems to exhaust, and even exclude something like a common good from the horizon of possibilities.³⁶

Equally critical of original enclosure movement, where resources were appropriated by the public, and current privatization movement, Esposito advocates that the best route to wholesome community starts by "breaking the vise grip between public and private that threatens to crush the common, by seeking instead to expand the space of the common."³⁷ As such, the issues with both private and public ownership are cast in terms of seeking and strengthening the common, the third, which is often masked and dominated by the pervasive person/thing distinction.

These two concepts, the third and the person/thing distinction, make Esposito's language relevant for investigating the dynamics of legal personhood in SOE-related ITA proceedings.

³⁴ Selkälä & Rajavuori, *supra* note 3; ESPOSITO, *supra* note 12 at 26, 33.

³⁵ See e.g., Timothy Campbell, "Enough of a Self": Esposito's Impersonal Biopolitics, 8 L. CULTURE & HUMAN. 31 (2012); Thomas F. Tierney, Roberto Esposito's "Affirmative Biopolitics" and the Gift, 33 THEORY CULTURE & SOC. 53 (2016).

³⁶ Esposito & Hanafi, *supra* note 21 at 89.

³⁷ *Id.* at 89.

As suggested in the Introduction to this Special Issue, one way to go past the myriad traditions, myths, and utopias of personhood is to reinstate the body at center of the discourse. Esposito's work provides a handy shortcut to this discussion. While his approach focuses on the material human body, SOEs can also be understood as corporate bodies constituting the third.³⁸ Other scholars interested in Esposito's framings have already embarked on similar paths, arguing that the notions of the person/thing distinction and the *dispositif* are instructive as to the creation and maintenance of legal persons in general. Barkan, for instance, has shown how Esposito's broad political philosophy can be applied to corporate bodies.³⁹ Soirila, likewise, has used Esposito's notions to analyze the changing international legal personality of states.⁴⁰ Thus, when removed from their anthropocentric origins, Esposito philosophy seems to provide an opening through which the dynamics of legal personality, its consequences in the real world and its theoretical permutations can be gleaned.

In the following, contemporary ITA proceedings are used as a case study highlighting politics, porosity, and ramifications of personhood.⁴¹ Through juxtaposition of the modern ITA practice and Esposito's notions of the person/thing distinction, legal framework of investment law and international law doctrines used in ITA appear as sites where SOEs form a liminal category—a third—that provides a new perspective on the constitution of international legal persons in ITA. In particular, SOEs reveal the malleability of positive international law when they, as hybrid entities and, by proxy, their owner states, are made as international legal persons in ITA. At all times, however, the (neo)liberal framework of investment law operates very close to the classic Roman *dispositif* of the person whose ultimate product is the slave, another hybrid entity created, used and abused by the person/thing distinction.⁴² Seen from this perspective, the ITA cases discussed below seem to open a distinct *dispositif* of a SOE as an instrument which both delineates the exact normative demarcation of the state as international legal person and creates pockets of indistinguishability and politics at its borders. This insight provides a new perspective on creation of international legal persons in ITA but, at the same time, it also adds a new dimension to Esposito's overarching framework resting on asymmetric relationship between persons and things.

³⁸ Selkälä & Rajavuori, *supra* note 3.

³⁹ See Joshua Barkan, *Roberto Esposito's Political Biology and Corporate Forms of Life*, 8 L. CULTURE & HUMAN. 84 (2012); JOSHUA BARKAN, CORPORATE SOVEREIGNTY: LAW AND GOVERNMENT UNDER CAPITALISM 76–86 (2013).

⁴⁰ Soirila, *supra* note 22.

⁴¹ See ESPOSITO, *supra* note 12.

⁴² *Id.* at 9–10.

C. Persons/Things in Investment Law: A Rough Sketch

This Section provides a brief account of the legal framework and key concepts that give shape to ITA. Focusing on international legal aspects of investment law, the Section draws on the recent *Tulip v. Turkey* case to introduce the system of bilateral investment treaties (BITs), the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention),⁴³ and the law of state responsibility. The complex array of treaty law, customary international law, and arbitral practice is used to explain the status of SOEs which, by and large, escape easy definitions and, as such, provide a primer on dynamics of international legal personality. Drawing parallels between investment law and Esposito's notions of the person/thing distinction, the section notes how ITA proceedings are contingent on well-defined categories of host states (persons) and foreign investors (things) in asymmetric system. Unlike in Esposito's account, in ITA, foreign investors continuously push SOEs to the edge of personhood for the purposes of triggering state responsibility, thereby revealing how investment law essentially prizes thinghood over personhood.

I. *Building on Tulip v. Turkey*

Tulip v. Turkey, an ITA case decided in 2014, concerned a dispute arising from a real estate development project in Istanbul.⁴⁴ In 2006, a Dutch company, Tulip Real Estate Investment and Development Netherlands B.V (Tulip), had been awarded a tender to complete the project by Emlak Konut Gayrimenkul Yatirim Ortakligi A.S. (Emlak), a Turkish real estate investment trust. Emlak was 39% owned by TOKI, Turkey's Housing Development Organization, a state organ responsible for Turkey's public housing.

After winning the bid, Tulip set up several local companies and entered a revenue-sharing agreement with Emlak. The development project faced serious obstacles from the start. Initially, there were disputes over stamp duties and allegations of embezzlement, but as the project developed it became obvious that the construction could not be completed in the agreed timeframe. After complex negotiations, Emlak finally terminated the contract with

⁴³ Int'l Ctr. for Settlement of Inv. Disputes, Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Oct. 14, 1966, 575 U.N.T.S. 159 (ICSID Convention).

⁴⁴ Tulip Real Estate Investment and Development Netherlands B.V. v. Republic of Turkey, ICSID Case No. ARB/11/28, Award (Mar. 10, 2014) [hereinafter *Tulip v. Turkey Award*].

Tulip in May 2010.⁴⁵ Unsatisfied with the result, Tulip commenced an ITA process against Turkey under the Netherlands-Turkey BIT.⁴⁶

Tulip argued that its claims arose, among other things, out of Turkey's unlawful expropriation of rights under contract and unfair and inequitable treatment of its investment. More specifically, Tulip asserted that Turkey, "acting through various alleged state actors and/or entities operating under State control," engaged in a pattern of conduct that interfered with the development project and ultimately led to its termination.⁴⁷ As such, the claims focused on the role and conduct of Emlak and its majority shareholder TOKI. As an example of the argumentation, Tulip contended that the decision to terminate the contract "was made by Emlak under the control of TOKI for non-commercial purposes and in the exercise of State power."⁴⁸ Simply put, the claimant submitted that Emlak operated under the "presumption of statehood" and that its actions were in fact Turkey's actions.⁴⁹

Ultimately, the arbitral tribunal rejected all claims pursued by Tulip.⁵⁰ In the process, however, the award and the separate decision on annulment⁵¹ underscored two important dimensions of contemporary investment law that illuminate dynamics of international legal personality in ITA. These dimensions relate to the tribunal's jurisdiction under the Netherlands-Turkey BIT and the ICSID Convention, as well as to the law of state responsibility.⁵² Crucially, these two streams of analysis pertain to the overarching argument

⁴⁵ *Id.* at 152–54.

⁴⁶ AGREEMENT ON RECIPROCAL ENCOURAGEMENT AND PROTECTION OF INVESTMENTS BETWEEN THE KINGDOM OF THE NETHERLANDS AND THE REPUBLIC OF TURKEY, (1986), <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2090> [hereinafter the Netherlands-Turkey BIT].

⁴⁷ Tulip v. Turkey Award, ICSID Case No. ARB/11/28, para. 60 (Mar. 10, 2014).

⁴⁸ *Id.* at 249.

⁴⁹ *Id.* at 262.

⁵⁰ *Id.* at 369.

⁵¹ Tulip Real Estate Investment and Development Netherlands B.V. v. Republic of Turkey, ICSID Case No. ARB/11/28, Decision on Annulment (Dec. 30, 2015) [hereinafter Tulip v. Turkey Annulment].

⁵² Tulip v. Turkey Award, ICSID Case No. ARB/11/28, para. 276 (Mar. 10, 2014). The third important dimension would be the differentiation of contractual and treaty claims, but for the sake of brevity this Article does not discuss these elements in detail. For comprehensive discussion, see, e.g., Yuval Shany, *Contract Claims vs. Treaty Claims: Mapping Conflicts between ICSID Decisions on Multisourced Investment Claims*, 99 AM. J. INT'L L. 835 (2005); James Crawford, *Treaty and Contract in Investment Arbitration*, 24 ARB. INT'L 351 (2008); Stephan W. Schill, *Enabling Private Ordering: Function, Scope and Effect of Umbrella Clauses in International Investment Treaties*, 18 MINN. J. INT'L L. 1 (2009); Michael Feit, *Attribution and the Umbrella Clause - Is there a Way out of the Deadlock?*, MINN. J. INT'L L. 21 (2012)

running through the *Tulip v. Turkey* case: To what extent does state ownership give rise to the “presumption of statehood”? Or, put differently, when does a separate legal entity—object, thing—assume sovereign qualities and merge with its owner-state—subject, person—in the eyes of investment law? In the following discussion, the doctrinal answer to these questions is approached with reference to Esposito’s theoretical framework in order to expose the dynamics of making persons and things in ITA.

II. The Basic Framework: Investment Treaties

As discussed in the Introduction to this Special Issue, law is instrumental in solidifying the positions between persons and things.⁵³ Unlike in the Gaius’ *Institutes*, where the relationship between *persona* and *res* was clearly laid out, contemporary investment law regulates the roles of host states and foreign investors in a more dispersed way. The status of SOEs, in particular, escapes easy definition unless viewed against the complex array of treaty law, customary international law, and arbitral practice.

In general, investment law comprises three distinct bodies of law: International law, domestic law, and contract law. The international law dimension is expressed in substantive obligations included in investment treaties and customary international law, as well as their interpretation and application in concrete disputes by arbitral tribunals.⁵⁴ In *Tulip v. Turkey*, relevant international treaties were the Netherlands-Turkey BIT and the ICSID Convention. As to customary international law, it was acknowledged that the law of state responsibility applied to the dispute.⁵⁵ In relation to domestic law, the case revolved around Turkish Foreign Direct Investment Law and Corporate Law.⁵⁶ Contractually, the key instrument was

and Shotaro Hamamoto, *Parties to the “Obligations” in the Obligations Observance (“Umbrella”) Clause*, 30 ICSID REV. 449 (2015).

⁵³ Selkälä & Rajavuori, *supra* note 3.

⁵⁴ Formally, neither international law nor investment law abide by strict adherence to precedent. In reality, however, parties to the dispute base their litigation strategies on earlier awards and judgements of other international courts and tribunals. In *Tulip v. Turkey*, for instance, the tribunal noted that “[e]ach Party refers the Tribunal to previous ICSID and investment treaty awards, and statements made in ICJ judgments. Although not bound by such citations, the Tribunal accepts that, as a matter of comity, it should have regard to earlier decisions of courts (particularly the ICJ) and of other international dispute tribunals engaged in the interpretation of the terms of a BIT.” *Tulip Real Estate Investment and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Bifurcated Jurisdiction Issue, para. 45 (Mar. 5, 2013) [hereinafter *Tulip v. Turkey Jurisdiction*].

⁵⁵ *Tulip v. Turkey Award*, ICSID Case No. ARB/11/28, para. 281 (Mar. 10, 2014).

⁵⁶ *Id.* at 438.

the revenue-sharing contract between Tulip's Turkish subsidiaries and Emlak.⁵⁷ These three sets of instruments fixed the general framework for the dispute and marked the outer bounds of the tribunal's competence.⁵⁸

Quite naturally, the single most important piece in the legal framework of *Tulip v. Turkey* was the Netherlands-Turkey BIT. Like most bilateral and multilateral investment treaties, the Netherlands-Turkey BIT is a state-to-state treaty which sets out terms and conditions for investment in one state by private companies and individuals of another state. Like other BITs, the Netherlands-Turkey BIT upholds a deeply asymmetric relationship between host states and foreign investors. Most importantly, the system grants investors many guarantees, such as fair and equitable treatment; full protection and security to the foreign investment; national treatment; most-favored nation treatment; and protection from investment expropriation except for a public purpose and against prompt, adequate, and effective compensation.⁵⁹ Premised on the idea that additional treaty protections will incentivize foreign direct investment (FDI) and improve economic growth and development,⁶⁰ BITs attempt to strike a balance between "the exercise of the sovereign rights of the State" and reasonable expectations of the foreign investors.⁶¹

The Netherlands-Turkey BIT is also instructive regarding the resolution of disputes arising from potential violations of investment guarantees. Conforming to a distinctive feature of BITs, the Netherlands-Turkey BIT enables foreign investors to submit the dispute to the International Centre for the Settlement of Investment Disputes (ICSID) for settlement by arbitration.⁶² To be more precise, in the Netherlands-Turkey BIT, both state parties *consent* to the submission of an investment dispute to the ICSID reciprocally and *a priori*.⁶³ While

⁵⁷ *Id.* at 58.

⁵⁸ Due to this Article's scope and aim, the following discussion will focus solely on the international law dimension.

⁵⁹ DOLZER & SCHREUER, *supra* note 5 at 119–93.

⁶⁰ See, e.g., Tim Büthe & Helen V. Milner, *The Politics of Foreign Direct Investment into Developing Countries: Increasing FDI through International Trade Agreements?*, 52 AM. J. POL. SCI. 741 (2008) and Eric Neumayer & Laura Spess, *Do Bilateral Investment Treaties Increase Foreign Direct Investment To Developing Countries?*, in THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT: BILATERAL INVESTMENT TREATIES, DOUBLE TAXATION TREATIES, AND INVESTMENT FLOWS 226 (Karl P. Sauvant & Lisa E. Sachs eds., 2009). For a critical examination, see Jason Webb Yackee, *Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence*, 51 VA. J. INT'L L. 397 (2011).

⁶¹ Compare with S.S. Wimbledon (U.K., Fr., Italy, Japan v. Germany), 1923 P.C.I.J. (ser. A) No. 1, at 25 (Judgment of Aug. 17). See also Crawford, *supra* note 52 at 354–55.

⁶² The Netherlands-Turkey BIT, *supra* note 46 at Art. 8(2).

⁶³ *Id.* at Art. 8(3).

there are other ways for states to consent to ITA, such as a specific contractual clause or domestic legislation, in the majority of cases state consent is based on a general offer found in BITs or multilateral investment treaties.⁶⁴ Through BITs' dispute resolution clauses, states are understood to make a standing offer to arbitrate with foreign investors according to the substantive and procedural terms contained in the investment treaty.⁶⁵

Through these provisions, the Netherlands-Turkey BIT illustrates key traits of the modern investment law framework, which consists of a complex web of bilateral investment treaties, multilateral investment treaties, and free trade agreements with investment chapters amounting to 3,400 individual treaties.⁶⁶ In particular, the Netherlands-Turkey BIT underscores how states have purposely exercised their sovereign prerogative to enter investment treaties with other states and, by doing so, purposely assigned foreign investors' additional substantive protections regarding their investments.⁶⁷ Moreover, states have provided foreign investors access to ITA through individualized claims—a distinctive, and highly polarized, feature of the BIT system.⁶⁸ Regardless of the extensive substantive and procedural protections allotted to foreign investors, the treaty-based structure of the investment system remains firmly embedded in a classic international law framework where states are still considered masters of the treaty universe. States can, for example, change the rules of investment law either by amending BITs or by exiting the regime altogether.⁶⁹

Overall, in the eyes of investment law, states are clearly primary subjects while foreign investors still resemble objects to whom states have, for various reasons,⁷⁰ considered

⁶⁴ CHRISTOPH SCHREUER ET AL., *THE ICSID CONVENTION: A COMMENTARY* 9 (2d ed. 2009).

⁶⁵ *Id.* at 9. See also Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107 AM. J. INT'L L. 45, 64 (2013). For similar expression in the case at hand, *Tulip v. Turkey Award*, ICSID Case No. ARB/11/28, para 176 (Mar. 10, 2014). For a classic text, see Jan Paulsson, *Arbitration Without Privity*, 10 ICSID REV. 232 (1995).

⁶⁶ Out of these, roughly 2,600 are already in force. See UNCTAD, *INTERNATIONAL INVESTMENT AGREEMENTS NAVIGATOR* (2016), <http://investmentpolicyhub.unctad.org/IIA>.

⁶⁷ See generally Kal Raustiala, *Rethinking the Sovereignty Debate in International Economic Law*, 6 J. INT'L ECON. L. 841 (2003).

⁶⁸ See, e.g., CATHARINE TITI, *THE RIGHT TO REGULATE IN INTERNATIONAL INVESTMENT LAW* (2014).

⁶⁹ Such actions may, however, take time. The Netherlands-Turkey BIT, for instance, remains in force for ten year periods and is tacitly extended for the same period, unless terminated. The Netherlands-Turkey BIT, *supra* note 46 at Art. 13(1)–13(2).

⁷⁰ See, e.g., SCHREUER ET AL., *supra* note 64 at 4. See also Gus Van Harten, *Five Justifications for Investment Treaties: A Critical Discussion*, 2 TRADE L. DEV. 19 (2010).

necessary to confer a highly-specific set of rights.⁷¹ Thus, while states have attempted to reduce the gap between asymmetric participants through treaty regimes that protect foreign investors, from a systemic point of view investment law appears to adhere to classic binary structure of subject and objects—persons and things. In this way, the contemporary investment law system shares the most important characteristics with Esposito’s tracing of asymmetric power relations encoded in the concept of legal personality.⁷²

As with any legal system, however, there are shades of grey when distinguishing between subjects and objects, persons and things. For Esposito, the slave as both *persona* and *res* was a clear example of a hybrid entity straddling the person/thing distinction, often to its own detriment. In the investment law context, a similar category is that of a SOE.⁷³ As state-owned companies established as separate legal persons in their domestic jurisdictions,⁷⁴ SOEs are nevertheless often entrusted with carrying governmental policies, particularly in sensitive fields such as energy, telecommunications, infrastructure, and finance.⁷⁵ Even when SOEs operate clearly outside any governmental prerogative, states usually retain a high degree of influence and control over companies in shareholder capacities.⁷⁶ Moreover, in typical investment projects foreign investors often contract, interact, and co-operate with SOEs, ministries, municipalities, and other sub-state entities, rather than the state itself.⁷⁷ This allows flexibility and other advantages of the corporate form, such as segmentation and limitation of potential liabilities.⁷⁸ If, however, the investment project faces obstacles, such

⁷¹ Braun, *supra* note 6 at 106–08.

⁷² See ESPOSITO, *supra* note 12 at 10. See also ESPOSITO, *supra* note 14 at 17.

⁷³ Compare with how “public undertakings” are understood in the EU law. See, e.g., Opinion of Advocate General Jacobs, Case C-482/99, 2001, E.C.R. I-4400, para. 32–56.

⁷⁴ For a succinct introduction to the issue, see ALBERT BADIA, *PIERCING THE VEIL OF STATE ENTERPRISES IN INTERNATIONAL ARBITRATION* 2–15 (2014).

⁷⁵ See, e.g., OECD, *GUIDELINES ON CORPORATE GOVERNANCE OF STATE-OWNED ENTERPRISES* (2015 ed.) 11–14, <http://www.oecd.org/daf/ca/OECD-Guidelines-Corporate-Governance-SOEs-2015.pdf>. See also Feit, *supra* note 52 at 21–23.

⁷⁶ In the OECD area, for instance, states have retained control of over 60% of *privatized* companies. Bernardo Bortolotti & Mara Faccio, *Government Control of Privatized Firms*, 22 *REV. FINANC. STUD.* 2907 (2009).

⁷⁷ Simon Olleson, *Attribution in Investment Treaty Arbitration*, 31 *ICSID REV.* 457–83, 461 (2016). See also Michael Feit, *Responsibility of the State Under International Law for the Breach of Contract Committed by a State-Owned Entity*, 28 *BERKELEY J. INT’L L.* 142–44 (2010).

⁷⁸ David Caron, *The Basis of Responsibility: Attribution and Other Transubstantive Rules*, in *THE IRAN-UNITED STATES CLAIMS TRIBUNAL: ITS CONTRIBUTION TO THE LAW OF STATE RESPONSIBILITY* 109, 165 (R.B. Lillich & D.B. Magraw eds., 1998).

as governmental interference, undercapitalization, or contractual breaches,⁷⁹ questions often emerge as to the responsibility and liability of the shareholder-state.⁸⁰

Despite these issues, most investment treaties, including the Netherlands-Turkey BIT, remain silent on SOEs.⁸¹ As a consequence, ITA tribunals have wide discretion when analyzing the status of a SOE against the substantive provision guaranteed in BITs. Because SOE-dominated sectors are often highly relevant for foreign investors, conduct of SOEs has spurred a substantial body of ITA case law where the relationship between SOEs and their owner-governments comes into focus. Because positive treaty law contained in BITs contributes only a little to the definition of SOE, other bodies of law are instrumental in mapping their status as persons or things, and the consequences that flow from such a characterization.

III. The ICSID Convention

A key piece in this process, and in the investment law framework generally, is the ICSID Convention. A procedural facility, the ICSID was intended to provide a depoliticized forum for investment disputes between host states and foreign investors.⁸² Since its inception, most BITs have included a reference to ICSID as the principal forum for dispute resolution.⁸³ This is mostly due to the ICSID's several unique features, which include direct enforceability and institutional links with the World Bank that provide an incentive for states to accept and comply with the ICSID awards.⁸⁴ The Netherlands-Turkey BIT also opts for the ICSID as its preferred dispute resolution forum.⁸⁵

⁷⁹ See, e.g., BADIA, *supra* note 74 at 197–203.

⁸⁰ Karl-Heinz Böckstiegel, *Enterprise v. State: the New David and Goliath?*, 23 ARB. INT'L. 93, 99–103 (2007).

⁸¹ Naturally, there are exceptions and some investment treaties do contain highly specific clauses on state-owned entities. The Energy Charter Treaty (ECT), for example, stipulates that “[e]ach Contracting Party shall ensure that any state enterprise which it maintains or establishes shall conduct its activities in relation to the sale or provision of goods and services in its Area in a manner consistent with the Contracting Party’s obligations under . . . this Treaty.” Art. 22(1) ECT. The North American Free Trade Agreement uses broadly similar language. The North American Free Trade Agreement, Can.-Mex.-U.S., Dec. 17, 1992, 32 I. L. M. 289 art. 1503 (1993).

⁸² See, e.g., Ibrahim Shihata, TOWARDS A GREATER DEPOLITICIZATION OF INVESTMENT DISPUTES: THE ROLES OF ICSID AND MIGA (1992), available at: <http://documents.worldbank.org/curated/en/335931468315286974/Towards-a-greater-depoliticization-of-investment-disputes-the-roles-of-ICSID-and-MIGA>.

⁸³ DOLZER & SCHREUER, *supra* note 5 at 19–21, 242–44.

⁸⁴ See, e.g., Feit, *supra* note 77 at 143–44.

⁸⁵ The Netherlands-Turkey BIT, *supra* note 46 at Art. 8(2).

Due to the popularity of the ICSID, jurisdictional requirements of the ICSID Convention have assumed a prominent gatekeeping role in ITA proceedings. In general, the ICSID's jurisdiction is contingent on a violation of an investment treaty provision. More specifically, the key provision is Article 25(1) of the ICSID Convention, which provides that the jurisdiction of the ICSID shall

extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.

Understandably, definition, scope, and content of key terms such as “investment,” “consent,” “a Contracting State,” and “a national of another Contracting State” have all been thoroughly discussed in arbitral practice and scholarship.⁸⁶ These definitions are also relevant for *Tulip v. Turkey*. From the SOE-perspective, the most fundamental issue was whether there actually was “a dispute with a Contracting State, here Turkey, for the purposes of the BIT and Art 25 of the ICSID Convention.”⁸⁷ As the logic behind the ICSID Convention is to fill a particular procedural gap stemming from the asymmetric relationship between a host state and a foreign investor,⁸⁸ both “private vs. private and state vs. state disputes” are generally excluded from the ICSID's jurisdiction.⁸⁹ Thus, unless the acts of a SOE can be attributed to the state, ICSID does not have jurisdiction. Similarly, the focus in *Tulip v. Turkey* shifted to the relationship between Turkey, TOKI, and Emlak.⁹⁰ Ultimately, the tribunal held that Emlak's conduct was not attributable to Turkey and on that basis ruled the dispute “outside the remit of the Tribunal,”⁹¹ that is, outside its “‘competence’ or ‘jurisdiction.’”⁹²

⁸⁶ For an overview, see SCHREUER ET AL., *supra* note 64 at 71–347.

⁸⁷ *Tulip v. Turkey Award*, ICSID Case No. ARB/11/28, para. 226–27, 276 (Mar. 10, 2014).

⁸⁸ SCHREUER ET AL., *supra* note 64, at 160.

⁸⁹ See, the views of the ICSID's principal architect, Aron Broches, in *The Convention on the Settlement of Investment Disputes Between States: Some Observations on Jurisdiction*, 5 COLUM. J. TRANSNAT'L L. 263, 267 (1966).

⁹⁰ *Tulip v. Turkey Award*, ICSID Case No. ARB/11/28, para. 276 (Mar. 10, 2014).

⁹¹ *Id.* at 327.

⁹² *Tulip v. Turkey Annulment*, ICSID Case No. ARB/11/28, para. 192–93 (Dec. 30, 2015). *Tulip v. Turkey* is by no means unique with regard to the complex delineation between the host state and its SOEs, or other instrumentalities, at the jurisdictional stage. For detailed discussion, see Luca Schicho, *The Relationship between a*

As the jurisdictional and procedural issues in *Tulip v. Turkey* reveal, investment disputes often arise precisely from the relationship between host states and their SOEs. Reflecting the fact that the specific BIT provisions pertaining to state-SOE relationship are rare, *Tulip v. Turkey* also indicates how broad substantive guarantees arising from individual investment treaties and the jurisdictional thresholds stemming from the ICSID Convention coalesce into a more extensive review where SOEs form a distinct category that straddles the division between the categories of a host state and a foreign investor. While treaty law contained in BITs and the ICSID Convention provides a rough outline for the ITA tribunals to cast SOEs as either persons or things in the asymmetric legal framework, these bodies of law do not have doctrinal tools to make the final distinction. In this context, the law of state responsibility and the doctrine of attribution emerge as crucial analytical tools delineating between the two categories—and making or breaking SOEs as persons and things in ITA.

IV. *The Law of State Responsibility*

The Netherlands-Turkey BIT does not contain any provisions pertaining to Emlak's or any other SOE's conduct. For this reason, SOE-related disputes recourse to the law of state responsibility, a specialized branch of customary international law, and especially the doctrine of attribution.⁹³ Attribution is a legal operation through which the conduct of a range of domestic law entities is treated as conduct of an international law entity, the state.⁹⁴ It refers to a process which aims to identify the conduct which may result in the state's international responsibility⁹⁵ and, as such, provides a critical element in shaping the legal personality of states.⁹⁶

As discussed in *Tulip v. Turkey*, in investment law context the issue often boils down to identifying and potentially attributing the conduct of government-affiliated entities, which nevertheless have their own legal personality, to the state. Similar to establishing the tribunal's jurisdiction under Article 25(1) ICISD Convention, states can only be held liable for

State and State Entities: A Matter of Jurisdiction or of the Merits?, in AUSTRIAN Y.B. INT'L ARB., 367 (Christian Klausegger et al. eds., 2011).

⁹³ Due to immense literature on the law of state responsibility, this Article focuses primarily on the ITA-related aspects of attribution doctrines. See Jure Vidmar, *Some Observations on Wrongfulness, Responsibility and Defences in International Law*, 63 NETH. INT'L L. REV. 335 (2016) and Outi Korhonen & Toni Selkälä, *Theorizing Responsibility*, in THE OXFORD HANDBOOK OF THE THEORY OF INTERNATIONAL LAW 844 (Anne Orford & Florian Hoffmann eds., 2016).

⁹⁴ Crawford, *supra* note 52, at 356.

⁹⁵ Olleson, *supra* note 77, at 457.

⁹⁶ Martti Koskenniemi, *Doctrines of State Responsibility*, in THE LAW OF INTERNATIONAL RESPONSIBILITY 45, 46 (James Crawford, Alain Pellet, & Simon Olleson eds., 2010).

acts of its SOEs when their conduct is attributable to the state. If the act cannot be attributed to the state, it has no responsibility towards the investor.⁹⁷ Thus, in *Tulip v. Turkey*, the issue was whether “the acts of Emlak . . . are attributable to TOKI and therefore to the State of Turkey.”⁹⁸ While the tribunal ruled that Emlak’s conduct was not attributable and also generally quashed Tulip’s claims as incapable of amounting to violations of the Netherlands-Turkey BIT,⁹⁹ the award’s systematic analysis illustrates the basic mechanisms of attribution doctrines and the way they delineate SOEs as persons or things in the international law system.

Nowadays, state responsibility and attribution doctrines are most often discussed with reference to International Law Commission’s (ILC) Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), a codification of customary international law completed in 2001.¹⁰⁰ Even though the ARSIWA is not binding as such, it is widely accepted as an accurate representation of the customary standards of state responsibility.¹⁰¹ Despite the ARSIWA’s rather informal form, Caron suggested already in 2002 that it would likely attract more influence as a collection of principles than as a formal instrument such as a treaty.¹⁰² Later research has mostly confirmed this prediction, and ITA tribunals, in particular, have been noted to rely more on the ARSIWA than on the ICJ’s jurisprudence.¹⁰³ Thus, in *Tulip v. Turkey* as well, both the parties and the tribunal accepted that “the ILC

⁹⁷ Feit, *supra* note 77, at 152.

⁹⁸ *Tulip v. Turkey Award*, ICSID Case No. ARB/11/28, para. 232 (Mar. 10, 2014).

⁹⁹ *Id.* at 359.

¹⁰⁰ International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, [2001] 2 Y.B. INT’L L. COMM’N 31 [hereinafter ILC ARSIWA Commentary].

¹⁰¹ In 2001, the U.N. General Assembly noted the ARSIWA and annexed them into its resolution, commending “them to the attention of Governments,” see U.N. GA Res 56/83, para. 4 (12 December 2001). For application of the ARSIWA in the ICJ’s jurisprudence, see especially the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. & Herz. v. Serb. & Montenegro*), 2007 I.C.J. 43, para. 385 (Feb. 26).

¹⁰² David Caron, *The ILC Articles on State Responsibility: The Paradoxical Relationship between Form and Authority*, 96 AM. J. INT’L L. 857 (2002).

¹⁰³ Alain Pellet, *The Case Law of the ICJ in Investment Arbitration*, 28 ICSID REV. 223, 232–33 (2013). In the case at hand, the parties had divergent views on hierarchy between the ICJ and ITA tribunals’ decisions: “Respondent submits that the judgments of the ICJ are at the apex; whilst Claimant submits that decisions of previous ICSID tribunals are more relevant as they specifically concern investment treaty law, and the construction of BITs, as compared to general principles of international law.” *Tulip v. Turkey Jurisdiction*, ICSID Case No. ARB/11/28, para 45 (Mar. 5, 2013).

Articles constitute a codification of customary international law with respect to the issue of attribution of conduct to the State and apply to the present dispute.”¹⁰⁴

In *Tulip v. Turkey*, one of the claimant’s key arguments was that the close connection between Emlak and the Turkish state meant that Emlak operated under “the presumption of statehood” and its acts were, by and large, attributable to Turkey.¹⁰⁵ Turkey did not deny links between Emlak and the state, but argued that under the law of state responsibility “even a close link . . . [did] not, in itself, provide a basis for attribution of the private company’s acts to the State.”¹⁰⁶ More specifically, both parties referred to three primary rules of attribution contained in ARSIWA. Accordingly, the *Tulip v. Turkey* award reflects and illustrates the basic structure of each rule expressed in Articles 4, 5, and 8 ARSIWA, in the ILC’s commentary and, to a lesser degree, in the ICJ’s jurisprudence.¹⁰⁷

According to Article 4 ARSIWA, “the conduct of any State organ shall be considered an act of that State under international law,” where “an organ includes any person or entity which has that status in accordance with the internal law of the State.”¹⁰⁸ The commentary further notes, invoking the classic *imperium/dominium* distinction, that under Article 4, “it is irrelevant for the purposes of attribution that the conduct of a State organ may be classified as ‘commercial’ or as *acta iure gestionis*.”¹⁰⁹ Under this rule of attribution, breaches arising from contract or other markedly private arrangements can trigger state responsibility if a SOE or other sub-state entity is considered an organ of the state.

In *Tulip v. Turkey*, the claimant used Article 4 ARSIWA to argue that Emlak was “an arm of the Turkish government” which worked “to fulfil an executive function of the Turkish State.”¹¹⁰ Alternatively, it was argued that by being “majority-owned by TOKI, a State organ,”

¹⁰⁴ *Tulip v. Turkey* Award, ICSID Case No. ARB/11/28, para 281 (Mar. 10, 2014). For similar approvals in other arbitral tribunals, see, e.g., *Noble Ventures v. Romania*, ICSID Case No. ARB/01/11, Award, para. 69 (Oct. 12, 2005), *MCI Power Group v. Ecuador*, ICSID Case No. ARB/03/6, Award, para. 42 (July 31, 2007) and *Hamester v. Ghana*, ICSID Case No. ARB/07/24, Award, para. 171 (June 18, 2010).

¹⁰⁵ *Tulip v. Turkey* Award, ICSID Case No. ARB/11/28, para. 235 (Mar. 10, 2014).

¹⁰⁶ *Id.* at 258.

¹⁰⁷ JAMES CRAWFORD, *STATE RESPONSIBILITY: THE GENERAL PART* 113–61 (2013). The ARSIWA does contain other rules of attribution but these are—Article 11 ARSIWA aside—less relevant for SOEs and ITA.

¹⁰⁸ For discussion on *de facto* organs, see *id.* at 124–26.

¹⁰⁹ ILC ARSIWA Commentary *supra* note 100 at Art. 4, para. 6.

¹¹⁰ *Tulip v. Turkey* Award, ICSID Case No. ARB/11/28, para. 235 (Mar. 10, 2014). Note, however, that the tribunal found that the claimant changed its target entity from Emlak to TOKI in the course of the proceedings. *Id.* at 283.

Emlak operated under “the presumption of statehood.”¹¹¹ The tribunal disagreed. Relying on Emlak’s status as a separate company operating under the Turkish Commercial Code, it was contended that Emlak did not fulfill the requirement of being an organ under the internal law of the state. Emlak was not a “quasi-state’ organ.”¹¹² Moreover, the tribunal explicitly denied that

ownership of a corporate entity by the State triggers the presumption of statehood. The position of the Tribunal is that, whilst state ownership may, in certain circumstances, be a factor relevant to the question of attribution, it does not convert a separate corporate entity into an ‘organ’ of the State.¹¹³

Under the Article 5 ARSIWA, the conduct of a person or entity which is empowered by the law of the state to “exercise elements of the governmental authority shall be considered an act of the state under international law, provided the person or entity is acting in that capacity in the particular instance.” The commentary takes SOEs explicitly into account as it holds that “the existence of a greater or lesser State participation in [entity’s] capital, or, more generally, in the ownership of its assets” are not decisive criteria for attributing conduct.¹¹⁴

Following the rationale of Article 5, Tulip argued that Emlak was empowered to exercise “power under Turkey’s zoning laws and with respect to land acquisition from TOKI’s land banks”¹¹⁵ and that Emlak was “publicly characterised by TOKI as an affiliate of this organ of the state.”¹¹⁶ Again, the tribunal disagreed. The tribunal reasoned that the statutes cited by Tulip granted certain preferential treatment, “but [did] nothing to empower Emlak actually to exercise any kind of governmental authority.”¹¹⁷ Moreover, Emlak’s contractual dealings

¹¹¹ *Id.* at 235.

¹¹² *Id.* at 288.

¹¹³ *Id.* at 289. Other tribunals have ruled differently on this issue. *See, e.g.,* Emilio Agustín Maffezini v. The Kingdom of Spain, ICSID Case No. ARB/97/7, Decision on Objections to Jurisdiction, para 96-97 (Jan. 25, 2000) and Salini Construttori S.P.A. & Italstrade S.P.A. v. Kingdom of Morocco, ICSID Case No. ARB/00/04, Decision on Jurisdiction, paras. 32–35 (July 23, 2001). Note, however, that these cases predate the ARSIWA.

¹¹⁴ ILC ARSIWA Commentary *supra* note 100, at Art. 5, para. 3.

¹¹⁵ Tulip v. Turkey Award, ICSID Case No. ARB/11/28, para. 237 (Mar. 10, 2014).

¹¹⁶ *Id.* at 242.

¹¹⁷ *Id.* at 293.

with Tulip showed no signs of exercising governmental authority in particular instances, such as its termination of the revenue-sharing contract.¹¹⁸

The most detailed probe into the relationship between Emlak and the state was conducted under Article 8 ARSIWA, which holds that the conduct of a person or group of persons shall be considered an act of a state under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that state in carrying out the conduct. Here, the commentary notes very directly that “corporate entities, although owned by and in that sense subject to the control of the State, are considered to be separate, *prima facie* their conduct in carrying out their activities is not attributable.”¹¹⁹ When there “was evidence that the corporation was exercising public powers, or that the State was using its ownership interest in or control of a corporation specifically in order to achieve a particular result,” however, attribution is possible.¹²⁰

Under the framework of Article 8 ARSIWA, Tulip argued that “TOKI exercised ‘an extraordinary level of control over every aspect of Emlak’s operations,’” chiefly through controlling voting and appointing directors to Emlak’s board.¹²¹ Moreover, the claimant contended that the specific decision to “terminate the Contract was made by Emlak under the control of TOKI for non-commercial purposes and in the exercise of State power.”¹²² The tribunal rejected, by majority, Tulip’s claims.¹²³ Considering all relevant elements of under Article 8—instructions, direction, and control—the tribunal accepted that “from an ordinary company law perspective, Emlak was subject to the control of TOKI and, therefore, the Turkish State.”¹²⁴ Nevertheless, there was no indication as to Emlak being directed by TOKI “with respect to the specific activity of administering the Contract with Tulip JV in the sense of sovereign direction instruction or control rather than the ordinary control exercised by a majority shareholder acting in the company’s perceived commercial best interests.”¹²⁵ In the view of the tribunal, there was no “improper usurpation of the Claimant’s rights by the

¹¹⁸ *Id.* at 299.

¹¹⁹ ILC ARSIWA Commentary *supra* note 100 at Art. 8, para. 6.

¹²⁰ *Id.*

¹²¹ Tulip v. Turkey Award, ICSID Case No. ARB/11/28, para. 243 (Mar. 10, 2014).

¹²² *Id.* at 249.

¹²³ *Id.* at 301.

¹²⁴ *Id.* at 307.

¹²⁵ *Id.* at 309–11.

'invisible' hand of the State."¹²⁶ Rather, Emlak acted "in what it perceived to be its commercial best interest in terminating the Contract."¹²⁷ Thus, even though one arbitrator argued that Emlak's decision to terminate the contract was "guided—if not fully directed—by the sovereign's hand,"¹²⁸ the majority held that its decisions were based on viable commercial grounds. Moreover, the tribunal noted that even if Emlak's actions were attributable, they would not amount to violation of the Netherlands-Turkey BIT.¹²⁹

In sum, the deliberation in *Tulip v. Turkey* seems to affirm the "fundamental precept in international law that attribution should not follow state ownership because of separate legal personality."¹³⁰ Thus, in order to construe SOEs as entities capable of triggering state responsibility in ITA, claimants have to show—with reference to their statutory position, governmental authority, or control—that they were, in fact, filled with sovereign spirit.¹³¹ To gain compensation, SOEs need to be made persons and not things. This idea provides the rationale and drive behind much of SOE-related ITA proceedings, but it also connects the highly-specialized doctrines of investment law to Esposito's notion of the person/things distinction and opens a distinct *dispositif* of a SOE.

V. Lessons of Tulip v. Turkey: Of SOEs and Slaves

Tulip v. Turkey provides a handy illustration of legal and political dimensions of modern investment law and ITA. In terms of law, the case highlights interdependence between BITs' substantive protections, the ICSID Convention's jurisdictional provisions, and the law of state responsibility. Politically, the case sheds light on the polarized environment of FDI where the possibility to commence individualized claims against a host state is a staple in a foreign

¹²⁶ *Id.* at 321.

¹²⁷ *Id.* at 324.

¹²⁸ *Tulip Real Estate Investment and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Separate Opinion of Michael Evan Jaffe, para. 8 (Mar. 10, 2014) [hereinafter *Tulip v. Turkey Separate Opinion*].

¹²⁹ *Tulip v. Turkey Award*, ICSID Case No. ARB/11/28, paras. 367–69 (Mar. 10, 2014).

¹³⁰ Kristen Boon, *Are Control Tests Fit for the Future? The Slippage Problem in Attribution Doctrines*, 15 MELB. J. INT'L L. 1, 17 (2014). See also CRAWFORD, *supra* note 107 at 161-165. For a critique of the tribunal's conclusions, see Albert Badia, *Attribution of Conducts of State-Owned Enterprises Based on Control by the State*, in ICSID CONVENTION AFTER 50 YEARS: UNSETTLED ISSUES 189, 200–01, 207–08 (Crina Baltag ed., 2016).

¹³¹ Compare this requirement for claimants with the findings in *Khan Resources v. The Government of Mongolia*, PCA Case No. 2011-09, Award, para. 189 (Mar. 2, 2015).

investors toolbox.¹³² Underneath these established debates impinging on ITA's pros and cons, however, *Tulip v. Turkey* has doubled as an introduction to dynamics and ramifications of international legal personality in ITA.

In *Tulip v. Turkey*, the tribunal rejected all claims arising from the contractual dispute between the claimant and Emlak, a state-owned entity. Throughout the proceedings, the status of Emlak was under spotlight. Was it a state organ? Did it exercise governmental authority? Did Turkey control Emlak and use its ownership to specifically terminate to contract? While not confined to ITA,¹³³ *Tulip v. Turkey* demonstrates how well-rehearsed these argumentative patterns are. As a general rule, foreign investors tend to argue that the host state is responsible for a breach traceable to a SOE. At the same time, respondent states will point to the separate legal personality of the SOE, underscore its independent decision-making, and emphasize inherent counterparty risks present in any investment decision.¹³⁴ Thus, in *Tulip v. Turkey*, the claimant based its argument on Emlak's presumed statehood, and the respondent on its corporatehood—or, in Esposito's terms, its status as a person or a thing. While technical, these arguments illuminate the stakes in construing proper parties to arbitral proceedings. Further, they provide a clear window to the dynamics of making or breaking international legal persons.

Ultimately, the factual circumstances in *Tulip v. Turkey* were such that state responsibility over the conduct of Emlak was not triggered and the dispute was viewed to fall outside the tribunal's jurisdiction. Thus, in *Tulip v. Turkey*, attribution emerged as crucial doctrinal platform where the conduct of Emlak was rendered illegible in the eyes of investment law: Because the separate personality of Emlak was upheld, there was no case to be made against the host state.¹³⁵ In many other cases, however, the outcome has been different. Apposite

¹³² Many critical commentators would not hesitate to interpret the knockout victory of Turkey both at the merits and the annulment stages as reinforcing the notion that ITA proceedings are a site for adventurous litigation by foreign investors.

¹³³ Similar patterns emerge when states are parties to international commercial arbitration. See, e.g., Veijo Heiskanen, *State As a Private: The Participation of States in International Commercial Arbitration*, 7 *TRANSNAT'L DISP. MGMT.* 1 (2010).

¹³⁴ See Feit, *supra* note 77 at 143–44.

¹³⁵ Compare with delineation processes in the practice of human rights treaty bodies, particularly the European Court of Human Rights. Mikko Rajavuori, *How Should States Own? Heinisch v. Germany and the Emergence of Human Rights-sensitive State Ownership Function*, 26 *EUR. J. INT'L L.* 727, 732–37 (2015).

ITA awards range from energy development¹³⁶ to disputes arising from duty-free shops,¹³⁷ cocoa bean processing,¹³⁸ hotel development,¹³⁹ waste management,¹⁴⁰ and financial hedging agreements.¹⁴¹ Moreover, many high-profile disputes have stemmed from failed privatizations¹⁴² and large-scale nationalizations.¹⁴³ Appropriately, even the single largest ITA award to date, *Yukos v. Russia*, contains an important attribution-dimension in SOE context.¹⁴⁴ In these cases, and many others,¹⁴⁵ the exact bounds and definitions of the host state greatly affect the outcome of proceedings. If the respondent is construed in a way that excludes SOEs and other sub-state entities, claimants often face an uphill battle. If, on the other hand, the respondent is construed expansively to include its instrumentalities, the claimant has more avenues to pursue compensation over alleged infringements of substantive investment treaty provisions.¹⁴⁶

¹³⁶ See, e.g., *EnCana Corp. v. Ecuador*, LCIA Case UN3481, Award (Feb. 3, 2006) and *Limited Liability Company AMTO v. Ukraine*, SCC Arbitration No. 80/2005, Final Award (Mar. 26, 2008).

¹³⁷ See, e.g., *EDF (Services) Ltd. v. Romania*, ICSID Case No. ARB/05/13, Award (8 October 2009) and *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award (Apr. 8, 2013).

¹³⁸ See, e.g., *Gustav F.W. Hamester GmbH & Co. KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, para. 143 (June 18, 2010).

¹³⁹ See, e.g., *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award (Dec. 8, 2000) and *Alpha Projektholding GMBH v. Ukraine*, ICSID Case No. ARB/07/16, Award, (Nov. 8, 2010).

¹⁴⁰ See, e.g., *Waste Management Inc v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (Apr. 30, 2004).

¹⁴¹ See, e.g., *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/02, Award (Oct. 31, 2012).

¹⁴² See, e.g., *Eureko B.V. v. Republic of Poland*, Partial Award, UNCITRAL (Aug. 19, 2005) and *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award (Oct. 12, 2005).

¹⁴³ See, e.g., *Rusoro Mining Limited v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award (Aug. 22, 2016).

¹⁴⁴ *Yukos Universal Limited v. The Russian Federation*, PCA Case No. AA 227, Final Award, para. 1450–80 (July 18, 2014).

¹⁴⁵ For good overviews of SOE-related ITA cases, see Schicho, *supra* note 92 at 369-70 and Badia, *supra* note 130.

¹⁴⁶ Note, however, that even SOE-related ITA claims often impinge on various substantive protections where attribution is not necessary. See Georgios Petrochilos, *Bosh International, Inc and B & P Ltd Foreign Investments Enterprise v Ukraine. When is Conduct by a University Attributable to the State?*, 28 ICSID REV. 262, 269–72 (2013).

While distributional impacts of such exclusionary/inclusionary dynamics are obvious,¹⁴⁷ for the purposes of this Article it is more important to note the impact of attribution doctrines on creation and maintenance of international legal personality in ITA. Viewed against Esposito's person/thing distinction, the basic framework of investment law—BITS, the ICSID Convention, the law of state responsibility—emerges as a stable legal environment where the roles of host states as persons and foreign investors as things are well-defined. In this framework, sovereign persons make and maintain investment law while foreign investor things use the system's substantive and procedural protections as a spring board to accelerate both their own and the host states' economic development through increased FDI. Contrary to Esposito's account of the Roman *Institutes*, however, the legal environment of investment law essentially privileges thinghood. On one hand, only private foreign investors have access to BITS' protective embrace.¹⁴⁸ On the other hand, the system incentivizes them to define host states as expansively as possible.¹⁴⁹ While making exclusionary/inclusionary host states parties to the dispute takes place in a system states have themselves created, the dynamics of ITA leave it to foreign investors to construe applicable definitions of the host state through creative litigation. The asymmetric structure of investment law is calibrated so that things make persons for the purposes of establishing jurisdiction and, ultimately, triggering state responsibility and liability.

In sum, the condition of a SOE highlights the exclusive nature of international personality in ITA. Unlike many theories on gradual personality suggest,¹⁵⁰ SOEs assume the role of either a person or that of a thing in ITA and, due to the dearth of primary treaty law concerning sub-state entities, the role of attribution doctrines is crucial in making the distinction. Much like slaves in ancient Rome, SOEs straddle the two conceptual categories and constantly risk being cast either as functional part of the state (person) or separate legal persons (thing). Amidst these doctrinally-entrenched positions, the treatment of SOEs acts within a continuous performative process, the *dispositif*, where persons are separated from things.¹⁵¹ Treatment of Emlak in *Tulip v. Turkey* provides a clear view on legal techniques that shape

¹⁴⁷ James Crawford & Paul Mertenskötter, *The Use of the ILC's Attribution Rules in Investment Arbitration*, in BUILDING INTERNATIONAL INVESTMENT LAW: THE FIRST 50 YEARS OF ICSID 27, 33 (Meg Kinnear et al. eds., 2015). See also *Eureko B.V. v. Republic of Poland*, Dissenting Opinion of Jerzy Rajski, para. 11 (Aug. 19, 2005).

¹⁴⁸ Naturally, tough questions regarding the exact definition of "a foreign investor" emerge. For a major case concerning the investor's nationality, see *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction (Apr. 29, 2004). For a case involving a state-owned claimant, see *Ceskoslovenska obchodni banka, a.s. v. Slovak Republic*, ICSID Case No. ARB/97/4, Award (Dec. 29, 2004).

¹⁴⁹ Compare with Danielle Morris, *The Regulatory State and the Duty of Consistency*, in THE ROLE OF THE STATE IN INVESTOR-STATE ARBITRATION 49 (Shaheez Lalani & Rodrigo Polanco Lazo eds., 2015).

¹⁵⁰ Selkälä & Rajavuori, *supra* note 3.

¹⁵¹ ESPOSITO, *supra* note 12 at 9 And Esposito, *supra* note 20, at 23--24.

the process. While the ultimate characterization depends on the many variables unique to each case, it is important to note how foreign investors continuously push SOEs to the edge of personhood and how easily SOEs may slip into one category from another. Illustratively, the *Tulip v. Turkey* tribunal cast Emlak as a thing by a close 2-1 vote. Thus, like the *dispositif* of the person in Esposito's political philosophy, the *dispositif* of a SOE emerges as an instrument that exposes the malleability of host states and foreign investors along the person/thing distinction.¹⁵²

In the following section, the analytical lens is widened to discern how the status of SOEs along ITA's person/thing distinction delineates the exact normative demarcation of the state as international legal person and creates pockets of indistinguishability and politics at its borders. Much like slaves in Esposito's framework, SOEs appear as a category vulnerable to use and abuse when their and their owner states' international legal personality is construed in ITA, particularly in the North/South relations that shaped the contemporary theorization of the legal person.¹⁵³

D. Politics, Porosity, and Ramifications of International Legal Personality in ITA

The previous section sketched the basic legal framework of investment law which rests on stable asymmetric relationships between host states (persons) and foreign investors (things). The law of state responsibility was further identified as a key site for making context-sensitive distinctions between state and non-state in an otherwise strictly binary system. In the case of Emlak and other SOEs, ITA tribunals cast state-owned companies as persons or things per the logic of attribution doctrine codified in the ARSIWA. Against this backdrop, this section follows Esposito's idea of indistinguishability and uses *dispositif* of a SOE to highlight politics, porosity, and ramifications of international legal personality in ITA. Two arguments, largely based on the North/South relations, are pursued. In the bottom-up approach, irregularities in ITA tribunals' application of attribution doctrines are used to illustrate conflicts in defining the limits of international legal personality. In the top-down approach, dynamics of international legal personality are juxtaposed with the concept of quasi-sovereignty developed in postcolonial theory. Together, these micro- and macro-level arguments suggest SOEs emerge as a liminal category straddling the person/thing distinction—a process which enables the use and abuse of SOEs as instruments of exclusion and domination with severe implications in the real-world. To illustrate the relevance of this discussion, the section starts by reviewing three cases that highlight variations when ITA tribunals make or break international legal persons.

¹⁵² ESPOSITO, *supra* note 12, at 26, 33.

¹⁵³ Selkälä & Rajavuori, *supra* note 3.

I. Personal Anxieties: The Case of Petrobangla

While multilayered and complex, the framework of investment law is generally viewed as stable. Accordingly, the system is also expected to lead to broadly consistent and foreseeable outcomes in individual cases. Naturally, however, the reality is more complicated.¹⁵⁴ Consider the case of Bangladesh Oil Gas and Mineral Corporation Petrobangla (Petrobangla). Over the past decade, Bangladesh has been drawn into three ITA proceedings that emanate from Petrobangla's actions vis-a-vis its contractual counterparts. While the cases have stemmed from unique contractual schemes and have been arbitrated under different BITs, it is important to note how each tribunal has viewed the position of Petrobangla differently.

In *Saipem v. Bangladesh*, the tribunal accepted that "at first sight at least, Petrobangla appears to be part of the State under Bangladeshi law" at the jurisdictional stage.¹⁵⁵ On the merits, however, Petrobangla's conduct was likened to a rational market participant acting in its commercial self-interest, leading the tribunal to find no treaty breach with respect to Petrobangla and its conduct non-attributable to Bangladesh.¹⁵⁶

By contrast, in *Chevron Bangladesh Blocks Thirteen and Fourteen v. Bangladesh*, the tribunal launched an extensive investigation into Petrobangla's status at the jurisdictional stage, ruling that Petrobangla was a public statutory body and, as such, an organ of the state under the Article 4 ARSIWA.¹⁵⁷ Thus, all Petrobangla's actions were "attributable to Bangladesh."¹⁵⁸ At the merits, Petrobangla was also considered to fall under the requirements set in Articles 5 and 8 ARSIWA due to its statutory creation, operation in a highly-regulated field, supervision, and funding.¹⁵⁹

Finally, in *Niko Resources v. Bangladesh, Bapex and Petrobangla*, the tribunal found that Petrobangla, regardless of its statutory origin and exclusive competencies, remained an

¹⁵⁴ See, e.g., Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 *FORDHAM L. REV.* 1521 (2005).

¹⁵⁵ *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, para. 145 (Mar. 21, 2007).

¹⁵⁶ *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/7, Award, para. 131, 148 (June 30, 2009).

¹⁵⁷ *Chevron Bangladesh Blocks Thirteen and Fourteen, Ltd. v The People's Republic of Bangladesh*, ICSID Case No. ARB/06/10, Award, para 147–49 (May 17, 2010) [hereinafter *Chevron v. Bangladesh*, Award].

¹⁵⁸ *Id.* at 148–49.

¹⁵⁹ *Id.* at 171.

entity separate from the state.¹⁶⁰ Thus, the tribunal concluded that it lacked jurisdiction over Bangladesh.¹⁶¹ Based on a special rule in the Article 25(1) ICSID Convention, however, the tribunal viewed Bangladesh to have “designated, implicitly but necessarily . . . Petrobangla as [an] agenc[y].”¹⁶² The decision was informed by the status of Petrobangla as a proxy of Bangladesh’s mineral policy and by the government’s involvement in contract negotiations.¹⁶³ Accordingly, Petrobangla was properly conferred “limited international capacity,”¹⁶⁴ making it, and not the owner-state, bound by the arbitration clauses.¹⁶⁵

Unique legal frameworks—whether BIT, domestic law, or contract—and factual circumstances aside, in each case ITA tribunals provided a different ruling on the relationship between Bangladesh and Petrobangla. In *Saipem*, Petrobangla was not deemed a functional part of the state. In *Chevron*, it was. In *Niko*, an intermediate position based on a special rule in the ICSID Convention was used to keep the state and the company in separate containers but, at the same, the close relationship between the two bound the company in arbitral proceedings as an implicitly designated entity. Thus, each tribunal used a variation of the *dispositif* of a SOE to construe the respondent state differently—although one should note that each case resulted in compensation to the foreign investor. In the following, Petrobangla’s personal anxieties are gleaned through two perspectives—the doctrinal ambiguity of attribution and postcolonial theory—that highlight politics, porosity, and the ramifications of international legal personality, particularly in the North/South relations.

II. Bottom-up Approach: Instabilities and Politics of Attribution Doctrines

Three renditions of Petrobangla by different ITA tribunals illustrate the variations that ensue when the law of state responsibility and attribution doctrines are applied to concrete cases. In the first instance, however, they draw attention to wider ramifications of making

¹⁶⁰ *Niko Resources v. The People’s Republic of Bangladesh, Bangladesh Petroleum Exploration & Production Company Limited and Bangladesh Oil, Gas and Mineral Corporation*, ICSID Case No. ARB/10/11 and ARB/10/18, Decision on Jurisdiction, paras. 220–27, 235 (Aug. 19, 2013) [hereinafter *Niko v. Bangladesh, Bapex and Petrobangla, Jurisdiction*].

¹⁶¹ *Id.* at 256.

¹⁶² *Id.* at 345. For discussion on distinguishing “designation” from “attribution,” see SCHREUER ET AL., *supra* note 64, at 150–51.

¹⁶³ *Niko v. Bangladesh, Bapex and Petrobangla, Jurisdiction*, ICSID Case No. ARB/10/11 and ARB/10/18, paras. 330–45 (Aug. 19, 2013).

¹⁶⁴ *Id.* at 329.

¹⁶⁵ *Id.* at 348.

international legal persons in ITA. Condorelli and Kress, for example, make a direct connection between attribution doctrines and the wider political economy of the state

[considering that] the international principles relating to attribution contribute to the delimitation of the public domain for the purposes of international responsibility, in distinguishing it from what is essentially the private sphere, it has hardly surprising that . . . attribution [has generated] . . . divergent views which are based on different conceptions of general legal policy.¹⁶⁶

The significance of attribution doctrines to the form and function of a sovereign state is particularly pertinent in North/South relations. As was the case with Petrobangla, the vast majority of all ITA proceedings involve investors from developed countries litigating against developing country governments.¹⁶⁷ Moreover, most SOE cases referenced in this Article have been lodged against countries such as Bangladesh, Ecuador, Egypt, Ghana, Oman, Sri Lanka, and Venezuela, as well as European transition economies like Poland, Romania, Ukraine, and Russia.¹⁶⁸

In these circumstances, the system-level ramifications of attribution doctrines are easily drawn to the fore. Crawford and Mertenskötter make this point clear when they argue that “[e]specially in an international context where BIT claims are still, albeit decreasingly, dominated by companies representing affluent investors against States with low GDPs per capita, the distributive effects of extending attribution rules in the context of international investment law may be significant.”¹⁶⁹

While the role of attribution doctrines sustaining the global distributional asymmetry is acknowledged, their political dimension is usually toned down by referring to the law of state responsibility as an inter-state bargain, an agreement between equal international persons. According to one notable commentator, for instance, “[a]dmittedly, the rules [of

¹⁶⁶ Luigi Condorelli & Claus Kress, *The Rules of Attribution: General Considerations*, in *THE LAW OF INTERNATIONAL RESPONSIBILITY* 221, 226 (James Crawford, Alain Pellet, & Simon Olleson eds., 2010).

¹⁶⁷ The ICSID Caseload - Statistics (Issue 2017-1), [https://icsid.worldbank.org/en/Documents/resources/ICSID Web Stats 2017-1 \(English\) Final.pdf](https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202017-1%20(English)%20Final.pdf).

¹⁶⁸ For a notable exception, however, see *United Parcel Service of America, Inc v. Government of Canada, Award on the Merits (24 May 2007)*, 46 I. L. M. 922 (2007).

¹⁶⁹ Crawford & Mertenskötter, *supra* note 147 at 33.

attribution] are far-reaching . . . [h]owever, as the Romans said: *dura lex, sed lex*.¹⁷⁰ Because the law of state responsibility is stable and clear, or so goes the argument, the distributional consequences of attribution doctrines are built into the core of the investment law regime. Here, the ARSIWA emerges as a finely-tuned instrument that carefully delineates the state sector from the non-state sector for the purposes of responsibility.¹⁷¹ Moreover, the ARSIWA explicitly limits its applicability to issues of state responsibility as “the rules concerning attribution . . . are formulated for this particular purpose, and not for other purposes for which it may be necessary to define the State or its Government.”¹⁷² Thus, argue Crawford et al.,

international law of attribution exists for a particular purpose, viz. to determine whether conduct said to breach an international obligation of a State is in truth conduct of the State in the context of an inquiry into responsibility. It is not its function to delineate the content of a State’s obligations, or to aggregate the State as an entity for other purposes or in other contexts.¹⁷³

In reality, however, both the scope and content of attribution doctrines under the ARSIWA are more malleable. To some extent, discrepancies between different ITA awards are expected because the ARSIWA is still a relatively young instrument.¹⁷⁴ In this regard, Hobér has pinpointed attribution doctrines as the chief culprits

[i]n the new era of investment arbitration there is one particular aspect of the law of state responsibility which has become increasingly important, namely, the attribution of conduct to states. The rules and principles pertaining to the attribution of conduct to states have come to play an important role, partly because states and their representatives often seem to be unaware of

¹⁷⁰ Kaj Hobér, *State Responsibility and Attribution*, in THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 549, 552 (Peter Muchlinski, Federico Ortino, & Christoph Schreuer eds., 2008).

¹⁷¹ Condorelli & Kress, *supra* note 166, at 224.

¹⁷² ILC ARSIWA Commentary, *supra* note 100, at chapter II, para. 5.

¹⁷³ Crawford and Mertenskötter, *supra* note 146, at 41.

¹⁷⁴ Hobér, *supra* note 170, at 582.

their existence. States are surprised when an opposing party invokes the rules so as to hold the state responsible for certain conduct.¹⁷⁵

In the ITA context, “surprising” dimensions of the law of state responsibility are not particularly new. On the contrary, a long-standing debate in investment law has concentrated on the fact that states are often taken by surprise by the wide-ranging commitments they have assumed under investment treaties.¹⁷⁶

The same holds for cases involving SOEs. Writing in the context of state participation in international commercial arbitration, Heiskanen, for instance, admits that “when acting as a private, the State may surprise not only the other party, but also itself.”¹⁷⁷ As a consequence, governments may be stunned when ITA panels demarcate the exact boundaries of the state by using far-reaching attribution doctrines.¹⁷⁸ This has led some commentators to doubt whether rules of state responsibility “developed in the context of reciprocal legal relations among states” are an ideal fit for asymmetric systems such as investment law.¹⁷⁹ While these arguments are generally dismissed,¹⁸⁰ instabilities in the application of the ARSIWA have been flagged as potential issues by investment law scholars.¹⁸¹

Caron suggested in 2002 that the ARSIWA would likely spawn problems due to its overuse and misapplication by future arbitral tribunals, and later research has mostly confirmed his hypothesis.¹⁸² Crawford, for instance, has noted “a slight paradox in the way certain

¹⁷⁵ *Id.* at 550.

¹⁷⁶ See, e.g., Lauge N Skovgaard Poulsen & Emma Aisbett, *When the Claim Hits: Bilateral Investment Treaties and Bounded Rational Learning*, 65 *WORLD POL.* 273 (2013).

¹⁷⁷ Heiskanen, *supra* note 132 at 13. For van Harten’s similar point about ICC arbitration, see Gus van Harten, *TWAIL and the Dabhol Arbitration*, 3 *TRADE L. DEV.* 131, 148–49 (2011) http://www.lalive.ch/data/publications/vhe_State_as_a_Private;_The_Participation_of_States_in_International_Commercial_Arbitration.pdf.

¹⁷⁸ Hobér, *supra* note 170 at 552.

¹⁷⁹ GUS VAN HARTEN, *INVESTMENT TREATY ARBITRATION AND PUBLIC LAW INVESTMENT TREATY ARBITRATION AND PUBLIC LAW* 105–09 (2008).

¹⁸⁰ Hobér, *supra* note 170 at 552.

¹⁸¹ James Crawford, *Investment Arbitration and the ILC Articles on State Responsibility*, 25 *ICSID REV.* 127–28 (2010).

¹⁸² Caron, *supra* note 102 at 857.

investment treaty tribunals have tended to refer to the ILC Articles.”¹⁸³ Turning to specific cases, Schicho has criticized “undifferentiated application of the rules of attribution” in several arbitral proceedings,¹⁸⁴ and empathetically contended that

the ILC ASR should be the primary reference point for arbitral tribunals dealing with questions of attribution [because they] . . . provide a clear framework of rules founded on a relatively consistent and steadily growing jurisprudence . . . [and] cover all relevant factual elements that can play a role in deciding upon the “close link” that characterizes the determination of attribution.¹⁸⁵

In a similar vein but in the trade law context, Lee has warned that “actual disputes of international economic law discussing this issue seem to blur the intended distinction [of the ARSIWA] and instead mingle the analyses.”¹⁸⁶ In Lee’s view, “[c]onsidering the sensitivity the state responsibility jurisprudence may raise with respect to state sovereignty, it is imperative that the basic architecture of the ILC Draft Articles be preserved as it is originally designed.”¹⁸⁷ Badia has viewed especially the “test of the ILC Article 8 . . . a hard nut to crack” and criticized several ITA tribunals for using “unconvincing” and “entirely naïf” interpretative standards when applying attribution doctrines to SOEs.¹⁸⁸ Olleson, in turn, has ascribed misapplication of the law of the state responsibility on the fact that “the rules of attribution . . . are well known and are easily accessible [and] there is a risk that they may be inappropriately applied to issues to which, on analysis, they are of no relevance.”¹⁸⁹

Clearly, all critical positions juxtapose the ARSIWA’s intended conceptual framework and the way they are applied by ITA tribunals. Nevertheless, when critics draw attention to expansive and doctrinally misconstrued use of the ARSIWA’s rules of attribution in an SOE-context,

¹⁸³ Crawford, *supra* note 181, at 128.

¹⁸⁴ Luca Schicho, *Attribution and State Entities: Diverging Approaches in Investment Arbitration*, 12 J. WORLD INVEST. TRADE 283, 295–97 (2011).

¹⁸⁵ *Id.* at 298.

¹⁸⁶ Jaemin Lee, *State Responsibility and Government-Affiliated Entities in International Economic Law The Danger of Blurring the Chinese Wall between*, 49 J. WORLD TRADE 117, 122 (2015).

¹⁸⁷ *Id.* at 151.

¹⁸⁸ Badia, *supra* note 130 at 207.

¹⁸⁹ Olleson, *supra* note 77 at 457.

they also expose the general role and ramifications of international legal personality. Variation and inter-tribunal dynamics in ITA tribunals' conceptualization of Petrobangla is a case in point. The *Chevron Bangladesh Blocks Thirteen and Fourteen v. Bangladesh* tribunal, for instance, built directly on the findings of the *Saipem v. Bangladesh* tribunal when it characterized Petrobangla as "a de jure organ of the State" at the jurisdictional stage.¹⁹⁰ By contrast, the *Niko Resources v. Bangladesh, Bapex and Petrobangla* tribunal explicitly rejected the *Chevron* tribunal's approach on attribution.¹⁹¹ Commenting on dynamics between the tribunals, Olleson considers the approach pursued by the *Niko* tribunal correct as it rightly interprets the *Chevron* ruling as misusing the attribution doctrine "in determining the question of whether the State had consented to arbitrate" at the jurisdictional stage.¹⁹² As technical as they are, these doctrinal arguments undergird the construction of proper parties to arbitral proceedings and, by proxy, states as international legal persons.¹⁹³

While the three recent cases against Bangladesh stem from unique legal and factual circumstances, irregularities in applying the law of state responsibility expose more general tensions when used to define the exact limits of the state either as a party to the ITA proceedings or for liability purposes. In concrete cases, particularly those that focus on political economies very different from stable Western liberal democracies, attribution doctrines may lead to overly exclusionary or inclusionary conceptions of the state, or rulings where attributability of a SOEs conduct is essentially predetermined at the jurisdictional stage. In both instances, seemingly neutral application of seemingly consistent law of state responsibility exposes the fault lines and stakes when *ad hoc* arbitrators make or break international legal persons. Belonging on a longer continuum of criticism over instable application of attribution, the treatment of Petrobangla illustrates how different ITA tribunals, applying the same analytical and interpretative tools arising from the ARSIWA, can readily cast the same SOE both as a functional part of the host state (person) and as an independent company (thing).

Instead of coming across as a stable codification of customary international law, the rules contained in the ARSIWA emerge rife with ambiguities and political tensions that illuminate pockets of indistinguishability around the boundaries of a SOE. As such, attribution doctrines as applied to SOEs—much like slaves in ancient Rome—exemplify the ease with which SOEs oscillate between the categories of persons and things, and also underscore the concrete

¹⁹⁰ *Chevron v. Bangladesh*, Award, ICSID Case No. ARB/06/10, paras. 143–49 (May 17, 2010).

¹⁹¹ *Niko v. Bangladesh, Bapex and Petrobangla*, Jurisdiction, ICSID Case No. ARB/10/11 and ARB/10/18, paras. 242–48 (Aug. 19, 2013).

¹⁹² Olleson, *supra* note 77 at 465.

¹⁹³ Compare with Koskenniemi, *supra* note 96, at 46.

modes of exclusion and domination the person/thing distinction produces.¹⁹⁴ Thus, when applied to SOEs, the process of casting state-affiliated entities as persons or things per the ARSIWA's logical rules appears less convincing than what the basic framework of investment law seems to suggest.

Moreover, Petrobangla's personal anxieties resonate with broader contemporary theorization of legal personality. Writing in the context of machine rights, Calverley, for instance, notes how exercise of "positive law, expressed in making, defining, and formalizing" different institutions and categories operates primarily "through the manipulation of the definition of the legal concept of person."¹⁹⁵ In the case of SOEs, the plasticity of customary international law rules of attribution along the person/thing distinction certainly evoke similar pattern.¹⁹⁶

Against this backdrop, the fluidity of the ARSIWA's scope and content in SOE-related disputes resonates with long-standing criticism of the ITA system.¹⁹⁷ In this regard, van Harten, for instance, does not consider the fact that the process where arbitrators define the reach of the state "in the foggy borderland between the worlds of public and private" particularly surprising.¹⁹⁸ Just as domestic and supra-national courts have rendered countless rulings defining exact limits of state for the purposes of liability, ITA tribunals, on occasion, need to delineate between government and corporation to decide a case.¹⁹⁹ Instead, in van Harten's view, "[w]hat is exceptional is that private contractors rather than tenured judges are left to manage the legal construction of the public sphere"²⁰⁰ and thus

¹⁹⁴ ESPOSITO, *supra* note 12 at 9–10. Soirila poignantly refers to this phenomenon as "the person/thing machine." Soirila, *supra* note 22 at 2.

¹⁹⁵ David J. Calverley, *Legal Rights for Machines: Some Fundamental Concepts*, in MACHINE ETHICS 213, 218–19 (Michael Anderson & Susan Leigh Anderson eds., 2011).

¹⁹⁶ Selkälä & Rajavuori, *supra* note 3.

¹⁹⁷ See, e.g., VAN HARTEN, *supra* note 179, SANTIAGO MONTT, STATE LIABILITY IN INVESTMENT TREATY ARBITRATION: GLOBAL CONSTITUTIONAL AND ADMINISTRATIVE LAW IN THE BIT GENERATION (2009) and Stephan Schill, *Enhancing International Investment Law's Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach*, 52 VA. J. INT'L L. 57 (2011). For critique, see José E Alvarez, *Is Investor-State Arbitration "Public"?*, 7 J. INT'L DISP. SETTLEMENT 534 (2016).

¹⁹⁸ Gus van Harten, *The Public-Private Distinction in the International Arbitration of Individual Claims Against the State*, 56 INT'L & COMP. L. Q. 371–94 (2007).

¹⁹⁹ See, e.g., CAROL HARLOW, STATE LIABILITY: TORT LAW AND BEYOND (2004) and FRANCESCO DE CECCO, STATE AID AND THE EUROPEAN ECONOMIC CONSTITUTION (2013).

²⁰⁰ van Harten, *supra* note 198, at 393.

“[t]he ultimate authority to determine what juridical sovereignty means is itself privatized.”²⁰¹

Considering the perceived rift in arbitrators’ epistemic communities, where one side of arbitrators emphasize ITA as commercial dispute settlement and the other as essentially public adjudication,²⁰² the variance in applying attribution doctrines appears essentially as a process where arbitrators’ “emotive associations” are brought to the foreground.²⁰³ Here, it has been suggested that “arbitration involves the creation of subjectivities which come to exert a controlling effect on the imagination of its practitioners,” thus projecting a particular political vision of the proper balance between state/non-state and public/private onto ITA proceedings.²⁰⁴ As the malleability of attribution doctrines suggest, the *dispositif* of a SOE may provide a view to an even longer historical continuum structured around the person/thing distinction that continues to sustain the use and abuse of legal personhood and subjectivity in ITA.²⁰⁵

III. Top-down Approach: Postcolonial Theory and Bound Personality

In addition to such a doctrine-bound bottom-up approach that illuminates ramifications of international legal personality, the growth of ITA has spawned intensive debate on the impact of the concept of sovereignty on international legal personality.²⁰⁶ Dynamics between these concepts are closely intertwined, and their link to state responsibility is clearly acknowledged. In this regard, Koskenniemi, for instance, contends that “‘State responsibility’ is a necessary aspect of international law’s being ‘law’, perhaps an indispensable element of the legal personality of States.”²⁰⁷ Similarly, Pellet describes the dynamics of sovereignty, responsibility, and personality in the following way:

²⁰¹ *Id.* at 393.

²⁰² Roberts, *supra* note 65, at 58–63.

²⁰³ Julie A. Maupin, *Public and Private in International Investment Law: An Integrated Systems Approach*, 54 VA. J. INT’L L. 367, 413–16 (2013).

²⁰⁴ Amr Shalakany, *Arbitration and the Third World: A Plea for Reassessing Bias Under the Specter of Neoliberalism*, 41 HARV. INT’L L. J. 419, 455 (2000). The public/private distinction, in particular, lies at the heart of many critiques mounted against ITA. For recent scholarship, see especially Maupin, *supra* note 202, at 387–400 and René Urueña, *Subsidiarity and the Public-Private Distinction in Investment Treaty Arbitration*, 79 L. CONTEMP. PROBS. 99, 104–07, 119–21 (2016).

²⁰⁵ Selkälä & Rajavuori, *supra* note 3. Esposito, *supra* note 20, at 21. See also ESPOSITO, *supra* note 12, at 27.

²⁰⁶ See, e.g., DOLZER & SCHREUER, *supra* note 5, at 8–11.

²⁰⁷ Koskenniemi, *supra* note 96, at 46.

[r]esponsibility interacts with the notion of sovereignty, and affects its definition, while, reciprocally, the omnipresence of sovereignty in international relations inevitably influences the conception of international responsibility [Further,] the very notion of responsibility has been drastically modified . . . it is no longer reserved only for States, and has become an attribution of the international legal personality of other subjects of international law.²⁰⁸

While there are multiple ways to conceptualize macro-level interrelatedness of these concepts, the following opts for the lens of the Third World approaches to international law (TWAIL). The use of such a macro lens flows naturally from the development of new modes of legal personhood under the 21st century globalization as very different political economies have converged. Much of this process owes to the success of international economic law regimes, investment law included, that have expanded certain forms of state and corporate personhood to cover the entire globe.²⁰⁹ As such, the TWAIL framing of SOEs along the person/thing distinction serves a litmus test indicating the ways international legal personality of (mostly developing) states is construed, and thus complements the above discussion on concentration of SOE proceedings against developing states whose state-company-relationship differs from the standards of (Western) liberal law.²¹⁰

Part of a larger trajectory of postcolonial theory,²¹¹ TWAIL is a research tradition that investigates creation, maintenance, and renewal of imbalances between developed and Third World societies through international law.²¹² Within international economic law, for instance, TWAIL approach is used to expose entrenched and uneven structures in legal regimes that manage tensions of international commerce for the benefit of the Global North.²¹³ In the specific context of investment law, Sornarajah has argued that “the

²⁰⁸ Alain Pellet, *The Definition of Responsibility in International Law*, in *THE LAW OF INTERNATIONAL RESPONSIBILITY* 3, 6 (James Crawford, Alain Pellet, & Simon Olleson eds., 2010).

²⁰⁹ Selkälä & Rajavuori, *supra* note 3. *See also* BARKAN, *supra* note 39.

²¹⁰ Compare with Aldo Musacchio, Sergio Lazzarini & Ruth Aguilera, *New Varieties of State Capitalism: Strategic and Governance Implications*, 29 *ACAD. MGMT. PERSP.* 115 (2015).

²¹¹ *See, e.g.*, ACHILLE MBEMBE, *ON THE POSTCOLONY* (2001).

²¹² For an introduction, see, e.g., Makau Mutua, *What is TWAIL?*, 94 *ASIL PROC.* 31 (2000).

²¹³ James Thuo Gathii, *Third World Approaches to International Economic Governance*, in *INTERNATIONAL LAW AND THE THIRD WORLD* 255, 263-64 (Richard Falk, Balakrishnan Rajagopal, & Jacqueline Stevens eds., 2008).

arbitration system . . . involve itself in ideological predisposition towards favourable stances to particular interest groups,” predominantly multinational enterprises from traditional capital-exporting states.²¹⁴

Importantly, the ramifications of the perceived bias are reflected in the doctrines of international law relevant to ITA, such as expansive interpretation of “jurisdiction” or “investment.”²¹⁵ Even though attribution doctrines have not been systematically investigated under TWAIL approach, discussion in the previous section suggests that exclusionary or inclusionary definition of the host state in SOE context may come across as such a platform. The characterization of Petrobangla as a functional part of the state under each major rule of attribution in *Chevron Bangladesh Blocks Thirteen and Fourteen v. Bangladesh*, for instance, could well point to such direction.²¹⁶

While the ultimate merits of such claims are not important for the purposes of this Article,²¹⁷ the TWAIL approach provides a useful lens to investigate the creation of international legal persons in general and quasi-sovereign persons in particular. Quite naturally, the concept of quasi-sovereignty suggests that not all sovereign legal persons are alike; instead, there are important distinctions between quintessential Western sovereigns and those hailing from the developing world.²¹⁸ Just as slaves were construed as “no longer humans like *all others*”²¹⁹ and bestowed “rather a distinct humanity—one whose very humanity was (and

²¹⁴ M. SORNARAJAH, RESISTANCE AND CHANGE IN THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 26–27 (2015).

²¹⁵ M. Sornarajah, *The Neo-Liberal Agenda in Investment Arbitration: Its Rise, Retreat and Impact on State Sovereignty*, in REDEFINING SOVEREIGNTY IN INTERNATIONAL ECONOMIC LAW 199, 210–22 (Wenhua Shan, Penelope Simons, & Dalvinder Singh eds., 2008).

²¹⁶ Naturally, resource-rich developing states are often plagued by corruption and governmental rent-seeking that appropriates oil and gas revenues to small elite groups. See, e.g., Guillermo Garcia Sanchez, *The Hydrocarbon Industry’s Challenge to International Investment Law: A Critical Approach*, 57 HARV. INT’L L. J. 475 (2016).

²¹⁷ Recent studies in the history of investment law seem to affirm many propositions made by TWAIL scholars over the years. See, especially, KATE MILES, THE ORIGINS OF INTERNATIONAL INVESTMENT LAW (2013).

²¹⁸ See ROBERT JACKSON, SOVEREIGNTY, INTERNATIONAL RELATIONS AND THE THIRD WORLD (1990). For a powerful critique, see SIBA N’ZATIOULA GROVOGUI, SOVEREIGNS, QUASI SOVEREIGNS, AND AFRICANS: RACE AND SELF-DETERMINATION IN INTERNATIONAL LAW (1996). For general discussion, see Selkälä & Rajavuori, *supra* note 3.

²¹⁹ ACHILLE MBEMBE, CRITIQUE OF BLACK REASON (2017). Chapter One, Section “Fantasy and the Closing of the Spirit.” [NOTE: The Author have access only to ebook which does not contain original page numbering, references pinpointed at chapter/section titles]

still is) in question”²²⁰ from ancient Rome to the 18th Century U.S., Third World sovereignty, too, is often seen distinct, fragile, suspect, and ridden with shades of grey.²²¹

Best illustrated by Anghie, the broader idea behind quasi-sovereignty emphasizes how the legal conceptualization of sovereignty was shaped in “colonial encounter” that tied “native ‘sovereignty’ or ‘personality’.”²²² This development primarily took place through a process “where that personality enable[d] the native to transfer title, to grant rights—whether trading, to territory, or to sovereignty itself.”²²³ Anghie’s argument suggests that while Third World societies were construed as legal persons able to contract with traditional European sovereigns on an equal plane, such a bestowal of sovereignty only produced rights of “dispossession . . . ability to alienate its lands and rights.”²²⁴ The “native,” argues Anghie, was “granted personality in order to be bound.”²²⁵ Viewed against general postcolonial theory, these legal operations have striking similarities with the concept of colonial gaze,²²⁶ a cultural process where non-European peoples were essentially turned into observed objects whose representations determined and fixed their status as colonized subjects.²²⁷ Thus, according to Mbembe,

[p]ower in the colony . . . consists fundamentally in the power to see or not to see, to remain indifferent, to render invisible what one wishes not to see . . . in the colony those who decide what is visible and what must remain invisible are sovereign.²²⁸

Applied to Anghie’s account of quasi-sovereignty, assigning Third World societies with legal personality emerges as an effort to render them visible in international law only for a moment and only for the purposes of appropriation and subjugation. Like slaves, quasi-

²²⁰ *Id.* at Chapter One, Section “Fantasy and the Closing of the Spirit.”

²²¹ Compare with the concept of semi-sovereignty developed in Matthew Craven, *Statehood, Self-determination, and Recognition*, in *INTERNATIONAL LAW 203* (Malcom D. Evans ed., 3rd ed. 2010).

²²² ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* 6, 105 (2004).

²²³ *Id.* at 6, 105.

²²⁴ *Id.* at 105.

²²⁵ *Id.* at 105.

²²⁶ See, e.g., EDWARD W. SAID, *ORIENTALISM* (5th ed. 2003).

²²⁷ Gaze, Colonial, in *INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES* (2008), <http://www.encyclopedia.com/social-sciences/applied-and-social-sciences-magazines/gaze-colonial>.

²²⁸ MBEMBE, *supra* note 219 at Chapter Four, Section “The Enigmatic Mirror”.

sovereign Third World states represent a caricature of “the *principle of exteriority* (as opposed to the principle of inclusion).”²²⁹ Parallels with Esposito’s framing are obvious. A product of the person/thing distinction, quasi-sovereignty appears as a mechanism where Third World society is briefly pushed to the edge of personhood with the sole intent of discipline.²³⁰

Crucially, these techniques also surface in international arbitration. Analyzing oil disputes arising from decolonization-era nationalizations in the 1960s and 1970s, Anghie uncovers a broadly similar dynamic where “Third World sovereignty [was] . . . rendered uniquely vulnerable and dependent by international law.”²³¹ In these arbitrations, oil concession contracts between Third World states and Western multinational companies were identified as quasi-treaties that granted companies extensive protections against expropriation. The key takeaway from such quasi-treaties was how a “Third World state, by contracting with the corporation, was providing it with a quasi-sovereign status—which gave it significant powers, not least of which was an elevation of its status to the international plane.”²³² As such, early oil arbitrations displayed a curious double movement where “on one hand, the Third World state elevated the corporation to the international level, and the concession was a quasi-treaty. On the other, the state, by entering into these concessions, is taken to have acted almost as a strictly private party, dealing with equals.”²³³

Thus, the Third World state was understood to turn a private company, at that time clearly an object (thing) of international law, into a quasi-subject (person) of that system through an internationalized contract.²³⁴ Participation in arbitral proceedings against a sovereign state was possible only because international legal personality of the company was construed in a particular way. Analyzing the same case law as Anghie, Shalakany, too, notes how the *Texaco* awards,²³⁵ in particular, exposed the dynamics of Third World sovereign personality. In Shalakany’s view, public/private distinction was the key in understanding the process:

²²⁹ *Id.* at Chapter Two, Section “The Black of the White and the White of the Black.” Emphasis in original.

²³⁰ ESPOSITO, *supra* note 12, at 9–10.

²³¹ ANGHIE, *supra* note 222, at 6.

²³² *Id.* at 233.

²³³ *Id.* at 234–35.

²³⁴ *Id.* at 233.

²³⁵ Awards on the Merits in Dispute between Texaco Overseas Petrol. Co./California Asiatic Oil Co. and the Gov’t of the Libyan Arab Republic (Compensation for Nationalized Property), 17 I. L. M. 1 (1978).

What ensued was a dual legal identity for the Libyan state: On the one hand, Libya had to act in its public law capacity as a participant in a highly politicized U.N. debate over the NIEO . . . and, on the other hand, it had to act in its private law capacity as a participant in high-stakes oil concession arbitration proceedings (a process widely understood as a means to resolve disputes between private actors).²³⁶

With the advent of BITs and ICSID facilities, many elements displayed in the early oil arbitrations already belong to legal history.²³⁷ BITs' dispute resolution provisions and the ICSID convention allow foreign investors to commence arbitral proceedings without the doctrinal heavy lifting often required in the past. Regardless, both Anghie's and Shalakany's accounts of allotting international legal personality to Third World societies for the purpose of alienating their property rights bears close resemblance to modern ITA practice in the SOE context. Attribution doctrines are an obvious parallel. As discussed above, attribution as a legal technique is crucial for rendering a SOE's breach of a BIT's substantive protections visible in the eyes of investment law. Due to development of investment law, contemporary foreign investors need not to impress tribunals with their quasi-sovereign personality under internationalized contracts. Instead, they need to convince arbitrators to hold SOEs as sovereign entities, as products of the "person/thing machine," if only for a moment.²³⁸ SOEs, to use Anghie's terminology, are thus granted international legal personality to be bound—and in order to bind their owner-states.²³⁹

Similarities between TWAIL conceptualization of foreign investors as elevated subjects and Third World states as downgraded quasi-sovereigns go beyond attribution doctrines. While foreign investors are increasingly considered elevated "to a partial subject in international law,"²⁴⁰ on the host state side, the *Tulip v. Turkey* tribunal, for instance, evoked language and argumentation strikingly close to TWAIL when it analyzed if Emlak amounted to a

²³⁶ Shalakany, *supra* note 203 at 456.

²³⁷ Compare, however, with umbrella clauses that have been noted "to 'lower' [some investment] relationships to the private law level (by emphasizing the private-law nature of the relevant undertakings), and to 'elevate' their protection to the international level." Mosche Hirsch, *Human Rights & Investment Tribunals Jurisprudence Along The Private/Public Divide*, in *NEW DIRECTIONS IN INTERNATIONAL ECONOMIC LAW* 5, 11–12 (Todd Weiler & Freya Baetens eds., 2011). For more thorough discussion, see works cited in *supra* note 52.

²³⁸ Compare with Soirila, *supra* note 22, at 2.

²³⁹ ESPOSITO, *supra* note 12, at 9–10.

²⁴⁰ Braun, *supra* note 6, at 116.

“‘quasi-state’ organ”²⁴¹—a category unknown to the ARSIWA. Likewise, Petrobangla was conferred “limited international capacity”²⁴² in *Niko Resources v. Bangladesh, Bapex and Petrobangla*. In both cases, SOEs essentially formed a liminal category that allowed the tribunals to liken them with both the host state (person) and the foreign investor (thing). Crucially, when making claims on SOEs’ identity and casting them as persons (as in *Chevron* and *Niko*) or things (as in *Tulip* and *Saipem*), ITA tribunals also make sweeping assessments of international legal personality and its ramifications.

The disagreement in the *Tulip v. Turkey* award is illustrative. In the majority’s view, Emlak was not an extension of the “‘invisible’ hand of the State,”²⁴³ while the minority considered it being “guided—if not fully directed—by the sovereign’s hand.”²⁴⁴ Similarly, many other SOE cases boil down to simple binary positions where ITA tribunals differentiate between sovereign and shareholder actions.²⁴⁵ Judged against TWAIL, these characterizations may tell more about ITA tribunals’ perception of appropriate forms and functions of sovereign legal persons and less about SOEs themselves. In many ways, then, contemporary SOE-related ITA cases resemble the dynamics of the *Texaco* case, where:

Libya did not lose . . . merely because it “breached the law;” it lost . . . despite the doctrinal anomalies, in part because its actions were seen as political and, as such, uncongenial to the disciplinary sensibility of the deciding arbitrators. Once Libya’s actions were associated with politics and the coercive exercise of sovereign powers in an unequal relationship, Libya was simply denied access to a whole set of legal interpretations that could have been more favorable to its position.²⁴⁶

²⁴¹ *Tulip v. Turkey Award*, ICSID Case No. ARB/11/28, para. 288 (Mar. 10, 2014).

²⁴² *Niko v. Bangladesh, Bapex and Petrobangla, Jurisdiction*, ICSID Case No. ARB/10/11 and ARB/10/18, para. 329 (Aug. 19, 2013).

²⁴³ *Tulip v. Turkey Award*, ICSID Case No. ARB/11/28, para. 321 (Mar. 10, 2014).

²⁴⁴ *Tulip v. Turkey Separate Opinion*, ICSID Case No. ARB/11/28, para. 8 (Mar. 10, 2014).

²⁴⁵ Compare with Carsten Gerner-Beuerle, *Shareholder between the Market and the State. The VW Law and Other Interventions in the Market Economy*, 49 COMMON MKT. L. REV. 97 (2012).

²⁴⁶ Shalakany, *supra* note 204, at 455–56.

In sum, micro-level analysis discussed in the previous section suggested that the application of attribution doctrines by the ITA tribunals stem from the need to give shape to a host state as an international legal person. As evidenced by SOE-related ITA proceedings, when deciding a concrete case, questions of state responsibility and liability are often contingent on the exclusionary or inclusionary definition of the state. In many critical narratives, creation and maintenance of such international legal persons is understood to take place in a fundamentally skewed framework which, allegedly, grants significant rights to foreign investors (things) vis-à-vis host states (persons) and, simultaneously, limits the governments' ability to regulate their domestic societies in ways that might impair foreign investment.²⁴⁷ Similarly, the macro-level analysis of TWAIL suggests that the concepts of sovereignty and international legal personality are inexplicably connected, and that this link continues to render Third World sovereignty as vulnerable and dependent also in ITA.²⁴⁸ Contrary to postcolonial theorization on quasi-sovereignty, however, modern ITA does not cast SOEs in roles characterized by property, legal incapacity, and non-personality.²⁴⁹ Instead, SOEs display inversed vulnerability where TWAIL-related processes of appropriation and subjugation are buttressed by granting them international legal personality. In both cases, the *dispositif* of a SOE exposes the porosity of international legal personality and its consequences in the real-world, particularly for developing states and those pursuing different models of political economy.

E. Conclusion

SOEs straddle key conceptual dichotomies—such as government/market and public/private—that continue to shape investment law as a species of (neo)liberal law. This Article has investigated treatment of SOEs in ITA as an upshot of yet another dichotomy: The person/thing distinction. Using Roberto Esposito's terminology, I have suggested that through the *dispositif* of a SOE we gain a new perspective to assess and understand politics, porosity, and ramifications of international legal personality and open the highly-specialized area of investment law to broader trajectories of political and social theory. Due to the centrality of investment law in contemporary global economic architecture, these changes impinge on fundamental concepts of legal personhood that give shape to international relations and international law more broadly.

Applied to ITA, Esposito's political philosophy connects the core concepts of investment law, the host state and foreign investor, to categories of persons and things that form the

²⁴⁷ Cutler, *supra* note 7, at 110.

²⁴⁸ ANGHIE, *supra* note 221, at 6.

²⁴⁹ MBEMBE, *supra* note 218, at Chapter One, Section "Fantasy and the Closing of the Spirit."

“bedrock for all legal systems.”²⁵⁰ When a dispute involving a host state SOE is considered to pass the *prima facie* test at the jurisdictional stage or when a SOE’s conduct is understood to encroach upon state responsibility, ITA becomes a site for casting SOEs as persons and things. Due to the built-in dynamics of investment law, however, asymmetries between persons (sovereign states, including their SOEs) and things (foreign investors) are effectively inverted.²⁵¹ In ITA, the logic of the person/thing distinction, whether gazed along its long historical development²⁵² or through Esposito’s contemporary political theory,²⁵³ is destabilized. Thus, foreign investors actively cling to their thinghood and attempt to push SOEs—often their contractual counterparts, other things—to the edge of personhood for the purposes of triggering state liability, if only for a fleeting moment. The *dispositif* of a SOE, structured by BITs and customary international law, arises amidst these forces.

The *dispositif* of a SOE provides a view into making or breaking persons and things in ITA and it has relevance beyond the confines of investment law. As micro-level analysis pertaining to instabilities of attribution doctrines and macro-level exploration of quasi-sovereign personality indicate, SOEs form a liminal category that oscillates between the state and the non-state, statehood and corporatehood, personhood and thinghood. Viewed against broader contemporary theorization of legal personhood, the case of SOEs highlights the malleability of positive law and the leeway it grants to adjudicators—a condition that sets the dispersed investment law regime apart from legal systems giving rise to the original *dispositif*, the Gaius’ *Institutes*. Another key difference deals with the relative positions of persons and things. Contrary to Esposito’s example of legal characterization of Roman slaves, Mbembe’s vision of slavery in postcolonial theory or Anghie’s notions of quasi-sovereignty in TWAIL, SOEs operate in a system that essentially prizes thinghood.

Regardless, the ITA process comes primarily across as what Esposito terms a “mechanism of social discipline” where the thresholds between different categories are constantly defined, negotiated and shifted.²⁵⁴ While disciplinary dimensions of a SOE being cast as a person instead of a thing are, on the surface, mostly financial, the ramifications of granting SOEs personhood impinge fundamental prerogatives of a sovereign state, as evidenced by the

²⁵⁰ ESPOSITO, *supra* note 12, at 16.

²⁵¹ Compare, however, with the idea of multinational companies gaining a distinct “corporate sovereignty” with the globalization of liberal legal regimes. See, especially, BARKAN, *supra* note f39 and Turkuler Isiksel, *The Rights of Man and the Rights of the Man-Made: Corporations and Human Rights*, 38 HUM. RTS. Q. 294 (2016).

²⁵² Selkälä & Rajavuori, *supra* note 3.

²⁵³ ESPOSITO, *supra* note 12.

²⁵⁴ *Id.* at 9.

“right to regulate” movement.²⁵⁵ Due to the systemic importance of many SOEs, whether operating in utilities, energy development, or finance, their characterization sends ripple effects across domestic political economies. In this sense, the *dispositif* of a SOE approaches Esposito’s understanding of the *dispositif* of a person, and abstract doctrines of international law can be seen to generate biopolitical effects at the scale of whole societies.

Even though the Article has documented instability of attribution doctrines, framed SOE-related disputes in TWAİL terms and highlighted ramifications of international legal personality for domestic political economies, it has refrained from taking a clear normative position on the way SOEs ought to be appraised in investment law. To be sure, treatment of SOEs in ITA can be read as an expansion of neoliberal legality that displaces non-Western forms of political economy.²⁵⁶ At the same time, however, the large number of ITA cases lodged against developing economy SOEs corroborates the dominant interpretation of state ownership as inefficient, corrupt, and prone to elite rent-seeking.²⁵⁷ Instead, this Article’s primary intervention has focused on the doctrinal processes through which the SOE personhood and, by extension, personhood of host states and foreign investors, are made.²⁵⁸ Crucially, ambivalence on the pros and cons of investment law and ITA fits in with broader outlines of Esposito’s philosophy and suggests possible application for his political theory when navigating contemporary traditions, myths, and utopias of personhood.²⁵⁹

The bulk of the doctrinal exposition in this Article has documented the use and abuse of SOE personhood or thinghood as a litigation strategy in concrete ITA disputes. The arguments pursued by both parties in *Tulip*, *Saipem*, *Chevron*, and *Niko* utilize the flexibility that flows from SOEs straddling the person/thing distinction. In doing so, these arguments essentially reproduce the classic Roman *dispositif* where persons are separated from things for the purposes of exclusion and domination. Under this reading, then, the condition of a SOE approaches that of a slave, and the significance of Esposito’s framework is to underscore politics, porosity, and ramifications of the dualist conception of personhood.²⁶⁰ But the treatment of SOEs enables also another reading couched in Esposito’s language, one that is increasingly supported by the changes in the world economy. Prompted by changing forms

²⁵⁵ See, e.g., TITI, *supra* note 68.

²⁵⁶ Compare with Nicolas M. Perrone, *The International Investment Regime After the Global Crisis of Neoliberalism: Rupture or Continuity?*, 23 INDEP. J. GLOBAL LEGAL STUD. 603 (2016).

²⁵⁷ See, e.g., Nadeja Victor & Inna Sayfer, *Gazprom: the Struggle for Power*, in OIL AND GOVERNANCE: STATE-OWNED ENTERPRISES AND THE WORLD ENERGY SUPPLY 655 (David Victor, David Hults, & Mark Thurber eds., 2012).

²⁵⁸ Selkälä & Rajavuori, *supra* note 3.

²⁵⁹ *Id.*

²⁶⁰ *Id.*

and the increasing significance of state capitalism,²⁶¹ various research traditions including management, business studies, and critical geography have started to problematize the hybrid character of SOEs in recent years.²⁶² Within investment law framework, ITA tribunals are only starting to confront a greater number of proceedings where SOEs act as claimants seeking protection under investment treaties and play the person/thing distinction to their own, and not necessarily their owner-states', advantage.²⁶³ Esposito's search of the third person can be seen to reflect this reality where SOEs emerge as unique corporate bodies penetrating into the core of investment law system and, perhaps, reconfiguring SOEs' international legal personality in their own terms and not that of a slave.²⁶⁴

²⁶¹ See, especially, ALDO MUSACCHIO & SERGIO LAZZARINI, REINVENTING STATE CAPITALISM. LEVIATHAN IN BUSINESS, BRAZIL AND BEYOND (2014); UNCTAD, WORLD INVESTMENT REPORT 2014 (2014), http://unctad.org/en/PublicationsLibrary/wir2014_en.pdf; and Przemyslaw Kowalski & Kateryna Perepechay, INTERNATIONAL TRADE AND INVESTMENT BY STATE ENTERPRISES (2015), <http://dx.doi.org/10.1787/18166873%0A>.

²⁶² See, e.g., Alvaro Cuervo-Cazurra et al., *Governments as owners: State-owned multinational companies*, 45 J. INT. BUS. STUD. 919 (2014); Garry D Bruton, Mike W Peng & Kehan Xu, *State-Owned Enterprises Around the World As Hybrid Organizations*, 29 ACAD. MGMT. PERSP. 92 (2015); Adam D Dixon & Ashby H B Monk, *Rethinking the Sovereign in Sovereign Wealth Funds*, 37 TRANSNAT'L. INST. BRITISH GEOR. 104 (2012); and Curtis Milhaupt & Mariana Pargendler, *Governance Challenges of Listed State-Owned Enterprises around the World: National Experiences and a Framework for Reform*, CORNELL INT'L L. J. (forthcoming).

²⁶³ See, e.g., Mark Feldman, *State-Owned Enterprises as Claimants in International Investment Arbitration*, 31 ICSID Rev. 24 (2016).

²⁶⁴ Selkälä & Rajavuori, *supra* note 3.

Special Issue
Traditions, Myths, and Utopias of Personhood

There Is No Europe—On Subjectivity and Community in the EU

By *Susanna Lindroos-Hovinheimo**

Abstract

This Paper investigates legal subjectivity in the European Union. It takes seriously the principle according to which the individual is at the heart of the Union's activities and asks what kind of legal and political subjectivity the EU can render possible. The analysis draws on the work of Jean-Luc Nancy and his conception of singular plurality. What comes to the fore is the interrelatedness of subjects and community. This implies that the subject should not be understood simply as an individual, nor as part of a communitarian whole. Neither view is ontologically plausible nor ethically sound. By conceptualizing subjectivity as both singular and plural, it may become possible to rethink the relationship between subjectivity and community in the Union. This is important because potential solutions to fundamental problems of legitimacy, solidarity, and the lack thereof, hinge on how the relationship is understood.

* LLD, Senior Lecturer in Jurisprudence, University of Helsinki. The article has been written in the research project "Reconfiguring Privacy – A Study of the Political Foundations of Privacy Regulation" at the University of Helsinki.

A. Introduction

The European harmonization project began with an emphasis on trade and free movement, but has gradually become attentive to the human beings who are its subjects, both as actors and as those acted upon. The emphasis placed on fundamental rights in legislation and case law alike attest to this development, as does the creation of European citizenship.

A substantial amount of critical legal research on the Union focuses on its lack of legitimacy, solidarity, and democracy. As several scholars point out, these issues are entangled with the problematic status of the legal and/or political subject in the EU.¹ The relationship between the European community, if there is one, and the members of that community is put to question. This paper proposes a perspective on the said relationship where both community and its members are equally complex categories, neither of which can in itself become the cornerstone of a political philosophy of EU law. What a European community would entail and what kind of subjectivity can correspond to it are analyzed here together. The paper emphasizes their interdependence but also the similarities in their conceptual construction.

The purpose of the paper is twofold. It will introduce Jean-Luc Nancy's thinking into philosophical analysis of law. By doing so it attempts to offer a fruitful way of thinking about legal subjectivity conceptually intertwined with community. The discussion will be situated in the area of EU law in an attempt to form a nuanced diagnosis of certain problems that the Union faces as a legal and political entity. The Paper will thus try to redefine legal subjectivity as well as draw a picture of what the EU as a community would ideally entail.

The Union is a pluralist legal system, where states retain final sovereign authority. Ultimately, it is the national legal order that commands the highest authority.² If conflicts arise, the European Court can settle some of them, but the disparate interests of Member States themselves are seldom the kind of legal conflicts that are adjudicated. In this way, the pluralist constitutionalism of the EU necessarily opens the door to insecurity. The fundamental values of the EU are not enough to prevent conflicts between Member States.

¹ See, e.g., Ségolène Barbou des Places, *The Integrated Person in EU Law*, in CONSTRUCTING THE PERSON IN EU LAW – RIGHTS, ROLES, IDENTITIES 179 (Loïc Azoulay, Ségolène Barbou des Places & Etienne Pataut eds., 2016); Dimitry Kochenov, *Neo-mediaeval Permutations of Personhood in the European Union*, in CONSTRUCTING THE PERSON IN EU LAW—RIGHTS, ROLES, IDENTITIES 133 (Loïc Azoulay, Ségolène Barbou des Places & Etienne Pataut eds., 2016); András Sajó, *Victimhood and Vulnerability as Sources of Justice*, in EUROPE'S JUSTICE DEFICIT 337 (Dimitry Kochenov, Gráinne de Búrca & Andrew Williams eds., 2015); Pavlos Eleftheriadis, *Citizenship and Obligation*, in PHILOSOPHICAL FOUNDATIONS OF EUROPEAN UNION LAW 159 (Julie Dickson & Pavlos Eleftheriadis eds., 2012).

² See ALEXANDER SOMEK, *THE COSMOPOLITAN CONSTITUTION* 21 (2014). For an interesting discussion, see also Mattias Kumm, *The Moral Point of Constitutional Pluralism: Defining the Domain of Legitimate Institutional Civil Disobedience and Conscientious Objection*, in PHILOSOPHICAL FOUNDATIONS OF EUROPEAN UNION LAW 216 (Julie Dickson & Pavlos Eleftheriadis eds., 2012).

Democracy, the rule of law, and fundamental rights do not provide a solid foundation that would keep economic and ideological interests in check. The cohesion of the Union is fragile and includes the potential for political solutions open to the self-interest of Member States and other actors. National interests tend to undermine considerations of the European common good. These problems point to a lack of unity in the European community.

This is not to say that the EU's pluralist constitutionalism is only harmful. It corresponds to the idea that the EU includes a promise of justice different from, but as valuable as, the one that nation states can achieve. The EU's legal setting is open enough to enable the pursuit of a good life according to a number of different values.³ It not only tolerates different views of the good, but also enables life accordingly. Such a view is quite appealing.⁴ The question arises, though, whether there can be any foundation for a democratic polity when the justice that the legal system essentially provides is one of openness? It can also be asked whether a pluralist Union can temper individual interests in favor of any form of social solidarity.

On the other hand, the EU is also being criticized for not being pluralist enough. Arguments abound in the Brexit-fueled debates about the EU's bullying approach towards national sovereignties and their own democratic rule. Separatist voices are heard in several Member States championing national interests against European unification.

Therefore, the Union seems to lack both a unifying essence as well as true openness to multiple views of a good life. Hence, it seems to be tainted by both flaws: It is not able to produce communitarian values, a sense of belonging or a foundation for European identity, but it nevertheless imposes a political and legal framework that is experienced as too narrow or foreign. Members feel alienated by the whole, but the whole is simultaneously not whole enough.

These are significant problems, but it is worth noticing that they often draw on a view of community and its members as separate entities. Such a conception may lead to a portrayal of society where individuals and the common are pitted against each other, or occasionally on the same side, but nevertheless clearly distinguishable by default.

There is, though, a possibility to analyze community and its members as mutually constructive. This Paper offers one possibility for such a conceptual standpoint from which to study the Union. The discussion moves both on the level of the relationship of the

³ See FLORIS DE WITTE, *JUSTICE IN THE EU: THE EMERGENCE OF TRANSNATIONAL SOLIDARITY* 207–15 (2015). According to Sangiovanni, the most plausible view of European solidarity should not begin with, for example, European identity fellow feeling, or democracy, but with the special character of the public goods generated by participation in European institutions. See Andrea Sangiovanni, *Solidarity in the European Union: Problems and Prospects*, in *PHILOSOPHICAL FOUNDATIONS OF EUROPEAN UNION LAW* 348 (Julie Dickson & Pavlos Eleftheriadis eds., 2012).

⁴ This view, though, may come close to the tolerant utopianism of Robert Nozick, which is tainted by the classic failures of extreme libertarianism.

Members States with the Union, as well as the relationship of legal subjects with a European community. It introduces the idea that a clear distinction between singularity and community cannot be made, nor should it be attempted. Whether such an alternative understanding of a singular plural community can become influential in the current climate of populist politics is another hard question and not for this paper to answer.

According to Nancy, “community” does not refer to a common being or participation in a shared unity. Community is portrayed as the sharing of something that is not really shared—that is, sharing the lack of a common substance or identity. Under this philosophy, a common set of values or a common identity is therefore not a prerequisite of community.⁵ Accordingly, there is no specific definition of the common good that can be seen as the ideal to evaluate or criticize law. The content of the common good, in order to stay common, must include indeterminacy and openness towards the future. If this is what community means, what would it demand of the EU?

B. Nancy: Singular Plurality

What makes Nancy’s philosophy so compelling is the amount, and depth, of thought he devotes to defining community and to the question of how the relationship between singulars and community may be understood. He does not prioritize singularity or community, nor does he make any easy distinction between the two. He also cannot be understood as a spokesperson for any political program. Rather, his philosophical project, which resembles Derrida’s deconstructive endeavors, consists of attempts to think through the complex relations between community and singularity.

Yet, before delving into questions of community, it is helpful to take a look at Nancy’s overall project, which is based on a detailed and complex ontology. It lays the foundation for his political thinking and therefore merits some examination. Nancy’s theory of singular plurality develops Heidegger’s critique of the subject.⁶ Following on from Heidegger, he investigates the being of humans, but he finds a founding plurality in the kernel of *Dasein*. Being is, above anything else, being-in-common. We are *with* and this “being-with” is not accidental. Ontology has to be understood as primarily plural. Plurality is not secondary in relation to singularity because being is, in essence, plural. This leads Nancy to state that a single being would be a contradiction in terms. A being that would be its own foundation and origin cannot be.⁷

⁵ See Philip Armstrong, Jason E. Smith, & Jean-Luc Nancy, *Politics and Beyond: An Interview with Jean-Luc Nancy*, 43 *DIACRITICS* 90, 94 (2015).

⁶ See Andrew Norris, *Jean-Luc Nancy and the Myth of the Common*, 7 *CONSTELLATIONS* 272, 274–75 (2000).

⁷ See JEAN-LUC NANCY, *BEING SINGULAR PLURAL* 12 (2000).

Being is singularly plural and plurally singular, but not in the sense that these would be attributes of being. For Nancy, the essence of being is singular-plural. This is the constitution of being that is reflected in every single, substantial essence of being. For existing beings, including people, animals, and things, this means that whatever exists coexists. The implication of existing is the sharing of the world. Understandably, Nancy argues that there can never be any real philosophical solipsism, just as there can never be a theory “of the subject” understood as a closed off singular being.⁸

Because he conceptualizes being as “being-with, Nancy recognizes the foundational importance of the term “with.” If being is being-with, then the with comes to constitute “being.” With is not simply an addition to some prior being, or a predicament of being, or a definition of certain beings. With is at the heart of being. This implies a reversal of the order of philosophical exposition compared to quite a few philosophers. For Nancy, the with does not come second to being, as it does for instance in Heidegger’s analysis of *Dasein* and *Mitsein*.⁹

Because there is always an element of plurality in being, according to Nancy, he needs to explain how anything could be singular at all. He does this by explaining that the very idea of a singular being implies singularization from others. A singular being is one that can be distinguished from other singularities. The singular, or a “one,” for Nancy means primarily “each one,” that is, a being amongst others.¹⁰ This leads to the conclusion that there can be nothing singular without there being other singulars. Moreover, if there can never be one singularity without there being others, then being is always both singular and plural. This is the very nature of being, and the foundation on which Nancy’s thinking rests. Being cannot be anything but singular *and* plural.

The singular can be understood as an ego, but not really as a subject like, say, the relation of a self to itself.¹¹ Rather similar to Derrida’s *différance*, singularity is neither me nor you, but that which is distinguished when the two are seen as distinct. It is the cut that differentiates between beings. Hence the importance of the term being-with, which refers to singulars singularly together. But it is important to note here that singulars do not form a sum nor are they incorporated into a common being.¹² Singulars, like individual human

⁸ See *id.* at 28–29.

⁹ *Id.* at 30–31. See also Frédéric Neyrat, *NO/US: The Nietzschean Democracy of Jean-Luc Nancy*, 43 *DIACRITICS* 66, 73 (2015).

¹⁰ See NANCY, *supra* note 7, at 33.

¹¹ See JEAN-LUC NANCY, *THE INOPERATIVE COMMUNITY* 26–27 (1991).

¹² See NANCY, *supra* note 7, at 32–33.

beings, can never be defined completely without reference to others, nor do they form a totality that erases their singularity.

What emerges from this ontology is a difficulty concerning the third person. How can one say “it is” or “there is,” when a point of view outside being-together seems to be impossible? There is no perspective exterior to being-with from where one could announce what exists. Nancy suggests that the way for being to speak itself is by saying “we are.”¹³ This problematic theme of how to speak—and write—of and about being troubles Nancy throughout *Being Singular Plural*. The work struggles to communicate being, that is, to communicate something to others, when the focus of the communication is the being with others itself.

According to this kind of ontology, then, the question of being and the question of the meaning of being, become questions of being-with. Being is never either singular or plural but always being-together-with-others. On the level of human life this means that we are always with others, and not only with other human beings—animals, things, ideas, and machines share the world with us as well.¹⁴ We are each singular, but our being in the world implies being singular together.

An illuminating way of expressing the core idea of singular plurality is the definition of “the one” that Nancy gives. The one is always more than one, not because it would somehow divide itself, but because it equals more than one. One cannot be counted without counting more than one.¹⁵ There is nothing that could be only one because that could never be counted at all. Counting one implies already others from which to count. Otherwise there could be no singularity at all, only a great mass of totality.

Nancy consistently stresses that neither singularity nor plurality can be given primary status. The social or communitarian dimension is not something added onto the singular being. One often hears such views: First there is the subject, then there is the group. In a number of theories, the rights-bearing subject comes first, followed by real social relationships.¹⁶ Conversely, Nancy’s argument is not that sociality and alterity determine the subject. Coexistence is not additional.¹⁷ It is the way things are and have to be, a necessary feature of existence.

¹³ *Id.* at 33.

¹⁴ See, e.g., Graham Harman, *On Interface: Nancy’s Weights and Masses*, in JEAN-LUC NANCY AND PLURAL THINKING: EXPOSITIONS OF WORLD, ONTOLOGY, POLITICS, AND SENSE 95 (Peter Gratton & Marie-Eve Morin eds., 2012).

¹⁵ See NANCY, *supra* note 7, at 39.

¹⁶ See Toni Selkälä & Mikko Rajavuori chapter in this volume, 18 GERMAN L.J. (2017).

¹⁷ See NANCY, *supra* note 7, at 44; NANCY, *supra* note 11, at 28.

Nancy gives examples of areas that are represented as singular practices, even though they could be and should be understood differently. Two of them are particularly illuminating: psychoanalysis and the economy. Psychoanalysis deals with relations, but paradoxically holds on to a strange individualized form. The same is true of the economy, which in its essence means co-action, relations, and exchange. The unequal appropriation of exchange, though, has made the co-ordinary nature of the economy vanish. Atomization has followed both in psychoanalysis and the economy, each of which have become global and now exert substantial influence on thinking and ways of living.¹⁸ The founding condition of “with” has become indiscernible.

Even though Nancy does not give preference to either singularity or plurality, when discussing society, he does make an interesting observation. He argues that being can only be understood by starting from being-with-one-another. The question of social being must therefore *constitute* the ontological question of being.¹⁹ Because of such commitments, Nancy’s ontology is not completely void of normative content.

Nancy is a materialist. His philosophy revolves around bodies, not mere abstract ideas, language, or signs. Ever since the publication of *Corpus* in 1992, his thinking has grown distant from deconstruction with its focus on writing. For Nancy, the world is a world of bodies and bodies are matter (even though they are not merely matter).²⁰ Singular bodies are possible because matter interacts, they are “with.” Bodies are in relation with one another but impenetrable to one another. For such a relationship, Nancy has developed the term “touching.”²¹ Bodies touching each other form singular plural existence, which can be properly described only from a point of view of the “we,” not an outsider’s “there is.”

C. Community, Not Common Essence

There is a strong tendency of law to treat humans as autonomous self-same subjects. Accordingly, the protection of individuals’ dignity, freedom, and subjective personhood are considered important aims in the EU. Judgments from the European courts refer repeatedly to individual autonomy and the need to respect personal identity. Indeed, it can be argued, as Weiler does, that Europe is profoundly committed to the individual and his or her rights, relentlessly placing him or her at the center of attention. Weiler asserts that “[s]ocial mobilization in Europe is strongest when the direct interest of the individual is at stake, and

¹⁸ See NANCY, *supra* note 7, at 45; NANCY, *supra* note 11, at 75–76.

¹⁹ See NANCY, *supra* note 7, at 57.

²⁰ See, e.g., Anne O’Byrne, *Nancy’s Materialist Ontology*, in JEAN-LUC NANCY AND PLURAL THINKING: EXPOSITIONS OF WORLD, ONTOLOGY, POLITICS, AND SENSE 79 (Peter Gratton & Marie-Eve Morin eds., 2012).

²¹ See also Irving Goh, *The Risk of Existing: Jean-Luc Nancy’s Prepositional Existence, Knocks Included*, 43 DIACRITICS 8 (2015).

at its weakest when it requires tending to the needs of the other, as the recent Euro crisis, immigrant crisis, and other such instances will readily attest.”²²

Hard cases often become hard because they bring to the fore uncomfortable tensions between individual rights and some common or public goods. Situations like these have long troubled jurisprudence. But the common good makes its appearances in EU law usually in the form of rights. Also here, there are impossible balancing acts between the public and the private, but both tend to be rights. One such instance is displayed in the *Google Spain* case, where the core values at stake were the general right to information against the right of an individual to have their data deleted.²³

Being centered on rights, it is understandable that the law itself does not take a stand on which conception of the common good would be ideal in the EU. What the pluralism of the legal system brings with it is exactly a myriad of ideals, values, and ways of life—those of individuals, peoples, companies, interest groups, and states. This opens the scene for politics, where struggles for definitions of the common good are played out.

In *The Inoperative Community*, Nancy ponders the connections between the community and politics. Politics certainly have to do with community and being in common, not merely with questions of order and administration. Following this line of thought, politics are not simply a sphere of power relations, even though it is that as well. Relations of force and struggle are important to notice, but, more than anything, what is at stake in the political is community.²⁴ And community is what should be at stake in politics. Occasionally in Europe, politics morph into transnational executive government guided by the appearance of necessity. The financial crisis is a pertinent example.²⁵ Effective problem solving becomes the focus, and issues of community are moved aside.²⁶ In these instances, considerations of community tend to give way to the logics of the market.

Nancy’s thinking does not provide ready-made tools with which to combat instances when the political turns into administration in the name of effectiveness or economic necessity. But his theory does give well-grounded reasons for considering community as something valuable that should be at the center of politics. He provides an elegant attempt to articulate an ideal understanding of community that is grounded in a specific and well-theorized

²² J.H.H. Weiler, *Deciphering the Political and Legal DNA of European Integration: An Exploratory Essay*, in *PHILOSOPHICAL FOUNDATIONS OF EUROPEAN UNION LAW* 137, 158 (Julie Dickson & Pavlos Eleftheriadis eds., 2012).

²³ Case C-131/12, *Google Spain SL v. Agencia Española de Protección de Datos (AEPD)*, 2014 ECLI:EU:C:2014:317.

²⁴ See NANCY, *supra* note 11, at xxxvii.

²⁵ See SOMEK, *supra* note 2, at 22–23.

²⁶ See, e.g., Gareth Davies, *Social Legitimacy and Purposive Power: The End, The Means, and the Consent of the People*, in *EUROPE’S JUSTICE DEFICIT* 259 (Dimitry Kochenov, Gráinne de Búrca, & Andrew Williams eds., 2015).

ontology, when he says that “we are brought into the world, each and every one of us, according to a dimension of ‘in-common’ that is in no way ‘added unto’ the dimension of ‘being-self’, but that is rather co-originary and coextensive with it.”²⁷

It is important to stress that, according to Nancy, we should not be seeking the essence of community. Thinking of community through a unifying essence, like nationality, religion or language, can lead to the closure of the political. It assigns to community a common being. Nancy’s community is something different, namely, existence in common but without common substance. To be in common is not to be fused into one united substance or social body. On the contrary, being in common means not having such a substantial common identity and *sharing this lack of identity*.²⁸ Could such a view be fruitful when considering the EU? The appearance of a European polity—a political demos—understood as including some common identity is nowhere in sight. But community should not and cannot be built on common identity. Community, in order to be community, is fundamentally lacking.

The myth of Narcissus illustrates the point: To gaze purely and only at oneself without any interference by otherness is impossible. Having access to what is properly oneself requires exposure to others. This means that my face is always turned toward another and faced by him or her. Such is the starting point, and also the reason for politics. Because we are always already in contact with others who are different from us, space for the political is opened up.²⁹

Western philosophy—including philosophy of law—is in the habit of conceiving society as conceptually intertwined with humanity itself. For instance, social contract theories include the idea that to have society there must be human beings, but in order for these beings to be human, they must by definition be social. The concept of a contract presupposes human beings capable of entering into contract, even though it is the social contract that makes humans properly human.³⁰ Similar argument structures are found in natural law theories starting with Aristotle. Legal subjectivity includes a loop: in order to be a subject in the eyes of the law one already has to belong to the group of beings that can be regarded as subjects. Such circularity is apparent in a longstanding definition of legal personhood as a right-and-duty-bearing unit. To be a subject of law one has to have rights, but to have rights one has

²⁷ NANCY, *supra* note 11, at xxxvii. As we emerge as subjects, we simultaneously become exposed to others. Here, in creation of our own subjectivity, we are being defined by the community. Being in common is not something secondary to being oneself. Both features – or rather both modes of being – are original, i.e. co-originary. Nancy’s writing plays extensively with the prefix ‘co’ and he also assembles and disassembles words in order to express his unique theory.

²⁸ *See id.* at xxxvii–xxxviii.

²⁹ *See id.*

³⁰ *See* Armstrong et al., *supra* note 5, at 91.

to be a legal subject. Capacity presupposes capacity. Nancy's solution to this paradox where the common precedes the individual and the individual precedes the common is at the core of his thinking: Being-in-common has to be being that does not presuppose a common substance.³¹ The challenge for politics is to operationalize a community without substance and without identity. And the challenge for legal philosophy is to rethink subjectivity without any founding essence.

The lack of essence is what makes community. A community cannot have a fulfilled and unified identity. It can rather be understood as the "between" that that we have between us. If it becomes a single thing—a body, mind, fatherland—it necessarily ceases to be "in-common." Yet the opposite fate is also possible, and this too dangers community. An individualized society is equally in fear of losing community. It becomes the reduction of the political to management and to power, and to the management of power, as may be seen in the EU. Thus, the tricky question is how to think of community in between these two negations of being-in-common. How can the community without essence, nation or destiny be? What kind of politics does not stem from the will to unify? And, on the other hand, what kind politics allows people to exist singularly together?

It is not easy to transfer Nancy's philosophy to the level of everyday politics or the law. This problem shall be discussed in more detail below. Suffice it to say for now that for Nancy, community is one thing, politics another. Politics refer to a space that needs to be filled. There has to be closure and therefore, there has to be law. Community, on the other hand, includes openness that stays open.

D. The World is Not Given, We Must Make It

Freedom is a focal concept for Nancy, but it is understood differently than in liberalism or in any other philosophy that departs from Kant and moves towards rights as the actualization of freedom.³² Nancy values another kind of freedom, the sort that consists of sharing. A community conceived of in this way would be grounded in freedom and a sharing of relations, not in individuals relating to each other as independent individuals.³³ Because subjectivity includes being-with, logically there cannot really be any independent subjects. In Nancy's words,

³¹ *Id.* at 92; NANCY, *supra* note 11, at xxxix.

³² See Susanna Lindroos-Hovineimo, *Excavating Foundations of Legal Personhood: Fichte on Autonomy and Self-Consciousness*, 28 INT'L J. SEMIOTICS L. 687 (2015).

³³ See, e.g., B.C. Hutchens, *Archi-Ethics, Justice, and the Suspension of History in the Writing of Jean-Luc Nancy*, in JEAN-LUC NANCY AND PLURAL THINKING: EXPOSITIONS OF WORLD, ONTOLOGY, POLITICS, AND SENSE 129 (Peter Gratton & Marie-Eve Morin eds., 2012).

[f]reedom cannot be presented as the autonomy of a subjectivity in charge of itself and of its decisions, evolving freely and in perfect independence from every obstacle. What would such an independence mean, if not the impossibility in principle of entering into the slightest relation—and therefore of exercising the slightest freedom?³⁴

To define the autonomy of the subject is not what Nancy is conveying, but freedom is, nevertheless, an important concept. Singular being, being just this once, is possible because freedom grants it the space to take place. Hence, freedom precedes singularity. Freedom is that which spaces and singularizes.³⁵ It is therefore perhaps best understood as the circumstance that needs to be presupposed for there to be singular beings.

According to this terminology, a singular being is not the same as an individual. In trying to figure out this distinction and its importance, one may think of the term “individual” as pointing towards an instance of a larger whole. An individual is often used to indicate an example of something. This particular cat is an individual who shares an essence with other cats. There are cats and here we have one example, this brown lazy cat. Singularities, on the other hand, do not share an essence with anyone. They are unique instances, each one completely different.

The term individual, then, is not singular enough for what Nancy is trying to explain. It also needs to be borne in mind that singularities are not just humans nor things, but also thoughts, cities, cars, communities, and religions. Anything that exists somewhere with others is a singularity.³⁶ In order to include all of these, Nancy often uses the term singular instead of individual.

It becomes evident that the subject, a political or legal one, requires re-conceptualization. It, he, or she cannot be understood as a self-same ego. Being-in-common defines a subject who has no essence. The only subjects share is what divides them:

My birth and my death are present to me and are my own only through the births and deaths of others, for whom in turn their births and deaths are neither present nor their own. We share what divides us: the freedom of

³⁴ JEAN-LUC NANCY, *THE EXPERIENCE OF FREEDOM* 66 (1993).

³⁵ *See id.* at 78.

³⁶ *See* NANCY, *supra* note 11, at 3–4; *see also* Marie-Eve Morin, *Nancy, Violence, and the World*, 16 *PARRHESIA* 61 (2013).

an incalculable and improbable *coming* to presence of being, which only brings us into presence as the *ones* of the *others*. This is the coming to presence of *our* freedom, the common experience of the exposure in which the community is founded . . .³⁷

Subjects' exposure to the incalculability of their birth and their death is the common thing that they share. And this very fundamental thing is not something shared at all, because my birth and my death are not really my own. I am not present in either of these events.

For Nancy, freedom is not a right nor an end towards which people should strive. Freedom is more like a fact. It is the original state that precedes singularity and sharing. Freedom cannot be given nor guaranteed by the law, it is expressed in the groundlessness of existence. Such groundlessness is in Nancy's theory the opening for justice.³⁸ Such justice is not a theory or a measuring rod, but the unending questioning of justice without ground.

According to Morin, the core of Nancy's ethics forms an anti-Kantian understanding of the subject. Where Kant sees the subject constituting himself as his own, autonomous sovereign, Nancy rejects the idea of subjects as autonomous controllers of themselves. A subject is not given to itself and therefore such a self-present agent cannot be the foundation for ethics. For Nancy the self may be understood as relation, as opening, or as difference.³⁹ For the self to identify itself there needs to be another, difference, and spacing.

This is one way in which ontology can be developed into ethics: Existence is an exigency, which requires us to become what we ontologically already are. The structure of the argument is then that ontology itself includes an ethical element, unlike most Western philosophy, where it has usually been done in a descriptive manner. This would mean that already on the level of existence, a demand is present. Nevertheless, the ethical importance of being-with does not stay on this abstract level. It transcends to the more active plane of action. What is important to note, though, is that the distinction between the internal—the structure of the subject—and the external—the subject's relations to others and the world—is one that Nancy adamantly tries to dismantle.⁴⁰ There is no easy distinction between the inside and the outside because being is always already singular plural.

³⁷ NANCY, *supra* note 34, at 95.

³⁸ See Hutchens, *supra* note 33, at 139.

³⁹ See Marie-Eve Morin, "We Must Become What We Are": Jean-Luc Nancy's Ontology as Ethos and Praxis, in NANCY AND THE POLITICAL 21 (Sanja Dejanovic ed., 2015).

⁴⁰ See *id.*; see also NANCY, *supra* note 11, at 15. An interesting comparison can be made here with the Levinas, who claims that ethics is first philosophy, that is, something prior and more fundamental to ontology.

The ontological demand requires a decision for the world. It implies a requirement to inhabit the world in a way that the world can really form a world, not a totalized essence, but a plurality of singularities co-existing. No essence or principle summing up the world or its meaning can or should be sought. To inhabit the world requires to stand within the world which has no firm ground.⁴¹ This way, the world is created. There is no meaning of the world and when we share this lack of meaning, we create a world.

Such a normative challenge is by no means unambiguous. Of course, Nancy has views on politics and justice that can be interpreted in a straightforward manner. The community is not a totality with an essence, nor should politics aim at such. That would be totalitarianism. But neither is it atomic and detached. Still, Nancy does not always lend his thoughts to such simple interpretation.

In the *Truth of Democracy*, he clarifies the distinction between ontology and the political. It becomes clear in this text that an analysis of existence does not automatically spill over into politics informing a normative stance. It is important that existence is understood as undefined and open, and thus politics should not colonize ontology by stating what the sense of existence is, or by defining the meaning of (good) life. Existence is without essence and without definable sense, and staying open to such a view is the requirement that Nancy places upon politics.⁴² He thus demands of politics an openness to creation(s) of the world, that is, space for different worlds to come into being and various things to exist.

To create the world means: immediately, without delay, reopening each possible struggle for a world, that is, for what must form the contrary of a global injustice But this means to conduct this struggle precisely in the name of the fact that this *world* is coming out of nothing, that there is nothing before it and that it is without models, without principle and without given end.⁴³

To create a world means to choose a world, one world among innumerable alternatives. This most serious ethical and political challenge permeates Nancy's thinking: The world is not given, we must make it. Such is the categorical imperative in this theory: To stand in the open, in the senselessness of the world. It is not a command to occupy the place of God, but to keep that place open, and nevertheless occupy the world. There is no truth about the

⁴¹ See Morin, *supra* note 39.

⁴² See JEAN-LUC NANCY, *THE TRUTH OF DEMOCRACY* 17–18, 26–28, 34 (2010).

⁴³ JEAN-LUC NANCY, *THE CREATION OF THE WORLD OR GLOBALIZATION* 54–55 (François Raffoul and David Pettigrew ed., 2007).

world, no sense of the world, and no world, until we inhabit it by creating it. A world is always to be made and remade.⁴⁴

In *The Experience of Freedom* this interpretation gets confirmation. When discussing evil, Nancy identifies how difficult evil is for philosophies of freedom. If there is freedom, it follows that there is a chance of wickedness. Our world presents us with this reality every day. The definition of evil or wickedness is that which hates singularity. It does not hate this or that singularity, but singularity as such and the relation of singularities. It hates freedom, which is the openness allowing for singularity. Evil and freedom, though, go hand in hand because evil is a constant potential inscribed into freedom. Evil belongs to the essence or structure of freedom because freedom can enable both good and evil. It contains both possibilities.⁴⁵

If there were any politics—understood as a program or policy—in Nancy’s philosophy, it would be communism. For him communism offers possibilities for thinking that can escape the impasse of present politics. Such communism would be attentive to singular pluralities, not just capital flows, and it would challenge the atomized ontology reigning supreme in Western thought. This version of communism would not, though, be of the kind that posits one value, truth or principle by which to make political and moral choices. If an absolute value were posited as the foundation of ethics, it would fix the meaning of existence thereby closing the space for alternative worlds. Every singular being would then make sense of the world through reference to this absolute value instead of making sense of its own existence with others.⁴⁶ This kind of society would not correspond to the idea of community and is certainly not what Nancy is after.

Nancy sees a real danger in the liberalist idea that everything is valuable. Every singularity cannot be equally valuable because sense and value come through differences. The whole concept of value is dependent on comparison of different alternatives. Hence this theory cannot accommodate the thought of radical equivalence. Therefore, even though no absolute value can be posted as the truth or the ground of ethics or politics, this should not lead to the equal value of everything.⁴⁷ One thought is not a priori as valuable as another, and distinctions can surely be made between good and evil acts.

⁴⁴ See Jean-Luc Nancy, *From the Imperative to Law*, in JEAN-LUC NANCY: JUSTICE, LEGALITY AND WORLD 11, 11–18 (B.C. Hutchens ed., 2012).

⁴⁵ See NANCY, *supra* note 34, at 128–29, 135.

⁴⁶ See Morin, *supra* note 39, at 67.

⁴⁷ See *id.* at 67.

E. Can There Be a European Community?

For Nancy, the capitalist economy is *the* example of politics of equivalence. “Capitalism is the result of a decision on the part of civilization: value is in equivalence.”⁴⁸ It threatens to turn singularities into flat commensurable beings. The aim of politics is, then, to contest equivalence.⁴⁹ This is a task for the EU as well. As Daniel Augenstein argues, the Union is still ultimately an organization centered on economic logic, not politics:

Whatever is deficient about EU political justice is not a problem of political *unity*. By conferring rights on individuals as a matter of European law, the ECJ posits the peoples of Europe as citizens of the European Union. Concurrently, by calling upon this citizenry to cooperate in the functioning of the European Union, the Court derives the authority of EU law from a people of Europe. Rather, what is problematic is the EU’s *political* unity; that is, recovering the politics of European market integration from behind the veil of the statist separation between the national-as-political and the European-as-economic.⁵⁰

According to Augenstein, the economic cart has been put before the horse. The Union claims to represent the people of Europe and to act in our name, which poses the problem of ownership over the polity.⁵¹ It raises questions of how we can endorse the policies that are presented as ours, even though they are in fact driven by management of economic necessities.⁵²

A truly pluralistic Union in the sense of singular plurality would be a community where members are different from each other. They would share the difference, not necessarily

⁴⁸ NANCY, *supra* note 42, at 23.

⁴⁹ See Neyrat, *supra* note 9, at 77–79.

⁵⁰ Daniel Augenstein, *We the People: EU Justice as Politics*, in EUROPE’S JUSTICE DEFICIT 153, 159 (Dimitry Kochenov, Grainne De Burca, & Andrew Williams eds., 2015).

⁵¹ *Id.* at 159.

⁵² Alexander Somek demands social justice: “[M]onetary union appears to have resulted in the rise of a collective Bonapartism that benefits bankers and harms low earners in the Union.” Alexander Somek, *The Preoccupation with Rights and the Embrace of Inclusion: A Critique*, in EUROPE’S JUSTICE DEFICIT 295, 309 (Dimitry Kochenov, Grainne De Burca & Andrew Williams eds., 2015).

anything else, and be fundamentally in relation to one another this way.⁵³ Such community would not be defined by nationality, as most Member States still are, nor left to the mercy of economic policies, as the Union still occasionally is.

There may already be potential for such a pluralistic relationship between the community and its members in the Union. As Azoulai argues, there is something profoundly anarchical about EU law's understanding of the individual. It includes the aspiration of self-realization and combines the opportunity to opt for different territories, lifestyles and regulatory systems with the capacity to leave one's own country and to question the prevalence of the bonds of nationality.⁵⁴ Understood this way, Union law—especially through EU citizenship—may display a logic resembling singular plurality.

Unfortunately, legal practice does not always correspond with such ideals. Recent citizenship jurisprudence presents an uncomfortable example of the loss of community. Nationality discrimination is reported by scholars who have shown how strongly Member States tend to pursue their own interpretations of EU law, thus ultimately corroding both the core of EU citizenship as well as free movement rights.⁵⁵ It appears that the ECJ is unable to stop this development, as may be seen for instance in the *Dano* decision.⁵⁶

Nevertheless, the need to temper nationalist interests can easily lead to such Union community building that pursues a common European identity. The risk is then that the Union itself becomes constructed as a subject that has an identity immanent to it.⁵⁷ If Nancy's theory of singular plurality has anything to teach, it is that there is no Europe. To be a community, the Union needs to accept its lacking identity and not aim at revealing or producing some common European essence.⁵⁸

There is reason to be worried about the normative fetishization of being-in-common, especially when it develops into a myth of communion like the bond of love among the members of the community. Yet Balibar asks a pertinent question: Does not such a myth

⁵³ See Andrew Norris, *Jean-Luc Nancy on the Political after Heidegger and Schmitt*, in *JEAN-LUC NANCY AND PLURAL THINKING: EXPOSITIONS OF WORLD, ONTOLOGY, POLITICS, AND SENSE* 143 (Peter Gratton & Marie-Eve Morin eds., 2012).

⁵⁴ Loïc Azoulai, *The European Individual as Part of Collective Entities (Market, Family, Society)*, in *CONSTRUCTING THE PERSON IN EU LAW—RIGHTS, ROLES, IDENTITIES* 203 (Loïc Azoulai, Ségolène Barbou des Places, & Etienne Pataut eds., 2016).

⁵⁵ See, e.g., Charlotte O'Brien, *Civis Capitalist Sum: Class as the New Guiding Principle of EU Free Movement Rights*, 53 *COMMON MKT. L. REV.* 937 (2016).

⁵⁶ See Azoulai, *supra* note 55; see also Charlotte O'Brien, *Case Law. The ECJ Sacrifices EU Citizenship in Vain: Commission v. United Kingdom*, 54 *COMMON MKT. L. REV.* 209 (2017).

⁵⁷ See Norris, *supra* note 6, at 275.

⁵⁸ See NANCY, *supra* note 43, at 61–74.

haunt every communal construction, even when there is no totalitarian politics attached to it that would want to produce the community on the basis of the myth?⁵⁹ Is not all community threatened by the myth of “us”?

As Balibar reads him, Nancy responds to this problem by distinguishing between communication and communion. Communion may be based on the myth, but communication is not. Communication is then not seen simply as the transfer of information from one subject to another, but as the separation of subjects that makes the transfer possible.⁶⁰ Because of the separation, a simple unifying “us” becomes impossible. Communication involves exposure to others and does not reduce singularities into a common whole. Already Rousseau noticed this: Society is developed as a bond *and* as the separation of singularities. In sum, community consists of singular beings that are in common but not totalizable.⁶¹

The question of European community has no definite answer, nor a definable solution, neither on the level of theory or empirical reality. It is not for political philosophy to posit an ideal for the Union according to some values or axioms. Nevertheless, in order for it to develop, it must achieve something new, something unprecedented. According to Nancy, “Europe will either invent an unheard-of form or it will cease to exist.”⁶²

Democracy still serves a purpose. It has the potential, if not always the tendency, to rupture the reigning economic logic of equivalence and create community without falling into pitfalls of totality. Here, democracy is not only a form of government, the reign of the people by the people. This would be too narrow a way to conceptualize democracy especially in the EU, where there is no people. The potential of democracy lies rather in the way it opens up the political space, that is, a space for questioning, probing, shaping, and redefining community. Instead of producing a common form or a shared identity, democratic politics can open a space for being-with.⁶³

⁵⁹ See ÉTIENNE BALIBAR, *WE, THE PEOPLE OF EUROPE? REFLECTIONS ON TRANSNATIONAL CITIZENSHIP* 69 (James Swenson trans., 2003).

⁶⁰ For more on this understanding of communication, see also Norris, *supra* note 53, at 147.

⁶³ See BALIBAR, *supra* note 59, at 70–71.

⁶² Armstrong et al., *supra* note 5, at 95.

⁶³ See Neyrat, *supra* note 9, at 80.

F. Conclusion

It has been asked in this article what kind of legal and political subjectivity the EU renders possible. The theoretical framework has been based on an ontology of singular plurality. According to the analysis developed, being-in-common defines the subject, which means that subjects are not primarily autonomous, self-same agents. A subject can be a subject only in a community and community can only exist if its members' singular plurality is respected. Hence the question becomes: What would it mean for the EU to be a community? According to Nancy, it would require sharing a lack, not being subsumed under a common idea or defined as a unified whole.

This article has understood community as conceptually stretched between atomism and unity. The European integration process is threatened both by tendencies towards atomism and unification, as evidenced by separatist Member States, economically driven agendas and nationalist identity politics.

The EU is haunted by two risks: Equivalence and totalitarianism. The first implies a blurring of differences and values, a system such as capitalism, where every singularity becomes a tradable, comparable, calculable unity. Totalitarianism, on the other hand, implies the view that society has—and needs to have—a unifying essence, as seen in nationalist ideology. The kind of community where singularities would stay singular and singularly valuable, is one where we exist together but without common substance. To be in common in a European community would not mean fusion into a social body, nor would it mean individualistic atomism.

Community in singular plural is the task of European politics. It requires recognition of the fact that there is no Europe to be identified with. This may pose an impossible demand in general and an especially difficult one for the EU. It requires us to inhabit the world in a way that can really form a community, not a totalized essence, but a plurality of singularities co-existing. No essence or principle can or should be sought, but a world has to be formed nevertheless. Co-habitation is the key, that is, existence together with others in a way that values singularity without everything being made equally valuable. Commercial interactions of seemingly independent subjects do not form a community.

Special Issue Traditions, Myths, and Utopias of Personhood

Law as Magic. Some Thoughts on Ghosts, Non-Humans, and Shamans

By Alexis Alvarez-Nakagawa*

Abstract

Legal metamorphoses between persons/things have been recurrent in history: Persons can become things, animals can turn into persons, and even ghosts can obtain personhood in the legal domain. Law would work then as a form of magic, a powerful instrument to create realities that, although fictional, have very real effects. Drawing on anthropology and legal scholarship, I will show the links between law and magic. In this endeavor, I examine two groups of legal cases from Argentina where people and animals respectively obtained personhood through the magic of law. First, I analyze the so-called human rights trials that are judging the crimes of the last military dictatorship (1976–1983), and I argue that these are working to restore the legal personhood of those who enforcedly disappeared. Second, I examine a series of judgments that have recently ruled—for the first time in modern legal history—that orangutans, chimps, and elephants are “non-human persons.” I conclude this Paper by contrasting legal magic with shamanic practices. I argue that even if these two are linked, it is possible to find in some forms of shamanism a different way of framing the relationship between persons/things that can offer an alternative (to) law.

* PhD Candidate and Graduate Teaching Assistant, School of Law, Birkbeck, University of London (a.alvareznakagawa@bbk.ac.uk). A previous and shorter version of this Paper was read in the “Persons/Things” Workshop held at the University of Turku, Faculty of Law, Finland, on May 12–13, 2016. I deeply thank the organizers of this event, Toni Selkälä and Mikko Rajavuori, for the invitation to present my work, and to all the participants for the invaluable comments and discussions. As editors of this volume, Toni and Mikko have made very important suggestions to improve this Paper, either indicating sources to explore, things that went unnoticed to the author, or offering incredible ideas to continue exploring. I would like to think that I have reciprocated their intellectual generosity by presenting a work that is now less imperfect than what it was before.

“We have come to an age that prides itself on hard facts,
that is found of thinking that everything is debunked.
Yet we are still full of *abracadabras*.”¹

A. Introduction

What if I start with a question? Is it not that every good essay should begin with one? Did I not already start with a kind of interrogation? Let us open this inquiry, then, by asking: What do people, animals, objects, and specters have in common? This might be an intriguing question to begin with. Nevertheless, throughout these pages, I would like to argue that all these entities are “creatures of the law.” In other words, that they all share the way in which law makes and unmakes them, and that law has considered them as persons or things—or even both at once—depending on the context and the historical circumstances. This is to say that all of these entities have in common a very precarious condition in which their existence is animated by and through law, a state that, certainly, we could call magical.

It is known that in some ancient and medieval legal traditions animals and even objects have been considered as having personhood, and accordingly, were usually subjected to punishments for their “deeds”: The practice of the *deodand* in English law—in which animals or objects were punished for crimes or for actions that brought damages to human beings—is just one example of a very extended practice in human history.² We are also aware that in ancient Roman Law, and more recently in U.S. legislation as well, some people were considered things or mere chattel, and thus were subjected to different forms of slavery and forced labor. The place of women and children as part of the belongings of the Roman household and under the absolute domain of the *Pater* is also very well known; a place that has been zealously preserved, with some mitigations, in the majority of modern legal orders. Moreover, nowadays, many legal regimes consider some people less than persons—expatriates, refugees, and inmates in many countries are deprived of rights—and can make abstract entities, such as corporations, states, and NGOs, full persons in law. During the last few years, in some South American constitutions, legal personhood has been granted to nature, such as in Bolivia and Ecuador’s Constitutions, and in some cases, as I show in this Paper, even ghosts and dead people gained legal standing.

¹ John H. Clark Jr., *Abracadabras in the Law*, 229 N. AM. REV. 584 (1930).

² For more about these practices, see EDWARD PAYSON EVANS, *THE CRIMINAL PROSECUTION AND CAPITAL PUNISHMENT OF ANIMALS* (1906); see also Jacob J. Finkelstein, *The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death, and the Western Notion of Sovereignty*, 46 TEMP. L. Q. 160–290 (1973).

While these metamorphoses may seem astounding to a lay person, legal scholars are accustomed to seeing how different beings pass from one state to the other in a pendulous fluctuation that seems endless. This ominous dance would be completely irrelevant, though, if not for the fact that the assigned legal state is usually accompanied by faculties or disabilities. In other words, the legal status determines the treatment that we give to these entities, the restrictions that we impose on ourselves in respect to them or that we impose on them in respect to us, and ultimately, the degree of value that we give to their “being in the world.”

In what follows, I explain these legal metamorphoses as a form of magic, and subsequently, I analyze two recent legal cases of Argentina that show very well how this alchemy of law works, making and unmaking personhood. For this, I draw on anthropological literature and also on an incipient legal scholarship that is trying to show the existing links between law and magic. I especially focus on the work of Colin Dayan, who has made an important contribution to understanding legal metamorphoses as a form of “profane magic”, with which I try to engage critically.³ I conclude the Paper by analyzing the main differences between law’s magic and some shamanic practices that have been studied by anthropologists during the last years with increasing interest. My intention is to show that these shamanic practices, even when sharing similarities with legal metamorphoses, perform a completely different function, allowing humans and non-humans to cross the barrier that actually separates them, thus complicating the current rigid demarcation between persons and things. The ultimate aim of this Paper is to provide some initial steps and to make some considerations towards an inquiry that could show that some forms of shamanism could be means to conceive an alternative (to) law—that is to say, either an alternative law or an alternative to the law—that can allow us to think in different ways of conceptualizing the relationship between persons/things; ways so distinct and different from the current ones that challenge our general understanding of the world and our relation to it.

B. Law *as* Magic

The very curious metamorphosis that beings experiment in law has been carefully studied by legal scholars over the years. Since the Roman *jurisconsultus*, defining the distinctions between *persona* and *res*, to the work of Alexander Nékám,⁴ early in the last century, and the most recent research by Christopher Stone,⁵ among many others, there has been a legal tradition that has paid careful and patient attention to this very particular legal phenomenon. However, as it is highlighted in the introduction to this volume, it can be said

³ See COLIN DAYAN, *THE LAW IS A WHITE DOG* (2013).

⁴ ALEXANDER NÉKÁM, *THE PERSONALITY CONCEPTION OF THE LEGAL ENTITY* (1938).

⁵ CHRISTOPHER STONE, *SHOULD TREES HAVE LEGAL STANDING? AND OTHER ESSAYS ON LAW, MORALS AND THE ENVIRONMENT* (1996).

that many questions still remain without answer and important issues continue undertheorized: How do we conceptualize these metamorphoses that occur within the law? How do we understand this constant legal alchemy? How do we analyze the realities that law creates with the production of persons and things?

To understand these metamorphoses, I propose to think of law *as* a form of magic. In other words, I argue that we can think of some modern legal practices as a secularized way of performing certain material effects through symbolical acts; rituals that work in the imaginary but have unmistakable consequences in the “real” world. To be more precise, I do not mean that law is *as such* magic, but I think that law can be thought *as if* it were a magical practice. That is to say, I would like to argue that many legal acts and its consequences can be categorized under this hermeneutical framework and that this point of view, this methodological outlook, could be fruitful and revealing of some of law’s most obscure features and characteristics.⁶ To be clear: I am not saying that all legal regulations resemble magic, neither that law, in general, should be categorized simply as a magical performance, but that certain legal domains and some particular legal acts, especially in the realm of persons and things, can be understood under this gaze. In short, I am interested in rescuing and exposing the magical dimension of legal acts, or how modern law and its formulas can work effectively and very frequently as magic used to do in other times and places.

Now for some people, this could be a strange lens to frame and consider the law. Some would probably say that with this methodological maneuver we risk placing law in an outdated framework, and more if it is considered that nowadays nobody believes in magic or, even worst, that everybody believes that magic does not exist. So, what is the point then of characterizing law as magic? What is the point of analyzing a “modern” and “rational” institution through the prism of a “primitive” and “irrational” practice? Well, precisely this one: To show that law is neither modern nor rational, and that law shares many features with magic’s alleged “irrational primitivism.” In other words, my point is that the “rationalization” of the legal domain in the West—*fantastically* described by Max Weber⁷—

⁶ For more about “As if” as a perspective to analyze law, see Christopher Tomlins & John Comaroff, “Law as . . .”: *Theory and Practice in Legal History*, 1 U.C. IRVINE L. REV. 1039 (2011); see Catherine L. Fisk & Robert W. Gordon, Foreword to “Law as . . .”: *Theory and Method in Legal History*, 1 U.C. IRVINE L. REV. 519 (2011); see also Stewart Motha, *As if – Law, History, Ontology*, 5 U.C. IRVINE L. REV. 327 (2015).

⁷ See MAX WEBER, *ECONOMY AND SOCIETY. AN OUTLINE OF INTERPRETATIVE SOCIOLOGY* 641 (G. Roth & C. Wittich eds., 1978). Even when the use of the term “rationalization” is notoriously vague in Weber’s analysis, this usually designates a general movement towards a systematic, methodological, universal, self-conscious way of thinking. That is to say, a form of thought “based on human reason and not on external systems like magic.” See Assaf Likhovski, *Protestantism and the Rationalization of English Law: A Variation on a Theme by Weber*, 33 L. & SOC. REV. 365 (1999). It is interesting to highlight that terms such as “magic” and “irrationalism” have in this context more or less an interchangeable meaning. Moreover, according to Weber’s description of the rationalization process, modern law and magic should be considered as being mutually exclusive phenomena. It is this discontinuity between magic and law that I want to question in this Paper.

never entirely happened in absolute terms, that this was merely an adjustment of the *rationale*, a shift in the imaginary domain of law rather than a change to *Rationality*.

I think that despite that we live, or, to be more precise, that we believe that we live, in an era well detached of our past “primitive” customs, maybe in a technological posthumous time beyond modernity, perhaps already in the future, or just in a postmodern hereafter; we can still think of legal transmutations as if they were a magical practice, a practice which thinking is magical, and which effects are, in some way, magical too. That is to say, even whether we supposedly live in a “disenchanted world,”⁸ an era devoid of mysterious forces, stripped of all uncanny powers, where rationality and technological advances seem to have entirely colonized our imaginaries, I would like to propose that our *logos* and *techné* are still imbued and pervaded in its core with our most ancient beliefs and practices. To say it differently, and as some scholars have pointed out recently, it is necessary to problematize the relationship between “enchantment” and “disenchantment,” particularly its teleological narrative, as there are reasons to argue that they might be simply two sides of the same coin.⁹ It would be possible to think that the process of rationalization and secularization itself created a fictional enchanted religious-magical past from which the modern era is seen, retrospectively, to have departed. In this regard, western modernity would have constituted itself as the epitome of rationalization and secularization by means of casting out the shadow of “irrationality” towards the past and the distant. It could be said that our world “enchanted” other worlds to become “disenchanted” itself.¹⁰

Hand in hand with this, the process of rationalization can be understood as the enactment of a large concealment of “irrational” practices and beliefs in institutions and social practices in the West, that not for being hidden stops being active and having social and political consequences. If this is true, the value of pointing out the magic that still pervades our law is to put in evidence these processes of suppression/repression. In this regard, this endeavor is taken not for the sake of a “re-enchantment of law,” as some may think or may want, but with the aim of showing the effects of power that this concealment has had and still has. Our task should be to trespass the fictional opposition between “enchantment” and “disenchantment,” in the understanding that this is entirely part of the same dynamic that erects persons and things and other binaries that structure our legal imaginary. In some way, the project that seeks to set aside the logic of enchantment/disenchantment goes hand in hand with the one that wants to leave behind the dichotomous oppositions between beings. But, before going any further, let us see how law acts magically.

⁸ See WEBER, *supra* note 7, at 405.

⁹ See Shai J. Lavi, *Enchanting a Disenchanted Law: On Jewish Ritual and Secular History in Nineteenth-Century Germany*, 1 U.C. IRVINE L. REV. 813 (2011); see also Tomlins & Comaroff, *supra* note 6, at 1060–61.

¹⁰ See Lavi, *supra* note 9, at 813–42.

C. The Magic(s) of Law: Perspectives in Anthropology and Legal Theory

If we consider for one moment what magic really is for us and how magic really works in societies that believe or believed in it, we immediately see that law and magic are historically and structurally linked. Historically, there are many testimonies of societies where law and magic worked closely together, and where they could not be totally isolated from each other in social practices. In this regard, for example, the studies of Georges Dumézil showed that long ago in Proto-Indo-European societies the functions of sovereignty were usually distinguished in two complementary parts: One juridical and related to the human world, the other sacred and magical and rooted in the supernatural order.¹¹ Law and magic were then a manifestation of the same underlying phenomenon, two sides of the same coin. It is interesting to note that it is possible to trace these two functions of sovereignty even well into the Middle Ages, as March Bloch has shown in his important study on the “thaumaturge-kings” in France and England, where curative powers and the performance of miracles were attributed to the kings.¹² This characteristic twofold function of sovereignty, based on law and magic, has been seen also in many “chieftainships” of societies from very different cultural roots, either in America, Africa, Asia, or Oceania.¹³ To be clear, I am not claiming the existence of a “universal” condition here, but it is important to acknowledge that the intertwinement between law and magic has been very common in human societies over different times and cultures.

Nevertheless, the interesting aspect of this is that the affinity between law and magic has been not only historical, but also functional and structural. Is magic not, similar to law, a way to control, to shape, to mold the world at our will, to create an order, in accordance with certain rules that we created? This is the definition of magic that an important part of the anthropological theory has been defending—of course, not without internal disputes and much controversy—since the inception of this discipline in the Nineteenth Century. It could be argued that the anthropological discourse has always tried to bring law and magic together, most of the times even without noticing it, trying to explain the one with recourse to the other, and such a conscious or unconscious strategy could be seen as a symptom of the structural homology that exists between these two phenomena.

To begin, it can be said that the anthropological literature has shown a long time ago the normative character of magic, and inversely, the magical character of norms. In his classic study, *The Golden Bough*, James Frazer argues that magic is actually a system based on laws

¹¹ See GEORGES DUMÉZIL, *MITRA-VARUNA: AN ESSAY ON TWO INDO-EUROPEAN REPRESENTATIONS OF SOVEREIGNTY* (D. Coltman trans., 1988).

¹² See generally MARC BLOCH, *LOS REYES TAUMATURGOS* (M. Lara & J. Rodríguez Aguilar trans., 2006).

¹³ See HUTTON WEBSTER, *MAGIC. A SOCIOLOGICAL STUDY* 287–93 (1948), reviewing many examples of chieftainships in different cultures.

that would be immanent in nature and that would govern it. Thus, in ancient times, what we call magic today, would have been merely the belief that a set of rules determined the production of events in the world, rules, that if used by men, would allow them to control the occurrence (or not) of certain events. The magician's act constitutes a manipulation of these laws to her advantage through *interpretive practices*—reading the omens, the natural phenomena, the will of the gods, etc.—and through practices that are based on *analogical thinking*. These are usually called the “laws of sympathy,” which Frazer divided into the “law of similarity” and the “law of contact,” which means, alternatively, that the like produces the like and that contact results in contagion (in concrete, that an image can produce the object itself, or that the part is the same as the whole). Frazer exemplifies the working of these laws with very interesting rituals that involve the use of effigies, in forms including drawings, images, objects or puppets that represent or are part of a person/thing in question. Under certain conditions, that are defined by the laws of sympathy, acting over these objects produces effects over the persons/things that they represent or belong to.¹⁴ In the bottom of this rationale, of course, we found at work the “association of ideas”—as E. B. Tylor, who inspired Frazer's work, has characterized these ideational connections¹⁵—or what has been called, more recently, *mimesis* by the Australian anthropologist Michael Taussig.¹⁶ The most important thing to remark, nevertheless, is that for Frazer, magical practices would be destined to *produce* certain effects in the world through the manipulation of these laws of sympathy: Magic would be, then, a *creative* practice in accordance with certain rules or laws.

It has to be noted that, for Frazer, as for many other anthropologists that followed him, the comparison to make was between magic and science—not between magic and law. The aim was to show that magic was an antecedent of scientific thinking, a “pseudo-science,” as, for example, Malinowski called it,¹⁷ or a wrong way of conducting science.¹⁸ In this comparative endeavor, however, the occurrence of a very paradoxical and interesting phenomenon can

¹⁴ JAMES FRAZER, *THE GOLDEN BOUGH: A STUDY IN MAGIC AND RELIGION* 11–13 (1925).

¹⁵ E. B. TAYLOR, *1 PRIMITIVE CULTURE* 116–19 (1920).

¹⁶ See MICHAEL TAUSSIG, *MIMESIS AND ALTERITY* 47–58 (1993), describing Frazer's sympathetic magic as a form of mimesis. With this characterization, Taussig points out that behind all forms of sympathetic magic lies as a foundation the mimetic faculty, that is, the capacity to imitate, to mimic or to double, a trait shared by all human beings, and we can add, by some non-human beings as well. For Taussig, this mimetic faculty is at the core of what produces resemblance and difference.

¹⁷ BRONISLAW MALINOWSKI, *MAGIC, SCIENCE AND RELIGION AND OTHER ESSAYS* 67 (1948).

¹⁸ It is important to highlight that those early anthropologists lost sight of the normative character of the natural sciences to which they were attempting to compare magic. As it is easy to notice, legalistic assumptions, called “laws of nature” and a legalistic methodology, called “scientific method,” are in the foundations of all natural sciences. This unawareness might be the reason of anthropologists' difficulties to see straightaway the close relationship between law and magic, and also of their recurrent, although, involuntary, associations of these two phenomena.

be appreciated. If, on the one hand, the anthropologists usually lost sight of the close connection between magic and law, on the other hand, maybe inadvertently but also very frequently, pointed out the characteristics that associated the one with the other. In this regard, they constantly highlighted that magic was more than merely a way of understanding the world, and that this practice also had an instrumental character, many times related to the exercise of power and sovereignty. In other words, anthropologists usually highlighted that magic was a practice to order, to mandate, to command, and thus, a phenomenon closely related to legal practices. Consequently, according to Frazer, for example, what distinguishes magic of religion and thus, what therefore brings magic near to law, is the *coactive* character of the former: The magic rite acts over the nature and the phenomena—even over the gods and the spirits—forcing them, obliging them to conform to human desires; religion, in contrast, tries to reach a conciliation with nature and the gods, to gain their indulgences and favors. Thus, if religion *implores*, magic—such as law—*commands*.

Marcel Mauss, in his study, *A General Theory of Magic*, was who probably pointed out more clearly, although maybe unintentionally, the magical character of law, or how legal acts can easily turn into magical rites. In this important study, Mauss starts arguing that magic might be confused with legal actions, but that we can and we should analytically distinguish them. This confusion originates in that magic has been linked traditionally to a system of *jural* obligations, since in many places certain words and gestures constitute binding sanctions. Mauss explains that legal actions often acquire a ritual and a sacramental character, such as in contracts, oaths, and trials. Nevertheless, for Mauss, despite the similarities, these rites are not magical in principle, to the extent that they only produce contractual obligations. But, immediately, he also points out that if these rites do more than merely establish binding relations and if they assume a special kind of efficacy, a productive or creative character, they cease to be legal to become magical actions. According to Mauss, magic rites are able to produce more than mere contracts, they are eminently creative, they “do” things.¹⁹ It seems that for Mauss, even though he does not put it in these terms, it is as if law were permanently at risk of falling into the realm of magic. In this regard, it can be argued that Mauss’ attempt to differentiate law of magic actually ends up showing how the law works magically. After all, it makes no sense to restrict the legal domain to contractual obligations—the only way that Mauss finds to distinguish law and magic—and even this distinction loses all its force if one thinks that establishing a binding relation also implies a creative act. Let us not forget that in this study, Mauss attempts to isolate magic of other phenomena, not only from law, to justify its autonomy as a field of scholarly inquiry; and from this need comes up the stilted character of some of his analytical distinctions. In any case, I think that Mauss’ analysis points out, to his chagrin, how difficult it is to distinguish law from magic. And I would argue that this distinction does not work because law shares what we could call the “mystic force,” to paraphrase Jacques Derrida, of magic, and because

¹⁹ MARCEL MAUSS, A GENERAL THEORY OF MAGIC 23–24 (Robert Brain trans., 1972).

underneath the apparently rational characteristics of contemporary law, still dwells a very vivid magical thought.²⁰ Thus, in its structural and instrumental aspects, magic and law are part of the same social and cultural phenomenon.

It is important to highlight that the magical elements underlying legal acts have been underscored also by legal scholars over the years. While these happened intermittently and usually unsystematically, it is necessary to acknowledge that many jurists have had a better eye than many anthropologists when it came to pairing law with magic. The Scandinavian school of legal realism deserves a special mention here—particularly in the works of Axel Hägerström and Karl Olivecrona²¹—that was probably one of the first in pointing out these “mysterious,” as they called it, aspects of the law. More contemporarily, a diversity of legal scholars coming out from different backgrounds have highlighted as well an interesting array of issues related to the “magic” of the legal domain.²² Since all these studies would deserve careful consideration, I would like to pause here just on one of them, on Colin Dayan’s magnificent *The Law is a White Dog*.²³ The reason for this is that I would like to engage critically with this work, inasmuch as it specifically analyzes legal metamorphosis between persons and things as a form of legal magic.

We have to start by saying that Dayan’s argument is that law works exactly as magic, as a tool that creates realities and, in turn, undoes them; realities that, although fictional, have very material effects for all those who are involved in legal proceedings. Furthermore, Dayan specifically compares law with shamanism and with voodoo, and in that process shows that law and magic share not only ritualistic, sacred, spectacular features, but also the protean capability of changing the world by using words. In Dayan’s terms, “law words . . . wield the power to transform.”²⁴

Even when Dayan doesn’t say it in these terms, following the “speech act theory,” it could be argued that both law and magic have a “performative” character. As I said before, magic

²⁰ See Jacques Derrida, *Force of Law: The Mystical Foundation of Authority*, in *ACTS OF RELIGION* 241–42 (2002). Aligning with Derrida’s claim, I can say that both law and magic need people to believe in them (give some credit or have some kind of faith in them) to be able to work and to have efficacy.

²¹ See KARL OLIVECRONA, *LAW AS FACT* (1971); Karl Olivecrona, *Legal Language and Reality*, in *ESSAYS IN JURISPRUDENCE IN HONOUR OF ROSCOE POUND* 151–91 (R.A. Newman ed., 1962).

²² See generally *LAW AND MAGIC: A COLLECTION OF ESSAYS* (C. Corcos ed., 2010); see also Tomlins & Comaroff, *supra* note 6; Fisk & Gordon, *supra* note 6; Jessie Allen, *A Theory of Adjudication: Law as Magic*, 41 *SUFFOLK U. L. REV.* 773 (2008); Lior Barshak, *The Totemic Authority of the Court*, 11 *L. & CRITIQUE* 301 (2000); Kaius Tuori, *The Magic of Mancipatio*, *LV REVUE INTERNATIONALE DES DROITS DE L’ANTIQUITÉ* 499 (2008); Christopher H. Hanna, *The Magic in the Tax Legislative Process*, 59 *SMU L. REV.* 649 (2006); Suzanne Last Stone, *Rabbinic Legal Magic: A New Look at Honi’s Circle as the Construction of Law’s Space*, 17 *YALE J.L. & HUMAN.* 97 (2013).

²³ See DAYAN, *supra* note 3.

²⁴ *Id.* at xiii.

was characterized by anthropologists as a means to perform, to produce the world, an instrument that molds and transforms reality with its incantations and ritual practices. Stanley Tambiah has focused on this aspect of magic using the speech act theory with wonderful analytical results.²⁵ But, what needs to be stressed here is that, as it is very well known, law has also been characterized as a performative discourse; actually law has been described as the performative speech act *par excellence*.²⁶ Thus, what Dayan points out here—although with different analytical tools—is possibly one of the main characteristics that indicate the common ground between law and magic: Its discursive character and its performative nature.

It should be noted that the most interesting aspect of Dayan's work is how it tracks in history the irrational aspect and the magical thinking in law, and how this search becomes a way of understanding the bizarre legal alchemy by which people can become objects and this latter, persons. Thus, at a general level, Dayan seeks to show how personhood is built and shaped by law, and in a particular plane, how certain people and certain things have been subjected historically to different forms of metamorphosis through legal rituals. Nonetheless, it should be said that Dayan's argument is highly critical of legal magic. Dayan characterizes law as a "bad profane magic" because the metamorphosis that it produces is usually aimed at creating on one side of the spectrum totally disable beings. Through law, capabilities and disabilities are distributed among the entities of the world. Persons have rights, things are mere objects of rights: The former may possess, the latter may be possessed. Accordingly, Dayan studies many historical examples as well as case law to show this protean character in law that objectifies and thus dispossess entities making them possessions. She mainly focuses on slaves, prisoners, and animals, and convincingly demonstrates that law has usually acted as a *magic of dispossession*.²⁷

In what follows, I focus on two cases from Argentina in which it might be argued that law acts by giving personhood to beings that were denied as persons before. In some way, these are cases of re-possession through the law, that is to say, the reverse of the process that is so well described by Dayan. The reason that guides me in this endeavor is not the desire to give a more apologetic picture of legal magic, to counteract Dayan's "pessimistic" outlook, as it might be thought, but to pave the way to show, at the end of this Paper, that there might be forms to neutralize the "bad magic" of modern law, and additionally, alternatives to it. That is to say, I would like to believe in a magic that *personifies/subjectifies* and thus

²⁵ See STANLEY TAMBIAH, *CULTURE, THOUGHT, AND SOCIAL ACTION: AN ANTHROPOLOGICAL PERSPECTIVE* 78–79, 123–169 (1985); see also STANLEY TAMBIAH, *MAGIC, SCIENCE, RELIGION, AND THE SCOPE OF RATIONALITY* 58 (1990).

²⁶ See JOHN AUSTIN, *HOW TO DO THINGS WITH WORDS* (1962); and Jacques Derrida, *Declarations of Independence*, 15 *NEW POLITICAL SCIENCE* 7–15 (1986); and MAUSS, *supra* note 19, at 241.

²⁷ See DAYAN, *supra* note 3, at xii–xiii, 33–34, 40, 56, 87, 209, 215. These pages are particularly on point, although this issue is analyzed throughout the entire work.

creates able beings, a magic of resurrection or re-possession, rather than of “dis-possession.”

D. Ghostly Personhoods: Argentina’s “Disappeared”

The first case that I would like to consider is that of the enforcedly disappeared people in Argentina—people denied as such by the State during the last military dictatorship—and the process through which they recovered their personhoods through several legal mechanisms implemented after the return to democracy. I believe that this is a very interesting example of legal metamorphosis because it shows how people that were totally denied as holders of rights, could recover later, through different legal rituals and performances, if not their lives, at least their political and legal standing. This is as well, interestingly, a form of legal *resurrection*, that implies the creation of a *ghostly personhood* that disrupts, to say the least, the binary traditional opposition between persons/things.²⁸

During 1976–1983, Argentina was ruled by a military dictatorship that widely violated the rights of the population. During this time, nearly 30,000 people were enforcedly disappeared. This practice involved the abduction of individuals targeted as political opponents by the military government—carried out in secret operations by military officers, police personnel, or other security forces—and the illegal detention of these people in clandestine centers located primarily in military or police facilities, where they were tortured and, for the most part, killed. Their bodies were then thrown into the water, incinerated, or buried in unmarked graves. Confronted by relatives and human rights organizations, the State refused to give any information about their final destiny. Thousands of *habeas corpus* petitions—an instrument typically used in Argentina to challenge the legality of a person’s detention—were presented all over the country at courts by familiars requesting the immediate *appearance* of all those missing, but every time, the Government denied its involvement and any responsibility.²⁹

Once the dictatorship fell and the democratic rule returned, one of the most significant challenges was to determine how to consider these people who were not *legally* dead, but that certainly were neither alive. And this was not merely a moral, historical or philosophical question to address but also a very important legal problem to sort out.³⁰ In 1979, the

²⁸ In Argentine law, death represents the end of legal personhood, and a dead person (a corpse) is considered a “thing” that is “out of the market” (is not commercial or tradable). See RICARDO LORENZETTI, 1 RESPONSABILIDAD CIVIL DE LOS MÉDICOS, 57–86 (1997).

²⁹ For an explanation of the phenomenon of the enforced disappearances in Argentina, see EMILIO CRENZEL, MEMORY OF THE ARGENTINE DISAPPEARANCES (2011); JO FISHER, MOTHERS OF THE DISAPPEARED (1989).

³⁰ It was imperative to determine the legal status of the disappeared in order to regulate several important aspects of social life: Family issues (*patria potestas*, adoptions, inheritances), labor and pension issues, state compensations, etc.

dictatorship established a legal procedure through which the disappeared could be declared “presumptively dead.”³¹ However, in 1994, the second democratic government elected after the fall of the dictatorship decided to create a new special legal category called “absence by enforced disappearance,” in response to the demands of an important part of the relatives of the victims.³² In this regard, many familiars and some political organizations refused to recognize the deaths of the *desaparecidos* without first recovering their bodies or without having, at least, a confession of the army confirming that they were killed. Because the military forces denied to provide any information on the whereabouts of the disappeared, the situation represented a political dead end. Moreover, for some organizations like the Mothers of Plaza de Mayo (*Madres de Plaza de Mayo*), the refusal to accept death was a political and ethical standpoint to face the government and the rest of the society, a claim that performed a *J'accuse* sustained in an “as if,”—as if the disappeared were not dead, or as if they were still alive—and consequently requested some sort of magic by the state: That the *desaparecidos* “reappear alive” (*aparicion con vida*). An impossible demand that made the accusation even more wrenching, if possible, and that forced the state to perform some sort of “resurrection” to conform.

Even if the immediate legal effects of the “absence for enforced disappearance” were similar to the declaration of “death presumption,” allowing, for example, that testamentary rights be exercised, the main advantage of the former was that it was not necessary to recognize or request the demise of the disappeared by their relatives, as happened with the 1979 law enacted by the dictatorship. Moreover, not even the state should have to declare the death, since the person in question was not inscribed in the official registries as “dead”—also a consequence of the 1979 law—but merely as “enforcedly disappeared.”³³ It could be said

³¹ Law No. 22.068, Sept. 6, 1979, B.O. 16/10/1979 (Arg.). Article 1 states:

It can be declared the presumptive death of the person who disappeared from their home or residence, if there are no news from them, and the disappearance was reported to the authorities between November 6, 1974, the date in which the martial state was declared by decree 1368/74, and the date of promulgation of this law (author translation).

³² See Law No. 24.321, May 11, 1994, B.O. 10/06/1994. In Article 1, the law states: “Can be declared the absence by enforced disappearance of every person that have been involuntarily disappeared until December 10, 1983, of their home or place of residence, if there are no news of their whereabouts.” Article 2 states that “for the purposes of this law, enforced disappearance is when someone has been deprived of their freedom and this was followed by the disappearance of the victim, or if the victim had been kept captive in clandestine detention centers, or deprived, through any other mean, of the right to jurisdiction”, while Article 7 asserts that the effects of the declaration of “absence by enforced disappearance” will be analogous to the ones prescribed for the “presumption of death” (author translations).

³³ The inscription of the disappeared as dead in the registries was politically unacceptable for some relatives because it equated the deaths of the *desaparecidos* with other “normal” deaths, and thus helped to “invisibilize” the very particular circumstances in which the disappeared died, especially when these deaths were the outcome of the dictatorial violence.

that even when the material situation of Argentina's disappeared is similar to what happened in other post-war, post-conflict or post-dictatorial contexts—where it was necessary to determine what to do with “missing” people—the way Argentina sorted out the legal conundrum and the creation of a legal status of “disappeared” is unique in the world. No other country has dared to go so far as to re-envision the usual distinctions between persons/things in the process of dealing with their violent pasts.³⁴

This legal status of “disappeared” is not only novel but also especially interesting since it makes evident the game of fictions in law that makes possible to characterize legal metamorphosis as a magical transmutation. In the *desaparecidos* we can see clearly how even though it was known with some certainty that these people were killed, the law was able to consider them in an intermediate state, a *liminal* realm, a threshold between the living and the dead, that is to say, a not so human *ghostly* existence.³⁵ More importantly, this legal status shows that even a dead person can be considered alive by law, and thus be given legal personhood. Dayan says, in this regard, though for a different but related context, that “law can make one dead in life, and it can also determine when and if one is to be resurrected,”³⁶ and she has every reason in relation to Argentina's disappeared. Law's magic can bring death to the living, it could make you certainly disappear when it withdraws its protection, but it also can bring life to the dead.

It should be said that this unique legal status established in the law 24.321 would have been unthinkable if not for the previous experience of the human rights trials carried out in Argentina since 1985 onwards. These trials, that continue today, judge the crimes of the dictatorship and the cases of enforced disappearances. It can be argued, and I do this in more detail elsewhere, that these trials are rituals where the *desaparecidos* are constantly conjured up, or more precisely, it should be said that these are rituals of “death and resurrection,”³⁷ a special kind of those rituals that are classified as rites of passage by the

³⁴ Under the International Convention for the Protection of All Persons from Enforced Disappearances and the Rome Statute of the International Criminal Court, the enforced disappearance is now an international crime. See International Convention for the Protection of All Persons from Enforced Disappearances, G.A. Res. 61/177, U.N. Doc. A/HRC/RES 2006/1 (Dec. 20, 2006); Rome Statute of the International Criminal Court, 2187 U.N.T.S. 90 (July 17, 1998). Accordingly, during these last years, many countries have incorporated this offense into their domestic laws. Nevertheless, this does not mean that victims are given a legal status or legal personhood as “disappeared” in these international or local settings, as it happens in Argentina.

³⁵ Other scholars have seen in this status of the Argentine disappeared a very particular “ghostly” or “spectral” condition. See AVERY F. GORDON, *GHOSTLY MATTERS: HAUNTING AND THE SOCIOLOGICAL IMAGINATION* (1997); see also María Julia Daroqui, “*Desaparecido*”: *Cuerpo Forastero de la Memoria Cultural Argentina*, in 20/21 ESTUDIOS. REVISTA DE INVESTIGACIONES LITERARIAS Y CULTURALES 35–50 (2003).

³⁶ DAYAN, *supra* note 3, at 49. It is interesting to note that Article 10 of law 24.321 performs this “resurrection” when states that in cases where the “dead presumption” had been already declared (in accordance with law 22.068), the relatives can ask the “reconversion” of this state to the “absence for enforced disappearance.”

³⁷ The rites of death and resurrection are rituals of renewal. Originally they were related to the cultivation of the land and with the cycles of seasons. These rituals are represented in many cultures and myths (for example, in the

anthropological theory,³⁸ and that are very common to many cultures in moments of “transition;” in the Argentine case, a moment of transition from a dictatorial past to a democratic present. The particularity of this ceremony, nevertheless, is that who dies to resurface again is the entire social being and not merely the disappeared. In any case, and for the purposes of this paper, it is interesting to observe that, through these judgments, the law gives new life to the disappeared, a new legal personhood that makes them witnesses and even actors in the prosecution of the crimes of the dictatorship. Somehow, if the enforced disappearance can be characterized as the most radical denial of personhood, these trials may be seen as an attempt to restore that legal personhood ripped from the victims.



Figure 1. Federal Criminal Court of Jujuy Province, 7 November 2014 (Photograph: Télam courtesy).

very well-known stories of the dead and resurrection of gods, like Osiris, Jesus, etc.). Frazer describes with detail a series of these rites all over the world. See FRAZER, *supra* note 11, at 691–701. For a more contemporary study, see MATTINGER TRYGGVE, *THE RIDDLE OF RESURRECTION* (2001).

³⁸ See ARNOLD VAN GENNEP, *LOS RITOS DE PASO* (J. Aranzadi trans., 2008), explaining rites of passage, and among them the rite of death and resurrection.

Consequently, the disappeared are constantly summoned and present in the premises of the trials. This is constantly reminded by a practice that is regularly—or, it could be said, “ritually,”—performed by the relatives of the disappeared during the hearings, that consists in placing pictures of them in the empty seats of the courts (see Figure 1).

To enter and stay in the chamber of a court judging the crimes of the dictatorship can be a very uncanny experience. An indescribable cold travels through your bones when looking at the accused; some warmth is felt in the chest by the greeting of a relative; and above all, the overwhelming ubiquity of the pictures of the disappeared: The sadness, the sacredness, the force of a life gone but still present that invades everything. Before the beginning of the hearings—these trials have several because they usually span over long periods of time, that can last months or even years—the pictures of the disappeared are spread all over the place, in lines, in columns, filling all the seats. An infinity of faces, waiting, with their gazes directed towards the judges, to the accused, to everyone that is there. Some of the pictures stand alone afterwards during the hearing, some others are taken by a familiar or a friend over their lap. But the faces of the disappeared are always there throughout the trial, watching, witnessing, accusing. They surround the living; their absence is undeniably present.³⁹

It is important to point out that all the pictures of the *desaparecidos* are usually entitled with the word “presente” (present). This intends to mean not merely that the disappeared are present on the premises of the court, but also that they are part of this time, and not of a buried past. In other words, this “entitle(ment)” is noteworthy because it points out that the disappeared are at the site, that they were somehow conjured up or called to the premises of the court because they have the right to be there (maybe to testify or to bear witness). This is a claim made by the relatives of the disappeared, of course; but, in the frame of the photography, this is an affirmation of the disappeared themselves, as if they were saying: *I am here, I am present*.

But also, it could be said that the word “present” points out to the existence of a *gift*, an exchange between the disappeared and the people that participate in the ritual.⁴⁰ In some

³⁹ For more images of this practice, in which the pictures of the disappeared are placed in the seats of the courts, see Alejandra Dandan, *Tres filas con las fotos de los desaparecidos*, PÁGINA 12 (Oct. 1, 2010), <https://www.pagina12.com.ar/diario/elpais/1-154125-2010-10-01.html>; *En marzo comenzarán seis juicios por delitos de Lesa Humanidad*, TELAM. AGENCIA NACIONAL DE NOTICIAS (Feb. 28, 2012), http://memoria.telam.com.ar/noticia/comenzaran-seis-juicios-por-delitos-de-lesa-humanidad_n750; *Son 15 los juicios que por delitos de lesa humanidad que se realizan en el país*, DIARIO REGISTRADO (Sept. 27, 2015), http://www.diarioregistrado.com/sociedad-/son-15-los-juicios-por-delitos-de-lesa-humanidad-que-se-realizan-en-el-pais_a56339d3a17bfa0004e87c653.

⁴⁰ In anthropological theory, gift-giving has been understood as a form of exchange that is at the very foundation of human reciprocity and community. It is interesting to note that Mauss defined gift-giving as a “spiritual machinery.” See MARCEL MAUSS, *THE GIFT: THE FORM AND REASON FOR EXCHANGE IN ARCHAIC SOCIETIES* 9, 10–24 (W.D. Halls

aspects, this is a gift of justice, a gift that is materialized when the violence suffered by the disappeared is exposed in the hearings and judgments, when their lives are remembered and mourned in the trials, when it is recalled how they lived, and why they probably died. All this process implies to return personhood to the disappeared, as a rectification and as a small act of justice. The disappeared, despite their absence, are legally present in every respect in the halls of the courts, they are the reason why the trial is conducted, once again.

In general terms, the disappeared are brought back, reincarnated, and embodied in the trials through the evidence gathered—sometimes their mortal *remains*, or in some other cases, their objects and possessions—and through the testimony of survivors and witnesses that recall the events, and that consequently, in that moment, give voice to the disappeared. To judge the dictatorial state for the disappearances is to consider that the lives of the disappeared matter again; to do justice for their deaths is to reinscribe their lives into the political community. In the end, the present exchanged, the gift between the court attendants and the disappeared is the very basis of the community itself, a very *political* gift meant to restore the links and joints of a *polis* torn apart by violence.⁴¹ In some way, then, this is also a gift of time—the only genuine gift according to Derrida⁴²—, a gift of presence in this very present time. It is also a chance to turn back time, to give (more) time to the disappeared, and make them come back to life to rejoin the community, and consequently, to give (more) time, maybe a second chance, at a life together. But all this is impossible, and still, all this happens through, and in spite of, its impossibility.

And this is precisely why this is magic. The pictures of the *desaparecidos*, together with their voices, heard through the many testimonies of witnesses, are the *effigies* of the deceased. Let us recall that, according to Frazer, one of the principles of sympathetic magic is that effigies replace the real. An image can produce the object itself, or part of an object can be considered as the whole. Pictures, drawings, puppets; or alternatively, parts of the body like nails, hair, skin, belongings like cloths, weapons, ornaments, or all these things combined

trans., 1990); see also EMILE BENVENISTE, VOCABULARIO DE LAS INSTITUCIONES INDO-EUROPEAS 63–66 (M. Armiño trans., 1983), showing that this exchangeability is in the very etymology of the term *donum* (gift).

⁴¹ It is interesting that Roberto Esposito finds in the etymology of *communitas* the word *munus* (co-*munus*), which points out to the *donum* (the gift, the exchange) at the core of the social. According to the Italian thinker, this gift is particular because it constitutes a duty (*onus*) and arises from a “lack,” a “fault,” a crime. See ROBERTO ESPOSITO, COMMUNITAS: THE ORIGIN AND DESTINY OF COMMUNITY 3–4, 8 (T. Campbell trans., 2010). Moreover, Benveniste finds that *munus* could be linked to a group of words meaning “inheritance” (a family gift) through the suffix “nus” or “nes.” See BENVENISTE, *supra* note 40, at 63. Here we are close to associating *munus* with *Manes*, the spirits of ancestors that Romans worshiped (gift-given) in the domestic cult. It is important to note that when Romans founded a new town (a new community), a round hole was excavated and a stone called *lapis manalis* (“stone of the Manes”) was placed in the foundations, representing the gates to the underworld. It could be argued that the *Manes* were closely related to the *munus* at the foundations of the community. The connection of all these ancient practices with the behavior of the relatives of the *desaparecidos* during the trials is, to say the least, uncanny.

⁴² See JACQUES DERRIDA, GIVEN-TIME: I. COUNTERFEIT MONEY 41 (P. Kamuf trans., 1992).

together in particular assemblages, are what they represent. In the context of the trials, the pictures on the seats, a skull found in an unmarked grave, fresh or blurred memories of a witness are the disappeared themselves; to act over these objects is to act, like in voodoo rituals, directly over them. The *desaparecidos* in the trials are *legal effigies*, representations of those who were disappeared—montages of images, voices, and memories—phantasmagorias that replace an absent body with a legal existence.⁴³ Paradoxically, or not, the disappeared gain new personhood through these objects. They are these objects, and these things are their personification. And believe it or not, these kind of substitutions, duplications, and replacements are not uncommon in other societies. This is what worshiping (gift-giving) a statue of an ancestor or a totem is, or what was meant in ancient funerary rites in Greece and Rome by using the figure of a *kolossoi* or any other *simulacra*, when there was no body to bury or to incinerate—that is, when the body was disappeared.⁴⁴

Deep in the bottom of these juridical performances in Argentina, then, we can see at work a—very ancient—magical thinking through which the disappeared comes again to life and recover their legal personhood. After all, an effigy is a *fetish*, and fetishes have the power to turn things around, from *head* to *toe*, as it is said, that is, from person to thing, but also the other way around.⁴⁵ We will see this same magic working again in the next case.

⁴³ Let us not forget that etymologically *phantasmata* means “image” or “representation” of an object. Moreover, from Plato onwards, there is a very long tradition that associates *simulacra* and *semblance* with *phantasms* (images). I cannot help but keep relating the image of the many faces of the *desaparecidos* at the seats of courts with the issue that in Spanish the word “semblance” (*semblanza*) is closely linked to “face” (*semblante*). On another note, it should be said that Derrida associates the nature of gift-giving with the operation of a *simulacra* (a counterfeit). For him, given the impossibility of a genuine gift-giving, a gift only can “appear” as a phantom. See DERRIDA, *supra* note 42, at 14, 31. It could be said that not by chance the *exchangeability* (the gift) is the very condition of ghostliness. As Derrida has pointed out: “Spectrality has to do with the fact that a body is never present for itself, for what it is. It appears by disappearing or by making disappear what it represents: One for the other.” DERRIDA, *supra* note 20, at 276. But, we can wonder: Are not *simulacra* and counterfeit also the main features usually assigned to magic? Is this not a characteristic that derives from its impossible-possibility?

⁴⁴ See JEAN-PIERRE VERNANT, MYTH AND THOUGHT AMONG THE GREEKS 321–33 (J. Lloyd and J. Fort trans., 2006), explaining that in ancient Greece—and also in Rome—when the body of a deceased person was missing, the funerary rites were still performed using an effigy (a *kolossoi* or *kolossos*) that substituted the absent corpse. The main reason of this is that they believed that if funerary rites were not performed correctly—for example, burying the body—the ghost of the dead person would be compelled to wander endlessly between the world of the living and that of the dead. The *kolossoi* was not merely an “image” of the missing, but her “double.” Vernant’s words, easily recall us the paradoxical existence of the disappeared at court: “Through the Kolossos, the dead man returns to the light of day and manifest his presence in the sight of the living. It is a particular and ambiguous presence that is also the sign of an absence.” *Id.* at 323.

⁴⁵ Of course, I cannot help but think here of Karl Marx’s “commodity fetishism,” a term used to describe the process in which capitalism puts the world “upside down,” making commodity acquire animated life (we could say personhood) while people are objectified (“reified”) by the forces of the market. See KARL MARX, 1 CAPITAL. A CRITIQUE OF POLITICAL ECONOMY, 81–96 (F. Engels ed., 1986). It is well accepted that Marx took the term from Charles de Brosses, who used it in a work of 1760 to describe the worshiping of certain talismans and amulets in West Africa. It seems that the word derives from the Portuguese word *feitiço* (charm, sorcery), which comes from the Latin *factitious* (made, artificial, made by art). According to the OXFORD ENGLISH DICTIONARY, a fetish is “an inanimate object worshiped for its supposed magical powers or because it is considered to be inhabited by a spirit.” In

E. Non-Human Personhood: Persons in the Forest or Orangutans in the Zoo

The second case is related to a series of very recent judgments in Argentina that granted personhood to non-human animals. The first of these is a 2014 judgment of the Federal Criminal Court of Cassation of Argentina—the highest court in criminal matters in the country—that granted to an Orangutan named “Sandra” the status of “non-human person” with basic legal rights, clearing the way for her to be released from the Buenos Aires Zoo after spending her entire life in captivity. The ruling came after animal rights campaigners filed a *habeas corpus* petition—as I mentioned before, a legal instrument frequently used to challenge a person’s unlawful detention—on behalf of Sandra. According to the newspapers, this is the first time worldwide that a court granted personhood to an orangutan.⁴⁶ They do not know, of course, the long history of metamorphosis that exists in the realm of law. But, let us concede that, probably for modern law, this could be the first time that non-human animals are given legal personhood,⁴⁷ and that is why the case has had worldwide impact.⁴⁸

The discussion in the case turned around the two different positions of the parties. The questions were whether Sandra should be considered a “person”—the position defended by the *Association of Officials and Lawyers for Animal Rights* (AFADA)—or as a “thing,” which was the position defended by the Zoo and consecrated in Argentine legislation. The former

anthropological terms, nevertheless, a fetish is a non-living object (it could be a material thing, but also an idea) towards which we project life and agency (personhood). See MICHAEL TAUSSIG, *FIELDWORK NOTEBOOKS 5* (2011). Beyond this characterization, it is important to highlight the force of the fetish to *personify* objects. In this regard, in this plane of doublings and replacements, it can be said that the life projected to the fetish is projected in turn by the fetish to what it represents (a dead person, a spirit, an animal, etc.).

⁴⁶ See Tom Bawden, *Orangutan Inside Argentina Zoo Granted ‘Non-Human Person Rights’ in Landmark Ruling*, THE INDEPENDENT (Dec. 22, 2014), <http://www.independent.co.uk/news/world/americas/sandra-the-orangutan-inside-argentina-zoo-granted-human-rights-in-landmark-ruling-9940202.html>; *Court in Argentina Grants Basic Rights to Orangutan*, BBC NEWS (Dec. 21, 2014), <http://www.bbc.co.uk/news/world-latin-america-30571577>; Helen Regan, *In Argentina, a Court Grants Sandra the Orangutan Basic Rights*, TIME (Dec. 22, 2014), <http://time.com/3643541/argentina-sandra-orangutan-basic-rights/>, among others.

⁴⁷ It is interesting to add here that in 2012, before Sandra’s case, legal personhood was granted to a non-animal-non-human being, a New Zealand river called Whanganui. See Kate Shuttleworth, *Agreement Entitled Whanganui River to Legal Identity*, NEW ZEALAND HERALD (Aug. 30, 2012), http://www.nzherald.co.nz/news/article.cfm?c_id=1&objectid=10830586. More recently, after Sandra’s case, legal personhood was granted to the Ganges and Yamuna Rivers in India, and to the Atrato River in Colombia. See Michael Safi, *Ganges and Yamuna Rivers Granted Same Legal Rights as Human Beings*, THE GUARDIAN (Mar. 21, 2017), <https://www.theguardian.com/world/2017/mar/21/ganges-and-yamuna-rivers-granted-same-legal-rights-as-human-beings>; Juan David Laverde Palma, *Un salvavidas para el Atrato*, EL ESPECTADOR (Apr. 29, 2017), <http://www.elespectador.com/noticias/nacional/un-salvavidas-para-el-atrato-articulo-691575>.

⁴⁸ The case was reported in newspapers all over the world, as can be confirmed with a quick Google search. Moreover, news following the subsequent events of the case has been reported all throughout 2015 and 2016 in different world newspapers and magazines. Even complete special stories have been dedicated to the case, as can be seen in the recent note by George Johnson. See George Johnson, *The Battle for the Great Apes*, 9 PACIFIC STANDARD 56–63 (2016).

argued that Sandra should not be treated as an object because of her intelligence and biological characteristics—orangutans share 97% of human DNA—and consequently contended that she was suffering and under depression due to the captivity. The Zoo, in contrast, sustained that it was a mistake to “humanize” the animal, and affirmed that to grant Sandra the same feelings as human beings showed a misconception of the actual biology of the orangutan.

As I said, the court finally decided that Sandra deserved the basic rights of a “non-human person.” The judgment is really short, two pages long, but it is surprising to find that the implicit argument used to justify the decision was the alleged *similarities* of orangutans with human beings.⁴⁹ A subsequent judge, Elena Liberatori, who took over the case after the Court of Cassation’s decision, was even more explicit in this matter: “[N]othing impedes that the rights to life and dignity, proper of living beings, and that are consecrated to human persons in the legal system, be extended *analogically* to Sandra, who is a sentient being.”⁵⁰ I would say, going back to Frazer, that the judges performed an act of magic here, a transmutation of the orangutan from a thing, as the Argentine law established, to a legal person, by using the principle of sympathy or mimesis, as in the case of the effigies of the disappeared in the human rights trials.

For the judges, the process of incantation starts with the “discovery” or “recognition” of human characteristics in orangutans. The biology and behavior of the animal are scrutinized to find out human or proto-human characteristics. Once these are found and established, the process of sympathy or mimesis is set in motion, and the next step is to reconsider our relationship with the orangutan. If the orangutan is similar to human persons, it should be considered as a non-human person. Or, to say it differently, once we assign to the orangutan the characteristics of humans, we make a person of the orangutan. It is interesting to observe that all the process turns around an implicit ergo: Orangutans have human traits, *ergo* they should be treated as humans. Some human characteristics, then, are isolated, abstracted, universalized as persons’ features that can be present or absent in other forms of being. The transmutation starts when the judges *project*, like in a fetish, these human traits onto the orangutan—referring to biology, behavior, or simply the capacity to “feel”—establishing thus the likeness between humans and orangutans. And this process finishes, subsequently, when the law fixes this metamorphosis in the words of a judgment that grants legal protection.

⁴⁹ See Cámara Federal de Casación Penal, Sala II [Federal Criminal Court of Cassation, 2nd Chamber], 68831/2014/CFCP, “Orangutana Sandra s/recurso de casación s/habeas corpus,” (2014) (Arg.).

⁵⁰ Juzgado N°2 en lo Contencioso Administrativo y Tributario de la CABA [Administrative and Tax Disputes Court N°2 of Buenos Aires City], A2174-2015/0, “Asociación de funcionarios y abogados por los derechos de los animales y otros contra GCBA s/amparo,” (Oct. 21, 2015) (Arg.) (author translation) (emphasis added).

I have to highlight that Sandra's case was just one in a series of attempts by campaigners all over the world to give the non-human members of the great ape family a status of a person in law. It is interesting to notice that only one month before the Argentine Court of Cassation ruled in this case, a court in New York decided, in contrast, that apes are "mere property." This was a case of a privately owned retired entertainment chimp living in a cage, and in contrast to the Argentine case, the judges here based the decision on the *differences* between apes and humans, and indirectly thus, on the ape's likeness to objects. In the ruling, the judges wrote: "Needless to say, *unlike* human beings, chimpanzees cannot bear any legal duties, submit to societal responsibilities or be held accountable for their actions."⁵¹ Thus, they concluded, chimps cannot be considered persons, as human beings are. In short, the magic of law can make you a possession, locking you up in a cage—as the chimp in the U.S. case—or can make you a possessor of rights, freeing you from that same cage—as in the Argentine case.

What is the reason for this different outlook between U.S. and Argentine judges? While this is hypothetical, I think that what enabled non-humans to be considered persons in Argentine law is in some way related with how it dealt with the disappeared during the last 32 years. It is necessary to highlight that modern forms of violence tend to be closely intertwined in our societies. As different studies have shown well, political violence responds, in the majority of cases, to the same logics of the violence projected towards animals.⁵² It is not by chance that, in the history of the West, to "animalize" (to consider less than human) was usually a first discursive step to justify violence, slavery, or different forms of mistreatments to other peoples. In this regard, it is easy to see that the victims of the dictatorship were treated as non-humans, beings without rights, mere objects of dispossession and violence. And, conversely, is also easy to appreciate that animals, on the other side of the spectrum, are constantly and usually left out of the pale of the juridical protection, which amounts to and resembles a kind of "disappearance." If this is the case, if the magic of dispossession at work was and is the same, the legal rituals and performances that give personhood back or for the first time, should be necessarily connected.

It is not just mere coincidence, in this regard, that the same legal instrument, the *habeas corpus*, that has been used during the dictatorship to demand in courts all over the country the "appearance" of the disappeared, is now used to request the recognition of the legal personhood of non-humans and their release from zoo's cages. As in the case of the *desaparecidos*, the *habeas corpus* functions here as the instrument to claim the "appearance" of the legal subjectivity of the entity in question, in the past the legal personhood of the illegally kidnapped, and now of the (il)legally captive non-human

⁵¹ People ex rel. Nonhuman Rights Project, Inc. v. Lavery, 124 A.D.3d 148, 152 (N.Y. App. Div. 2014) (emphasis added).

⁵² See DAYAN, *supra*, note 3.

beings.⁵³ Overall, both cases are in some way similar since sympathetic or mimetic magic is at work and law acts remaking the personhood of these entities. In one case personhood is re-given to human beings that were previously denied as bearers of rights, and in the other to a non-human animal that was treated as mere property. In both scenarios, dispossessed lives are readmitted in the field of the possessors of rights.

It could be said that Sandra's case not only blew up her cage—the almost 140-year-old Buenos Aires Zoo is now allegedly in the process of being converted into an “Eco-Park” that will not hold animals anymore—but also, since then, the binary opposition between humans and non-humans (persons/things) has been deeply undermined in Argentine law. In this regard, after Sandra's landmark judgment there have been other cases in which personhood was granted to non-human animals by different Argentine courts. In May 2016, for example, a chimp called “Cecilia,” captive in Mendoza Province's Zoo, has been declared a “non-human subject of rights” and thus her release and transfer to a reservation was set in motion. The interesting thing about this case is that it triggered the implicit recognition by the Provincial State of similar rights to other animals in that zoo—toucans, llamas, and guanacos—that will also be moved to reservations.⁵⁴ Subsequently, in November 2016, three elephants caged in the Zoo of Buenos Aires have been recognized by the newly created Special Prosecution Office for Environmental Issues (*Unidad Fiscal Especializada en Materia Ambiental*) as legal persons that need representation like “legally incapable people,” granting powers thus to an NGO to fulfill this task.⁵⁵

To conclude, we have to recognize that it is curious, to say the least, that fate wanted that the first case in the world in which personhood has been granted to a non-human animal was regarding one whose name is “orangutan,” a word that comes from a late Seventeenth

⁵³ The literal classic English translation of *habeas corpus* is: “You should have the person” or “you shall have the body.” *Habeas* is translated as “to have, to hold,” and *corpus* (literally “body”) is translated as “person” in this context. See OXFORD ENGLISH DICTIONARY. It is interesting that according to the CAMBRIDGE ENGLISH DICTIONARY the *habeas corpus* is: “A legal order that states that a *person* in prison must *appear* . . . before a court of law” (emphasis added). Furthermore, it is curious to notice that the form used in some Fourteenth Century English-French documents and writs is *habeas corpus ad subjiciendum*, which means, “to *produce* or have the *person* to be subjected to examination”. See BLACK'S LAW DICTIONARY 837 (rev. 4th ed. 1968) (emphasis added). We can see that the issues of “appearance,” “production,” “examination,” and “personhood” are in some way intrinsically related to the history of this legal instrument. I am confident that a genealogy of the *habeas corpus*, which probably can be traced back to the Roman *Interdictio de Homine Libero Exhibendo* and maybe even further in time, may shed light on how law historically framed and shaped persons/things, and on the all too magical nature of this process.

⁵⁴ See Roxana Badaloni, *Mendoza: la justicia consideró a una mona “sujeto de derechos y autorizó su traslado*, CLARÍN (Nov. 5, 2016), http://www.clarin.com/sociedad/mendoza-justicia-considero-derechos-traslado_0_HyyTwU5eg.html.

⁵⁵ See *Tres elefantas del Zoo porteño ya tienen abogados y hacen juicio*, CLARÍN (Nov. 24, 2016), http://www.clarin.com/ciudades/elefantas-zoo-porteno-abogados-juicio_0_HygIMmmGe.html.

Century Malayan expression (*orang-utan*) that means “person of the forest.”⁵⁶ It is less curious, maybe, but not less ominous, that personhood has been granted in this case to a form of being that is currently in grave danger of extinction, at risk of vanishing of the earth, that is, at the edge of *disappearance*.⁵⁷

F. Shamanism and Personification: Towards an Alternative (to) Law?

As I mentioned in the beginning, in this last Section I would like to take some steps towards an inquiry that could show that different ways of conceiving persons and things are possible. In other words, I would like to start thinking in alternative forms of conceptualizing the relationship between them and to assess some ideas that might have the potential to subvert what we now understand by persons and things. Even if the legal cases exposed above are a good anticipation to these alternatives, it is important to highlight that these forms are beyond our current legality—and its “magic”—and challenge our general understanding of the world and the ways by which we relate to it.

As I said before, Colin Dayan shows that legal metamorphoses are sustained in a hierarchical relationship composed by persons with rights and things without rights. Law, thus, is a magic of dispossession, because it creates on one side of the spectrum totally disabled beings. Notwithstanding the precision of this characterization, I wonder if Dayan’s comparison between law and some other forms of “archaic” magic is entirely accurate. In particular, I wonder whether this account should not be rethought in order to make space to take into consideration some important anthropological studies that recently shed light in the area of shamanism, and that have shown that some of the characteristics and effects of this latter might be considerably different from the ones of legal magic described above.

It is clear that the metamorphoses that law produces are part and parcel of practices carried out in all the so-called “primitive” societies, as Dayan seems to suggest. This could be exemplified very well with the shamanic beliefs in the possibility that, through certain rituals, humans could become animals, objects or spirits, or that the latter could become humans under certain conditions. So far, the similarity between the archaic and legal magic is that both are meant to produce these metamorphoses. There is, nevertheless, an important aspect that Dayan overlooks that distinguishes legal metamorphoses from the ones produced by archaic magic, an aspect that could have even the potential to open up a door to new forms of law or to alternatives to the law.

⁵⁶ *Orangutan*, OXFORD ENGLISH DICTIONARY (2d ed. 1987).

⁵⁷ See generally Alejandro Estrada et al., *Impending Extinction Crisis of the World’s Primates: Why Primates Matters*, 3 *Sci. Adv.* 1 (2017).

Recent anthropological works belonging to the so-called “ontological turn” in this discipline—such as Eduardo Viveiros de Castro’s studies on the Tupinambá;⁵⁸ Roy Wagner’s on the Melanesians⁵⁹ or Albert’s “translation” of the teachings of the shaman Kopenawa about the Yanomami,⁶⁰ among others⁶¹—, suggest that shamanic metamorphoses were and are a manifestation of a cosmology that claims the *ontological indivisibility* of the world and the *continuum* between different entities (humans, animals, things, spirits). In contrast, according to Dayan’s description, the metamorphosis that law performs seeks to support distinctions and borders set out in modern thought. In this regard, I would be inclined to think that even if the magic of law has a similar structure to shamanism, as Dayan seems to suggest, and both are imbued with the same principles, mimesis and sympathy, they perform different functions. While the law is meant to sustain the barriers that place humans as distinct entities, the forms of shamanism described by these anthropologists are meant to allow humans to cross the boundaries to other forms of being in the world.⁶²

This raises an array of interesting questions that one could be tempted to ask: What are the possibilities of turning, switching, or maybe simply contaminating practices of law with the logic of shamanism? In other words, considering the sameness in the structure of law and shamanism, both based on mimesis and sympathy, can we change the function of the former to throw down the barriers that currently isolate humans from the world they inhabit? What would remain, in this case, of the divide between persons/things?

Even when there is no straightforward answer to these questions, what is necessary to point out here is that persons and things do not exist in a natural state; persons and things exist only in a mutual relationship that in our Western world is codified by law. In this legal domain, objectification makes personification possible, and personification makes objectification a reality. In other words, “personhood” and “objecthood,” and their current characteristics, are mutually dependent in modern law.

⁵⁸ See EDUARDO VIVEIROS DE CASTRO, *CANNIBAL METAPHYSICS* (P. Skafish trans., 2009).

⁵⁹ See ROY WAGNER, *THE INVENTION OF CULTURE* (1981).

⁶⁰ See DAVI KOPENAWA & BRUCE ALBERT, *THE FALLING SKY: WORDS OF A YANOMAMI SHAMAN* (2013).

⁶¹ The term “shamanism” has been used over the years to describe many different practices around the world. Even when all these practices usually have some traits in common, also may have big “cosmological” differences. That is why I must emphasize that in this Paper I am referring only to the forms of shamanism described in the works quoted above.

⁶² In a similar vein, Taussig has noted that mimesis has a complex relation with alterity: The former can close the doors to the latter—like in law’s case—or can be a passage to other forms of being—like in shamanism. After all, mimesis is always a mean to relate to otherness. In Taussig’s terms, we can think in “mimesis as an art of becoming something else, of becoming other.” See TAUSSIG *supra* note 16, at 36.

In his *Mythologiques*, Claude Lévi-Strauss illustrates very well a similar issue with the basic dichotomy of “the raw and the cooked”⁶³: According to his structural analysis, the “raw,” which represents the “natural” state of the thing, could be conceived only and through the “cooked,” which represents the emergence of “culture.” Inversely, the cooked can only be conceived if a previous natural state prior to cooking is imagined. Nature/raw and Culture/cooked are mutually dependent. And the same applies to persons and objects; the one without the other is totally unthinkable. We have, although, different ways of conceptualizing this relationship between persons/things; in other words, we have different ways of codifying the raw and the cooked, or the relationship between objects and persons. Some of these forms even put in tension the dichotomy as such and invite us to envision different states of “personhood” or “objecthood.” Interestingly, Lévi-Strauss also tells us a story that can help us to think that these other forms of conceiving the relationship between persons/things are possible.

In *Race and History*, and later on also in *Tristes Tropiques*,⁶⁴ the French anthropologist tells us an anecdote from the times of the Spanish Conquest, that says that a few years after the “discovery” of America the Spaniards sent out investigative commissions to the Antilles to determine whether the Indians had souls or not. As it is well known, this was a main worry to the Catholic Kings, Ferdinand and Isabella, and several legal scholars and theologians of the time occupied their minds trying to determine the “nature” of the Indians.⁶⁵ Interestingly, at the same moment, Lévi-Strauss tell us, it seems that the Indians were conducting an experiment of their own which consisted in immersing Spanish prisoners in rivers during prolonged periods of time to verify if their corpses were subject to putrefaction.

⁶³ CLAUDE LÉVI-STRAUSS, *THE RAW AND THE COOKED: MYTHOLOGQUES*, VOLUME 1 (J. Weightman & D. Weightman trans. 1983).

⁶⁴ Claude Lévi-Strauss, *Race and History*, in 2 *STRUCTURAL ANTHROPOLOGY* 329 (M. Layton trans. 1978); CLAUDE LÉVI-STRAUSS, *TRISTES TROPIQUES* 76 (J. Weightman & D. Weightman trans., 1992).

⁶⁵ Some of the most important Spanish legal scholars and theologians of the time, such as Matías de Paz, Francisco de Vitoria, Domingo de Soto, Bartolomé de Las Casas, Juan Ginés de Sepúlveda, among others, wrote about this issue and participated in heated debates that attempted to determine the “nature” of the Indians. It should be noted that Aristotelian Thomism was the ideological frame of these discussions about the human or non-human (animal) condition of the inhabitants of the New World. The hierarchical categories that this tradition of thought established between beings—beginning with the justification of “natural slavery” by Aristotle himself—allowed to situate Indians, in the better case, in the lower step of an ontological ladder that had Europeans on the top. See LEWIS HANKE, *ARISTOTLE AND THE AMERICAN INDIANS: A STUDY IN RACE PREJUDICE IN THE MODERN WORLD* 12–28 (1959). Of course, behind these debates about Indian personhood, we can find the magic of a very material *dispossession*: The appropriation of Indians’ lands and labor force in the process of colonization. Probably, the most remembered of these discussions about Indians “souls” were the ones that took place in Valladolid in 1550–1551, between Las Casas and Sepúlveda. It is interesting to notice that these politico-theological debates have been considered as the inception of international law. See e.g., Oscar Guardiola-Rivera, *Absolute Contingency and the Prescriptive Force of International Law, Chiapas-Valladolid, ca. 1550*, in *EVENTS: THE FORCE OF INTERNATIONAL LAW* 29 (F. Johns et al. eds., 2011); Martti Koskenniemi, *Colonization of the ‘Indies’—The Origin of International Law*, in *XXI LA IDEA DE AMÉRICA EN EL PENSAMIENTO IUS INTERNACIONALISTA DEL SIGLO 43–44* (2010); see also ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* 13–28 (2004).



Figure 2. Engraving of Indians experimenting by drowning Spaniards, Theodor de Bry, Frankfurt, 1578.

In other words, they attempted to determine whether Spaniards possessed a body or not. It could be said that, as it was happening on the other side of the Atlantic with Spanish scholars and theologians, that Indians' thoughts were occupied here trying to establish the "nature" of Europeans.

Eduardo Viveiros de Castro, a Brazilian anthropologist, has used this peculiar anecdote to show the contrasts between the two cosmologies; differences that led to alternative ways of codifying the relationship between persons and things. It could be said that in the Western tradition, the body—that is to say, the "objecthood"—is what is shared by all beings, humans and non-humans alike. Spaniards were certain that Indians have a body—after all, animals have them too—but doubted whether they had a soul—an exclusive feature of human beings. From the Indians' perspective, in contrast, the soul—that is, the personhood—was what all beings shared regardless of whether they were humans or non-humans.⁶⁶ In other

⁶⁶ According to Viveiros de Castro, this cosmology was shared by Amerindian societies from Alaska to Tierra del Fuego; and puts upside down the Western distinction between subject and object, soul-body, form-substance, or culture-nature. See EDUARDO VIVEIROS DE CASTRO, *LA MIRADA DEL JAGUAR* 270 (L. Tennina trans., 2013).

words, the Indians doubted that Spaniards had a human body—they could be ghosts, spirits or gods—but not that they had a soul, an intrinsic feature of all beings.

We can say that for the Indians everything was a person, this was somehow the underlying state common to all beings. In contrast, Spaniards believed the opposite—like we usually do now, according to our Western cosmology—that because “substance,” “matter,” “objecthood,” is our common being, we are all objects with only the potential to be persons. Personhood, in this case, is a supplement, an addition to an underlying objective state. In this latter case, personhood should be proved, while in the former, it is something given. Here we can see the difference between law’s magic and shamanic magic, the first tends to *objectify*, while the second tends to *personify*.

After this description, it is not difficult to see that one of the main functions of legal magic is to make what we call “the human”: To make a difference and to differentiate the human from the rest of beings that populate the world. In other terms, the law is a technology, an “anthropotechnology,” to use Fabian Ludueña’s expression, that has made possible, for example, to conceive human beings as distinct from animals or plants.⁶⁷ In contrast, the magic of shamanism is a technology meant to blur this difference: It equates the human with the animal (animalizes the human and humanizes the animal).⁶⁸ Nevertheless, the paradox is that while law, mainly interested in distinguishing the human, creates a vast world of objects (that sadly includes a wide range of humans), shamanism, that, in contrast, is interested in undistinguishing the human, creates an unlimited world of persons. If law is an

⁶⁷ In very general terms, following Michael Foucault’s famous classification, I understand for “technology” the skills, methods, and processes used by men in the production of *signs, power, things*, but also of *persons*. See TECHNOLOGIES OF THE SELF: A SEMINAR WITH MICHEL FOUCAULT (L. H. Martin et al. eds., 1988); see also FABIAN LUDUEÑA, LA COMUNIDAD DE LOS ESPECTROS 11–14 (2010), following Foucault and Sloterdijk in defining “anthropotechnology” as the technique through which the *homo sapiens* acts over their own animal nature in order to produce what is usually called the “human”.

⁶⁸ I want to counter here some “inattentive” but possible critique that this characterization of law or magic as technologies could get. I would like to say that if we leave behind the traditional dichotomy between “enchantment/disenchantment,” as I asked to do before, there is no restraint to conceive magic as a form of “technology.” The only thing that could stop us from considering law, magic, religion and many other manifestations as technologies within the same horizon of inquiry is the modern division between “rational” (sciences, techniques, etc.) and “irrational” (magic, religion, etc.) practices. To throw down the barriers that the “enchantment/disenchantment” dichotomy erects means also to build bridges between different traditions of thought that nowadays seems—but only *seems*—to go in alternative directions. I mean, can we think in a perspective or horizon of inquiry that merges *shamans* and *cyborgs*? Can we think of current “devices” and “gadgets” as talismans or amulets of power? Can we think of algorithms as spells or rituals? Are not the robots, effigies and puppets of ourselves? In the very technological but also mystical era in which we live, these seem a fruitful epistemological strategy to adopt. This epistemological path, that shows a magical world resurfacing in a hyper-technological one, can be seen in an emerging trend that could be generally called “techno-animism” or “techno-shamanism.” See Casper Jensen & Anders Block, *Techno-animism in Japan: Shinto Cosmograms, Actor-Network Theory, and the Enabling Powers of Non-Human Agencies*, 30 THEORY CULTURE & SOC. 84–115 (2013). In any case, I have the impression that, taken together, the collection of essays of which this paper forms part also goes in this very interesting direction.

anthropotechnique of *containment*, a centripetal force that essentializes and enthrones human beings cutting them from their surrounding world; shamanism is an anthropotechnique of *expansion*, a centrifugal force that spans the human, merging it, and thus, in strict terms, losing it, in the totality of the existence.

While the magic of law orders through division and differentiation, shamanism works through assimilation and homogenization. If law objectifies the world because it is *appropriative*—it performs a *dispossession*—shamanism personifies the world because it is *expropriative*—it performs a *personification* and a *re-possession of the world*. Shamanism expropriates men, it leads them out of their selves, makes them transcend their immanence. By this way, shamanism dissolves men's ontological difference with the world, and, accordingly, populate this later with infinite subjectivities. On the contrary, law makes the world an immanence of the human, it performs an appropriation of the world by men, and thus objectifies the non-human. In law, the world spins around the human, in shamanism the human spins around the world.

Now, these different aspects of the two phenomena should not make us think of shamanism as an opposite to law, and vice versa. This is not a new dichotomy that should replace the old binary between persons/things. Law and shamanism have differences but also, as I pointed out before, several similitudes. In this regard, it is important to highlight that law and shamanism function under the same magical principles (*mimesis* and *sympathy*), and thus, infinite movements, exchanges, and contaminations could happen between them. It is as if the law would be at constant risk of falling into shamanic practices, and that this latter would be in permanent danger of becoming law. While there is a cleft that separates law and shamanism, there is also a bridge that connects them and that produces the usually imperceptible transfers, passages, exchanges from one to the other, as Marcel Mauss seems to warn us when encouraging us to make an effort to analytically distinguish law from magical performances.⁶⁹ It is the case that law may become shamanic magic at any time and that this later can be institutionalized in law with the same impetus. In a sense, this is precisely the magic of law or the law of magic.

G. Conclusion

I said before that some archaic magic, such as the forms of shamanism that I have described above, might represent a departure from our traditional way of thinking of persons/things. I also mentioned that this could disarticulate the binary oppositions through which we are used to conceptualizing the relationship between them, and furthermore, that this could be an opportunity to envision a different legality or an alternative to law.

⁶⁹ See Mauss, *supra* note 19.

If we think carefully, it can be said that in a cosmology where every-body/thing is a person, personhood becomes something totally different.⁷⁰ But, in this case, also things become something else. The shamanic cosmologies tend to see personhood, not as an essence or a quality but as a relative position, a point of view, a *perspective*, that can be occupied by anyone/thing at different moments or situations. In general, it can be said that we see ourselves as persons in our world, but that animals and spirits also do the same in theirs. This implies a radical displacement of the concept of personhood: If we all are persons, if we all are projected over an immanent plane of personhood, then *we* the persons, stop being so special and unique. Thus, between the legal magic and the shamanic magic, there is certainly a different cosmology and another way of relating to the world and the beings that inhabit it.

Law considers all of us objects, at least until we can prove that we have the *human* conditions to be persons. In other words, until we prove the contrary, we are mere objects of appropriation. Shamanism believes that we all are already *humans*—we all have already a “soul”—and thus personhood is something given. Thus, from the “anthropocentrism” of modern law to the “anthropomorphism” of shamanism, we can find another way of codifying the relationship between persons/things, a codification that actually implodes the modern binary demarcations between them. The gates for a different law, or for an alternative to the law are already partially opened.

It is hard to envision how this law, or this alternative to it, would look on a global scale and how it would affect our current *very* human forms of existence. In a world where every/body-thing is a person, can we even think of private property or forms of ownership? If animals and other things like rivers are persons, does this mean that they *act* as humans do? In this case, are they responsible for their wrongdoing? In which cases can we consider them liable for their deeds? Further, should we start thinking in liability schemes for the ones who may harm these beings? In these cases, what would be exactly a harm? If everything is a person, does this mean that new forms of kinship and relationships would be possible and acceptable? Of course, these and other questions of the kind easily come to our minds when we think for a moment in a world replete of persons. None of them have, however, answers that at the end do not seem aporetic or paradoxical. But, turning things around, we could also ask: Is it really necessary to ask these questions? Is it even possible to find an answer beforehand? Is it not the case that these questions arise when we try to think about this different cosmological frame in our current cosmological terms? All the more, do we not stumble around with these problems due to our current cosmology? It might be said that we want it or not, with or without shamanism, many of these interrogations are already with us. And they have been triggered in the last years increasingly by the technological advances that pose now and will raise in the future very tough questions. Shamanism could

⁷⁰ See Eduardo Viveiros de Castro, *Perspectival Anthropology and the Method of Controlled Equivocation*, TIPITÍ: J. SOC. ANTHROPOLOGY LOWLAND S. AM. 16 (2004).

be, in this regard, not as much a form to look for particular answers to these interrogations, but a way to a new cosmology in which these questions do not even arise. That is a higher bet.

In this regard, in this Paper, I tried to analyze two cases in which the gates to a different legality or an alternative to it are halfway open. Two cases in which personhood is remade after objectification. The examples of Argentina that I exposed here in its particularities, seem to me a key and good cases to understand how law's magic could be opened to work, such as shamanic magic, towards personification, remaking personalities who were previously radically denied as such.

Let us end as we started, with a question: Is this still law or something else? Both in the case of the disappeared and in the case of the non-humans, law switched inadvertently to shamanic magic and the binary division between persons/things lost its relevance, causing the emergence of new entities that brought more persons to the world. In some way, then, this is something beyond our current legality, but at the same time, it is something already happening in our law. This is, of course, something really impossible, an impossible possibility, such as magic is. But, have I ever said otherwise?

Special Issue
Traditions, Myths, and Utopias of Personhood

A Cyborg Turn in Law?

By Mika Viljanen*

Abstract

This Article deploys cybernetic theory to argue that a novel legal impact imaginary has emerged. In this imaginary, the subjects of legal interventions are performed and enacted as cybernetic organisms, that is, as entities that process information and adapt to changes in their environment. This Article, then, argues that in this imaginary, law finds its effectiveness—not by threatening, cajoling, educating, and moralizing humans as before, but by affecting the composition of cybernetic organisms, giving rise to new kinds of legal subjects that transcend the former conceptual boundary between humans and non-humans, or persons and things. The cybernetic interventions work to change the cyborgs' behavioral responses, thus giving law a new kind modality of power. This Article develops a model for understanding cyborg regulation through case studies and argues that cyborg regulation deploys three distinct strategies. Cyborgs can be controlled through affecting the informational inputs the entities receive, through agencement practices that intervene in the material constitution of the cyborg cognitions, and, finally, by psycho-morphing humans to make them useful components of the cyborg cognitive machineries. The Article ends with a discussion of the theoretical implications of the transition to the cyborg imaginary.

* LL.D. (Turku, 2008), Acting Professor of Civil Law, University of Turku, Finland.

A. Introduction

I. Law is for Humans

Law is for humans, not for apes, dogs, trees, rats, the nature, or the universe. There is a simple reason for drawing this traditional line. Law, legal measures, and regulation, can only affect humans. All of the law's threatening, cajoling, bribing, educating, and moralizing is lost on non-humans. Non-humans lack the properties that allow law to affect its targets. In the nineteenth century, the non-humans lacked a free will and moral capacity.¹ A century later, the absence of free will had transformed into an inability to be guided by economic incentives.² Of course, we know that cracks have started to appear in the monolithic edifice of human law. Trees and rivers may sometimes have standing and have, at times, even been recognized as having personhood.³ Corporations most definitely are persons and have First Amendment rights in the US.⁴ All these things indicate that, slowly but surely, law's anthropocentricity is being questioned, as rights and agency in law have been extended to non-human things through various constructs. The boundaries of law have been pushed outwards from humans.

II. A Cyborg Trajectory

This Article attempts, however, to track another transformation in law's relationship with humans and non-humans, persons and things. It provides an account of a development where humans, non-humans, persons and things enmesh and combine to form an unprecedented legal mode of existence, one that runs perpendicular to the creeping hybridization of humans and non-humans.

The central gestalt in this story is that of a *cyborg*, a *cybernetic organism*. The cyborg as a legal entity simply does not conform to the old categorizations and their concomitant dichotomous conceptual structures of allotting everything to either to the category of persons or things. It is something new—neither human nor non-human, neither a person nor a thing.

The core argument of this Article is that law and regulation—in some quarters but not everywhere—have come to embrace a cybernetic imagination and turned into a cyborg

¹ See generally 1 FRIEDRICH CARL VON SAVIGNY, SYSTEM DES HEUTIGEN RÖMISCHEN RECHTS 331–34 (1840).

² See generally RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (2014).

³ On the Whanganui River personhood dispute, see Elaine C. Hsiao, *New Zealand Whanganui River Agreement*, 42 ENV. POL'Y & L. 371 (2012).

⁴ *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

practice. To be more precise, a host of new regulatory projects and interventions perform and enact cybernetic imaginations of law's intentionality and effectuality. If traditional law was effective because it could do things to humans based on their human faculties, the new cyborg law targets cyborgs and finds its impact through cyborg pathways.

III. Structure

This Article tracks cyborg law through four movements.

In Part B, I will first discuss law's anthropocentricity. The section revolves around two brief sketches of the human gestalts that serve as the vehicles through which law creates changes in its environment. The objective of the section is to serve as a counterpoint to Part D and its discussion of the cyborg regulatory approach: Cyborg law breaches the traditional boundary between law and the regulatory target.

Part C develops an understanding of what cyborgs—or cybernetic organisms—are. The section provides a succinct introduction to cybernetic theory in order to set up the following discussion of the legal cyborg imaginary.

In Part D, I deploy cybernetic theory to analyze a host of recent regulatory projects.⁵ I argue that when viewed through cybernetic lenses, these projects seem to be enacting and performing a *cyborg legal imaginary*. The regulatory targets are, first, reproduced as entities whose primary and determinative feature is that they gather and process information. They are, effectively, cyborgs. Second, new regulatory impact pathways, that is, methods for affecting the behavior of the regulatory targets, emerge. These pathways are, similarly, cyborg pathways. This Article discerns three detailed impact strategies for cyborg law. First, in information-mediated cyborg strategies, law works through inputs and outputs to underdetermine what its subject will do. Second, cyborg regulation also engages in material agencement⁶—the construction of the socio-technical assemblages that constitute the cyborg agents' cognitions and determine their behavior. Third, this Article discusses psychomorphing. Psycho-morphing is the cybernetic practice for shaping human cognitive proclivities.

This Article concludes, in Part E, with a discussion of the theoretical implications of the cybernetic turn.

⁵ The case studies include Finnish gender equality plans under the Finnish Gender Equality Act, see 609/1986 Laki naisten ja miesten välisestä tasa-arvosta [Law on Equality Between Men and Women, Gender Equality Act] (Fin.), nudging, and two different banking regulation schemes.

⁶ See *infra* Section D.III.1.

B. The Human Boundary

I. Humans in the Center

Standard legal theory narratives castigate law as a singularly human endeavor, to the point that the assumption is often not even articulated, let alone contested. Modern law inevitably pertains to humans and targets them as the objects of its interventions.⁷

The reason for this anthropocentricity is a truism. The things law does can only be done to humans: Using language to threaten, cajole, bribe, incentivize, coordinate action, and engage in moral suasion are all activities that can only affect our species. Non-humans lack the unique faculties that render us responsive to legal interventions. Imposing a legal obligation on a dog is senseless. The dog cannot understand it, and neither could a rat, a tree, nor a river. These things have no agency, will, culture, or thinking capacity. They are parts of nature.⁸

Even if traditional accounts of law are implicitly unequivocal on the centrality and inevitability of humans as the platforms which mediate law into real world effects, the distinguishing faculties that make humans uniquely capable of mediating the law's effects remain undertheorized. Two imaginations, in particular, stand out. The first performs a variety of economic human gestalts, the other frames people as moral creatures. Both share one common feature: They erect a boundary between law and the individual. Law does not constitute the individual. It enters human cognitive flows as an input that modulates the intensity of motivational impulses, but does not influence their production.

II. Variations of Deterrence

One influential way of thinking about how law achieves its power to affect people centers around the notion of *deterrence*. The deterrence imaginary conjures up a story told countless times. The sovereign—an authority with the power to issue authoritative commands—establishes a behavioral requirement on the sovereign's subjects and expects compliance. The behavioral requirement is not a wish. The subjects are under a legal obligation to obey. Further, the obligation is backed by a threat. If the subjects fail to comply, the sovereign will impose a sanction.⁹

⁷ For recent accounts, see FREDERICK SCHAUER, *THE FORCE OF LAW* (2015); SCOTT J. SHAPIRO, *LEGALITY* (2011); RICHARD H. MCADAMS, *THE EXPRESSIVE POWERS OF LAW: THEORIES AND LIMITS* (2015).

⁸ On the constant and failing boundary work required to sustain the distinction between nature and culture, see BRUNO LATOUR, *WE HAVE NEVER BEEN MODERN* (1993).

⁹ On the command model of law, see Gerald J. Postema, *Law as Command: The Model of Command in Modern Jurisprudence*, 11 *PHILOS. ISSUES* 470 (2001); Mark Greenberg, *The Standard Picture and Its Discontents*, 1 *OXFORD STUD. PHIL. L.* 39 (2011).

Humans become susceptible to the sovereign's command influence because their makeup allows the threat of a sanction to have an effect on them. In simplified terms, the human, as a subject of law, is a hedonist: To avoid the pain caused by the sanction, she will comply with the sovereign's command. The sanction provides a reason for compliance, and overrides the person's intrinsic motivation to not do the sovereign's bidding. In this imaginary, law, thus, is about the threat that the sovereign's subjects fear and seek to avoid.¹⁰ It folds the subject's future—manipulated by law to potentially contain the sanction—to bear on her choices at the present.

The exact mechanics of deterrence have been subject to intense debates for centuries. The Benthamite understanding leaves the details unarticulated: "Nature has placed mankind under the governance of two sovereign masters, pain and pleasure. It is for them alone to point out what we ought to do, as well as to determine what we shall do."¹¹ Modern microeconomics has provided law and economics with a far more nuanced understanding of the calculus of pain. *Homo economicus* is assumed to be a rational being with perfect knowledge of her surroundings and stable preference functions engaged in constant utility calculi, where the individual compares the utility of each option available to her and chooses the one that promises her the highest expected utility.¹²

Law, in turn, works on these utility maximizers by manipulating the inputs that go into the incessant calculi. In short, it manipulates the costs and benefits of the choices, creating *incentives*. The sanction exacts a toll on the expected utility flowing from a choice, measured as a function of the probability of being caught and the absolute disutility flowing from being sanctioned, while the utility gains flow from the probability of receiving a reward and the extent of the utility created by the action and reward.

Thus, the details of the deterrence stories vary. Critics have argued that the humans enacted and performed by the microeconomic account are caricatures at best, and have argued for a fuller, more forgiving understanding of human decision-making processes. For the critics, the human condition is not characterized by Becker's cool rationality, perfect information, and stable preference functions, but instead by bounded rationality,¹³ serious cognitive

¹⁰ See also SCHAUER, *supra* note 7, at 93–109 (arguing that the threat of sanction and coercion of obedience are the characteristic signifiers of all modern law).

¹¹ JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION OXFORD: CLARENDON PRESS 1907 at I.1 (1789).

¹² See generally Gary S. Becker, *Nobel Lecture: The Economic Way of Looking at Behavior*, 101 J. POLIT. ECON. 385 (1993). The beauty of the theory is that it can be applied even if demonstrably faulty as an empirical description, see Gary S. Becker, *Irrational Behavior and Economic Theory*, 70 J. POLIT. ECON. 1 (1962).

¹³ OLIVER E. WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM 44–45 (1985).

problems,¹⁴ imperfect and asymmetric information settings,¹⁵ and possibly unstable, time- and frame-incoherent preference functions.¹⁶ Further, whether law in fact deters and how effective it is in deterring undesirable behavior is a fervently contested question, with many critics arguing that the choices law typically seeks to affect are often beyond its reach in terms of deterrence.¹⁷

III. Moral Norms Through Law

Morals and social norms open up another imaginary of law's effectiveness.¹⁸ Here, a fraught picture emerges. In one strand of the moral imaginary, human action is not guided by self-interest. Instead, humans are, at least at times, norm-bound in their decisions. They follow both legal and social norms.¹⁹ The moral nature of humans—the fact that they can adopt and internalize behavioral norms and let them guide their behavior—renders legal interventions capable of affecting the world. If legal interventions can change or sustain the internalized norms we hold ourselves by, then law can affect our behavior.

The imaginary is variegated. How the mechanisms, in particular, function is often left vague. In addition, the economic theory has attempted to internalize norms as parts of its account of human motivation. This works to conflate the norm pathway with the utility calculus pathway.²⁰ Law creates moral norms, sustained by un-official enforcement by second and third persons, creating in the individual an incentive to comply.²¹

¹⁴ Richard H. Thaler, *From Homo Economicus to Homo Sapiens*, 14 J. ECON. PERSP. 133 (2000).

¹⁵ Joseph E. Stiglitz, *Information and the Change in the Paradigm Economics*, 92 AM. ECON. REV. 460 (2002).

¹⁶ See, e.g., Steffen Andersen et al., *Lost in State Space: Are References Stable?*, 49 INT'L ECON. REV. 1091 (2008).

¹⁷ For a general overview, see P. H. Robinson & John M. Darley, *Does Criminal Law Deter? A Behavioural Science Investigation*, 24 OXFORD J. LEG. STUD. 173 (2004).

¹⁸ The imaginary seems to have received relatively little attention in Anglophone countries, see, e.g., generally KENWORTHY BILZ ET AL., *LAW, PSYCHOLOGY, AND MORALITY*, 101–31 (2009); Eyal Zamir et al., *Law, Moral Attitudes, and Behavioral Change*, OXFORD HANDBOOK OF BEHAV. ECON. & L. (Eyal Zamir & Doron Teichman eds., 2014). It has, however, received more attention, for example in the Nordic countries, in regards to criminal law, see JUSSI TAPANI & MATTI TOLVANEN, *RIKOSOIKEUDEN YLEINEN OSA: VASTUUOPPI* 43–45 (2nd rev. ed. 2013).

¹⁹ Habitual obedience, where people's submission gains a "unreflective, effortless, engrained character of a habit," H. L. A. HART, *THE CONCEPT OF LAW* 51–54 (2nd ed. 1994), is one version of the moral-creating effect of law.

²⁰ McAdams provides the most sophisticated account of law's causal pathways. In his account, law serves an expressive, coordinating function, allowing humans to coordinate and homogenize their expectations, but it ultimately converges back on self-interested individual's calculations. See MCADAMS, *supra* note 7 *passim*.

²¹ See generally Steven Shavell, *Law versus Morality as Regulators of Conduct*, 4 AM. L. ECON. REV. 227 (2002); Jon Elster, *Social Norms and Economic Theory*, in *CULTURE & POL.* 363 (Lane Crothers & Charles Lockhart eds., 2000); Joshua W. Buckholtz & René Marois, *The roots of modern justice: Cognitive and neural foundations of social norms and their enforcement*, 15 NAT. NEUROSCI. 655 (2012).

IV. The Barrier In-between

Both imaginaries share one key commonality: They enact and maintain a distance between law and the individual, erecting a barrier in between. The barrier ensures that the law remains external to the person's psyche. As a result of this externality, that legal interventions are not constitutive of the person or her character. Law remains non-productive of the person. Law produces signals, impulses, and outside reasons for the person to choose one course of action over others. At times, it reinforces the person's intrinsic motivational impulses, and at others it counteracts them. These signals do not change how the person thinks, understands her environment, or the workings of her cognitive process. Instead, law works on the finished products of our cognitive processes. Consequently, standard accounts of law hold that legal interventions respect the *a priori* constitution of the human cognitions and volitional processes.²²

This relationship of externality is at its most explicit in the deterrent imaginary. In the moral imaginary, law, however, comes close to producing the human agency, the person it seeks to regulate, as the norms we live by shape us in important ways. They reflect our values, our ethical and aesthetic beliefs and convictions. Nevertheless, the imaginary, I think, finds a way to maintain the distance between the person and law by rendering the social norms analogous to legal rules.²³ The individuals apply the norms, and their application provides reasons for action but the norms are not internalized as part of their psyche to produce the person's intrinsic reasons.

This externality changes in cybernetic regulation. The barrier dissolves. Law infiltrates its subjects' cognitive and volitional processes.

²² In particular, feminist, black studies, and post-colonial studies scholars have argued that this may be an illusion and that legal normative power is, in fact, complicit in producing its subjects. The critics have pointed out that law frames issues, creates social institutions, sustains categorical boundaries and structures, and, most importantly, like other powerful discourses, offers subjectifiers that people can use to subjectify themselves. See, e.g., Nicola Lacey, *The Constitution of Identity: Gender, Feminist Legal Theory, and the Law and Society Movement*, BLACKWELL COMPANION TO L. & SOC'Y 471 (Austin Sarat ed., 2004); Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988); EFRÉN RIVERA RAMOS, *THE LEGAL CONSTRUCTION OF IDENTITY: THE JUDICIAL AND SOCIAL LEGACY OF AMERICAN COLONIALISM IN PUERTO RICO* (2001). The accounts have typically been inspired by the work of Michel Foucault and Judith Butler, see, e.g., Michel Foucault, *Technologies of the self*, ETHICS: SUBJECTIVITY AND TRUTH 223–52 (1997); JUDITH BUTLER, *THE PSYCHIC LIFE OF POWER: THEORIES IN SUBJECTION THEORIES IN SUBJECTION* (1997).

²³ See, e.g., Shavell, *supra* note 21.

C. Introducing Cyborgs

I. Enter Cyborg and Cybernetics

As recounted briefly in the Introduction, the key point I make in this Article is that a novel and distinctly non-anthropocentric legal imaginary is slowly emerging in regulatory practice. This imaginary dethrones humans from their traditional apex in the law, circumventing their status as the sole platforms and mediators of law. Instead of humans, cyborgs now constitute the nexus through which law and regulation flow and effect changes in the external world. Most importantly, the new imaginary obliterates the distance between law and regulation and its subjects. In the cybernetic imaginary, regulatory and legal interventions produce the regulatory targets, pervade them, and constitute their nature as actors.

To understand how this cybernetic law works, a digression into the basic features of cybernetic theory is in order. Here, the story is bifurcated. There are two cybernetic theories.

II. The Union of Flesh and Circuits

The first theory framework posits cybernetic organisms as hybrid creatures of flesh and silica. This strand of cybernetics dominates our popular imagination with the cyborgs populating post-apocalyptic wastelands, dysfunctional megacities, and far away galaxies as monsters or evil man-machine hybrids. The T-800, played by Arnold Schwarzenegger in the movie series *The Terminator*, was first the mortal enemy and then a friend with a metallic endoskeleton, a computer for brains, and soft biological tissue to make the machine resemble a human. Darth Vader in *Star Wars* inverts the construction. Darth Vader was Anakin Skywalker until he turned to the dark side of the Force and, after an accident, was fitted with a respirator, and artificial legs and hands.

The modern off-shoots of the drive to fuse biological substrate and technology are found in *transhumanism*.²⁴ Transhumanism deals with human augmentation and enhancement,²⁵ with a vibrant literature discussing its ethics²⁶ and risks.²⁷ Transhumanism is, however, also shadowed by another, more fundamental framework for cybernetic thought on the relationship between humans and technology. Many theorists, such as the renowned

²⁴ Nick Bostrom, *A History of Transhumanist Thought*, 1 J. EVOL. TECHL. 1 (2005).

²⁵ Nick Bostrom & Anders Sandberg, *Cognitive Enhancement: Methods, Ethics, Regulatory Challenges*, 15 SCI. ENG. ETHICS 311.

²⁶ M. J. McNamee & S. D. Edwards, *Transhumanism, medical technology and slippery slopes*, 32 J. MED. ETHICS 513 (2006); ALLEN E. BUCHANAN, *BEYOND HUMANITY? THE ETHICS OF BIOMEDICAL ENHANCEMENT* (2011).

²⁷ NICK BOSTROM, *SUPERINTELLIGENCE. PATHS, DANGERS, STRATEGIES* ch. 9 (2014).

feminist cyborg theorist Donna Haraway²⁸ and the French philosopher Bernard Stiegler²⁹ have argued that humans are always and inescapably cyborgs.³⁰ To be human is to exist enmeshed with and inside technology. Humans constantly use tools, other physical implements, and intellectual resources to not only augment ourselves, but to make ourselves distinctly human. Our skills and capabilities are collections of different techniques, painstakingly arranged to form a scaffolding around ourselves to allow us to be ourselves. In this sense, humans are always cyborgs.³¹

III. Information Processing Cyborgs

Another possible framework for cybernetic theory also exists. For Norbert Wiener, the father of the post-World War II cybernetic thought in the US, cybernetics was about *information and information processing*. In this strand of cybernetic thought, cybernetic organisms are, pure and simple, entities that process information, take inputs and turn them into outputs, with no flesh and blood necessarily involved.³²

This cyborg imaginary reflects a crucial conceptual change: The emergence of the computer, the thinking machine as the primary archetype of cognition.³³ Cybernetics flips the direction of mimesis between human minds and computers. What happens inside the computer replaces the operations of a human mind as the primary imaginary of cognitive activity. Consequently, human minds are transformed into computers of a very particular kind: Biological information processing units with massive parallel computing power, highly deficient memory functions, and dubious decision-making software. In this imagination, the human brain is the product of an evolutionary process where both the biological wetware and cultural software emerged as the most sophisticated cognitive machines of our day, but contain nothing magical or non-replicable in them. With sufficiently advanced technology

²⁸ Donna Haraway, *A Cyborg Manifesto: Science, Technology and Socialist-Feminism in the Late Twentieth Century*, in SIMIANS, CYBORGS AND WOMEN: THE REINVENTION OF NATURE 149 (1991).

²⁹ BERNARD STIEGLER, TECHNICS AND TIME, 1: THE FAULT OF EPIMETHEUS (1998).

³⁰ For an early musical exploration of the theme, listen to KRAFTWERK, DIE MENSCH-MASCHINE (CAPITAL RECORDS, 1974).

³¹ N. Katherine Hayles, *Flesh and Metal: Reconfiguring the Mindbody in Virtual Environments*, 10 CONFIGURATIONS 297 (2002); ROSI BRAIDOTTI, THE POSTHUMAN (2013); ANDY CLARK, NATURAL-BORN CYBORGS: MINDS, TECHNOLOGIES, AND THE FUTURE OF HUMAN INTELLIGENCE (2003). Compare with Jannice Käll's chapter in this volume, 18 GERMAN L.J. (2017).

³² NORBERT WIENER, THE HUMAN USE OF HUMAN BEINGS (1974). See also generally ANDREW PICKERING, THE CYBERNETIC BRAIN: SKETCHES OF ANOTHER FUTURE (2010) (discussing the early British cybernetics thinkers).

³³ N. KATHERINE HAYLES, HOW WE BECAME POSTHUMAN ch. 1 (1999); JEAN-PIERRE DUPUY, ON THE ORIGINS OF COGNITIVE SCIENCE (2009); JEAN-PIERRE DUPUY, THE MECHANIZATION OF THE MIND (2000); Orit Halpern, *Cybernetic rationality*, 15 DISTINKTION SCAND. J. SOC. THEORY 223 (2014).

and resources, we can create a non-biological computer that is indiscernible from the human brain—a whole brain emulation.³⁴

When the move to conflate cognition with computing coalesces with the first imagery of cyborgs, as enmeshing of flesh and silica, a possibility opens up: As the computer becomes the primary reference point and site for cognition, data processing and cognition change from human-specific activities to potentially something non-human. Cognitive ability is no more a human prerogative, but the property of any thinking machine. Crucially, it becomes possible to think that cognition can be distributed from single human minds to technological systems comprising of multiple, carefully coordinated cognitive sub-entities.³⁵ A new cognitive agnosticism emerges. Cognitions may be biological, hybrids, or entirely technological. It becomes possible to conceptualize humans, possibly augmented by technological appendices, jointed into whole together with technologies, computers, physical infrastructure, and theoretical resources as giant cognitive machineries, as macrocognitions.³⁶ These macrocognitions may be cybernetic organisms. They consist of multiple circuits, as well as a wide variety of hardware, wetware, and software, but the crucial functional affinity to thinking machines remains. The macrocognitions take inputs and process them into outputs in the form of behavioral adaptations.

Edvin Hutchins' theory of distributed cognition is the seminal theoretical account of how these macrocognitions work. Hutchins argued that cognition never, in fact, had its locus in the human mind. Instead of being a human faculty, cognitive action is always extended outside and beyond the mind. Hutchins' case study example was a navy vessel. Although the ship had a dedicated navigator whose mouth usually evokes all navigational commands, Hutchins argued that navigation took place outside the navigator's mind. The commands the navigator uttered were the results of a complex socio-technological arrangement. The arrangement consisted of the navigator, his assistants, lookouts, huyes, alidades, charts and chart tables, telephones, wires, manuals, other ships, mathematicians, and countless cartographers, and spanned centuries in time. The navigator would have been useless without the machinery that was distributed around him and in which he was immersed. This led Hutchins to conclude that the mind is not the site of cognition. Cognition, instead, takes place in radically distributed cognitive assemblage composed of both human and non-human material and immaterial resources.

³⁴ See, e.g., A. Sandberg, *Feasibility of Whole Brain Emulation*, 5 PHILOS. THEORY ARTIF. INTELL. 251, 262 (2013) (arguing that the whole brain emulation has no "fundamental obstacles" but only requires "a large amount of engineering and research"); NICK BOSTROM, *SUPERINTELLIGENCE: PATHS, DANGERS, STRATEGIES* 35–43 (2014).

³⁵ For an early jurisprudential deployment of the idea, see SERGE TAYLOR, *MAKING BUREAUCRACIES THINK* (1984) (arguing that the environmental statements were introduced to forge a particular bureaucratic way of thinking).

³⁶ On micro- and macrocognitions, see Gary Klein & Corinne Wright, *Macro-cognition: From Theory to Toolbox*, 7 FRONT. PSYCHOL. 54 (2016).

D. Contours of Cyborg Law and Regulation

I. Cyborg Impact Pathways

The second strand of cybernetic theory leads me to the fundamental theoretical move of this Article. I argue that law has turned cybernetic during the last few decades. We have incorporated the information processing strand of cyborg theory into some of our regulatory structures. Here, it is important to note the limits of the thesis. I do not argue that the cybernetic turn would encompass the entire spectrum of regulatory projects. To the contrary, my thesis is that the cyborg imaginary seems to inform and explain a relatively restricted number of innovative regulatory projects.

In the following Section, I will argue that existing legal and regulatory interventions already enact and perform their subjects as cybernetic organisms which process information in distributed cognitive assemblages³⁷. To flesh out the thesis, I will develop a conceptual model for this new kind of cybernetic law and regulation. I will sketch out three partly overlapping *impact imaginaries* that explain how cybernetic regulation works and becomes effectual. I will argue that cyborg law finds its impact by: (1) Deploying information-mediated cyborg strategies, (2) engaging in material cognitive agencement, and finally, (3) psychomorphing the human components of distributed socio-technical cognitive assemblages.

The cyborg Information-mediated strategies³⁸ utilize the connection between the informational inputs that enter the cyborgs and the cyborgs' behavioral tendencies. The idea is simple: As machines, the cyborgs have predictable responses to known informational inputs. Affecting the informational inputs will change the behavioral outputs. The notion of material cognitive agencement,³⁹ in turn, puts in full play the theory of distributed material cognition. In agencement-based schemes law finds its impact by controlling the cyborgs' internal compositions as information processing entities. Controlling how and what kind of machinic assemblage information is processed will result in predictable behavioral outcomes. Psychomorphing, finally, provides an inroad into understanding how humans are embedded into cyborg cognitions as reliable "cogs and bolts" of the cognitive machineries.

To facilitate the sketches, I will investigate and comment on four regulatory frameworks which, I think, perform and enact a cyborg regulation approach. The first framework is a relatively small-scale Finnish regulatory project, embedded in the Finnish Gender Equality

³⁷ A key template for the argument can be found in Philip Mirowski's history of post-World War II US economic thought, see PHILIP MIROWSKI, *MACHINE DREAMS: ECONOMICS BECOMES A CYBORG SCIENCE* (2002).

³⁸ See *infra* at Section D.II.

³⁹ See *infra* at Section D.III.

Act. A provision in the Act requires that Finnish employers draft specific gender equality plans for eligible workplaces. The second and third schemes stem from banking regulation. The second process I will discuss is the Internal Capital Adequacy Assessment Program (ICAAP), a giant banking regulation project under the Basel Committee on Banking Supervision (BCBS) and its Basel II Accord⁴⁰ and subsequent Basel II.5 revisions.⁴¹ For my third example, I will argue that the United Kingdom's Financial Conduct Authority's Conduct Rules⁴² also deploys a similar cyborg regulation approach. The first three case studies target management-based regulation (MBR) schemes. The fourth example turns towards nudging—another emergent regulatory modality. The case studies serve two purposes. First, the discussions attempt to demonstrate that the cybernetic imaginary can, in fact, provide a more functional explanation of how the studied regulatory frameworks function than their existing alternatives. Second, the forays allow me to illustrate and further elaborate on important aspects of cyborg regulation.

II. Information-mediated Strategies

1. Slaves to Inputs

Information-mediated strategies weaponize the information dimension of the cyborg existence. Remember that the behavioral outputs of a cybernetic organism are a function of two co-dependent factors. The outputs, first, depend on the internal makeup of the cyborgs' cognitive machinery, that is, their machinic composition. This allows cyborgs to be coordinated through material agencement practices.⁴³ It is, however, important to note that the informational inputs—the second factor—are also crucial. Feeding the cybernetic organisms a particular set of data inputs will trigger largely predictable outputs, if the cognitive proclivities that flow from the cybernetic organism's machinic constitution are known. Thus, an impact pathway emerges. The cyborg's actions can be controlled by regulating the information that enters its cognitive machinery. The crucial point to note is that this information-mediated regulatory strategy skirts direct interventions into the cyborg's constitution. The cyborg itself—its inside—can be left alone.

⁴⁰ BASEL COMMITTEE ON BANKING SUPERVISION, INTERNATIONAL CONVERGENCE OF CAPITAL MEASUREMENT AND CAPITAL STANDARDS: A REVISED FRAMEWORK – COMPREHENSIVE VERSION Part III, <http://www.bis.org/publ/bcbs128.htm> (2006).

⁴¹ BASEL COMMITTEE ON BANKING SUPERVISION, ENHANCEMENTS TO THE BASEL II FRAMEWORK, <http://www.bis.org/publ/bcbs157.htm> (2009).

⁴² Financial Conduct Authority, FCA HANDBOOK COCON, <https://www.handbook.fca.org.uk/handbook/COCON/2/?date=2016-06-30>.

⁴³ See *infra* at Section D.III.

2. Feeding Information to Gender Equality Cyborgs

To illustrate how information-mediated cyborg regulation works, consider a Finnish regulatory scheme designed to advance workplace gender equality. The scheme is located in two sections of the Finnish Gender Equality Act, Sections 6(a) and 6(b). The two sections require that all Finnish employers, with over 30 employees regularly on their payrolls, must draft bi-yearly gender equality plans for each workplace. First, the plan must contain a survey of gender equality at the workplace. The survey should analyze of the distribution of men and women in different occupations and contain a pay survey detailing the differences in pay and pay grades between men and women. Second, the plan must include a list of measures that the employer plans take to promote gender equality and equality in compensation. Third, the plan is to contain an appraisal of the results of the measures contained in earlier gender equality plans. The rules require the employer to draft the plan in cooperation with employee representatives.

If one deploys the cyborg regulation model to analyze the scheme, patterns emerge. First, the rules require that a specific body is set up. The body consists of both employer and employee representatives. It does not bear direct responsibility for drafting the plan, but functions as a co-operational body that prepares it. In cybernetic terms, the body is a distributed cognition that works on gender equality issues at the workplace. It processes information, plans action, and evaluates results. The specific composition of the body will likely give it particular behavioral proclivities compared to alternative implementations. The introduction of employee representatives, for example, is likely to change the way the body operates when compared to what would likely happen if the representatives were absent.

The distributed cognition facet of the project is not, however, the key issue here. Instead, I discuss the rules to illustrate a very small scale example how the distributed cognitions can be controlled through information. The information-mediated impact mechanism becomes visible when we look at how information is used in the rules to affect the outcomes of process within the gender equality bodies. Remember that the plans must be built on a “survey of the gender situation at the workplace and analyze the responsibilities women and men have, and detail pay and pay differences.” By determining what information becomes available to the gender equality cyborg, the rules, effectively, frame and define what gender equality is and, consequently, significantly affect what will be done to address gender equality as a problem. The rules on information acquisition, first, translate the abstract idea of gender equality into a battery of discrete measurements. They turn the issue into numbers and indicators, specific categories of data. The scheme, second, ensures that these inputs serve as the focal points for the gender equality body’s cognitive work, the things that constitute the objects of strategizing, planning, and manipulations. Equality is performed and enacted and worked on through the indicators. Improvements in equality translate into improvements in the indicators.

Here the particular mode of information-mediated legal effectiveness comes into view. The informational setting has no prescribed behavioral consequences, but is likely to have a predictable impact. In this case, the informational set-up increases the odds that the plans will to contain measures that trigger changes in the indicators the rules assign as the objects of interests. Further, as the process is also normatively rigged, the indicator values will likely move towards increasing equality and, ultimately, pay parity.

3. Information Mediated Regulation in ICAAP

The ICAAP rules contain another example of how information-based cyborg regulation works. ICAAP was originally a part of the 2006 Basel II reform package,⁴⁴ the constitutive document of the pre-crisis banking regulatory paradigm, but it was augmented in 2009 with “additional guidance.”⁴⁵ Until recent years, the Basel Accords have focused on exclusively capital adequacy.⁴⁶ The capital adequacy strategy builds on the assumption that banks, by their nature, take excessive risks and over-leverage their books if not strictly regulated.⁴⁷ Consequently, regulation has centered around imposing minimum capital requirements on the firms. The goal was to ensure that individual banks hold sufficient capital reserves to guarantee macrolevel banking system stability. The ICAAP rules were introduced to complement the minimum capital strategy. They “encourage banks to develop and use better risk management techniques in monitoring and managing their risks.”⁴⁸

Risk measurement technologies, consequently, constitute the bedrock element of the monitoring prong in the Basel II ICAAP project. The anatomy of the prong is relatively simple. First, the ICAAP rules identify a selection of banking risks. The list includes, for example, credit risk, market risk, operational risk, counterparty credit risk, liquidity risk, banking-book interest rate risk, and strategic risk.⁴⁹

After identifying the risks, the rules contain a set of *de facto* mandatory blueprints for designing and implementing a functional risk-measurement system for each of the risks.

⁴⁴ BASEL COMMITTEE ON BANKING SUPERVISION, *supra* note 40, at Part III.

⁴⁵ BASEL COMMITTEE ON BANKING SUPERVISION, *supra* note 41, at 9–27.

⁴⁶ On the history of the Basel Accords, see C. A. E. GOODHART, *THE BASEL COMMITTEE ON BANKING SUPERVISION : A HISTORY OF THE EARLY YEARS, 1974–1997* (2011); DANIEL K. TARULLO, *BANKING ON BASEL: THE FUTURE OF INTERNATIONAL FINANCIAL REGULATION* (2008).

⁴⁷ On the theoretical underpinnings, see, e.g., Joao A. C. Santos, *Bank Capital Regulation in Contemporary Banking Theory: A Review of the Literature*, 10 *FIN. MARK. INSTITUTIONS INSTRUMENTS* 41 (2001); David Miles, Jing Yang & Gilberto Marcheggiano, *Optimal Bank Capital*, 123 *ECON. J.* 1 (2013).

⁴⁸ BASEL COMMITTEE ON BANKING SUPERVISION, *supra* note 40, § 720.

⁴⁹ *Id.* § 732–42.

While the rules allow banks considerable leeway in determining the specifics of the systems, they require that the banks build systems that meet strict quality standards. Encouraging good risk management, thus, translates into a requirement to build giant risk-measurement and management systems. The ensuing risk-measurement systems are giant, and hugely expensive, contraptions combining technological infrastructures, theory frameworks, and conceptual schemes with people and computing power. They constitute, in effect, distributed risk sensory systems—the banks' risk eyes and ears.⁵⁰

To understand how the systems work, consider the credit risk measurement system. Credit risk is the quintessential risk banks run. If a bank lends money to a borrower, the firm risks that the borrower may fail to repay the loan—in other words, default.⁵¹ After a default, the bank will have to make an impairment write-down to asset value and report a loss. This risk of loss is the credit risk. The credit risk measurement systems, in turn, allow banks to turn this menacing possibility into an object.

Gauging the risk with an ICAAP compliant system is by no means straightforward. To implement an advanced credit risk measurement system, a bank must first collect or otherwise procure massive amounts data on past default experience.⁵² Then, analysts must perform comprehensive and complicated statistical analyses to identify risk factors that borrowers with similar past default rates share.⁵³ Once the risk factors are known, the analysts allocate past borrowers with the identified similar features into credit grades and calculate a yearly default rate for each grade. Finally, the backward-looking default rate data are transported from the past to the future and turned into prospective default probabilities.⁵⁴ If, for example, ten out of a thousand borrowers in a grade have defaulted each year during a ten-year period, the bank may infer that the probability of default (PD) for the borrowers in the grade is one percent. Finally, the new PD data can be used as an input in value-at-risk models. The models fuse the PDs with advanced statistical theory, assumptions about correlations, and probability distributions to ultimately produce quantitative estimates of overall the riskiness of the portfolio.⁵⁵

⁵⁰ The process in which the systems are built is also an agencement process. I will discuss agencement in more detail below in Section D.III, but in relation to the ICAAP risk measurement systems.

⁵¹ BASEL COMMITTEE ON BANKING SUPERVISION, *supra* note 40, at § 452–53.

⁵² *Id.* § 462.

⁵³ *Id.* § 416.

⁵⁴ *Id.* § 447.

⁵⁵ On methodologies available at the time Basel II was designed, see, *e.g.*, Michel Crouhy, Dan Galai & Robert Mark, *A Comparative Analysis of Current Credit Risk Models*, 24 J. BANK. & FIN. 59 (2000).

I argue that the ICAAP rules on risk-measurement system designs perform a variation of the information-mediated cybernetic regulation strategy. On the one hand, the rules force banks to engage with particular objects. To expand on the example above, credit risk is compelled—of course, for a good reason—to be treated as the risk of default and ensuing impairment write-downs. The rules impose an ontology of risk on the banks, in essence requiring them to focus on this kind credit risk. On the other hand, the systems also ascribe an epistemology of the object on the banks. Here, the rules determine how the risk can be turned into a quantitative expression, and how the vaunted operative expression, probability of default, can be created.

The exact behavioral consequences of ICAAP input interventions are diffuse and hard to trace on an exact scale. The stratagem the regulators pursue does not, however, require detailed knowledge. The ICAAP rules seek to increase banking system stability by rendering banks more rational and sophisticated risk managers than they would be without intervention. To attain that purpose, the regulators articulate and re-enforce reasonable ontologies for the objects the banks should work on. In addition, they arm banks with functional epistemological technologies to know the objects. This should take the banks a long way towards stability. A bank that knows what it should be thinking about and has the ability to quantify the thing that should be at the center of its travails is likely much safer than one that remains ignorant and clueless. The behavioral consequences may be diffuse if their overall direction is desirable.

III. Material Cognitive Agencement

1. What is Material Cognitive Agencement?

The second cybernetic strategy bundle centers around what I call *agencement*. Agencement is a concept based on the work of Michel Callon, a French sociologist and one of the founding fathers of actor network theory (ANT). In two articles dating back to 2005⁵⁶ and 2008,⁵⁷ Callon argued that human economic agency should be understood as consisting of multiple parallel distributed cognitions. Agencement, then, was the operative concept that Callon coined to describe the cognition. The term is a neologism founded on a French wordplay on the two meanings of the word agencement. First, agencement is an apt notion for conceptualizing what economic agency is for Callon—becoming and existing as an economic agent is a process. Humans agencify themselves and are agencified, reflecting the first meaning of the word. The endstate of the “agencification” process is, by the second meaning of the word, an assemblage. To invest their agency, humans weave and are woven into

⁵⁶ Michel Callon, *Why Virtualism Paves the Way to Political Impotence: A Reply to to Daniel Miller's Critique of the Laws of the Markets*, 6 ECON. SOC. EUR. ELECTRONIC NEWSL. 3 (2005).

⁵⁷ Michel Callon, *Economic Markets and the Rise of Interactive Agencements: From Prosthetic Agencies to Habilitated Agencies*, in LIVING IN A MATERIAL WORLD 28 (Trevor Pinch & Richard Swedberg eds., 2008).

assemblages of heterogenous and often unexpected entities, computers, theories, identity markers, calculative devices, and other intellectual resources: Humans are “made up of human bodies but also of prostheses, tools, equipment, technical devices, algorithms, etc.”⁵⁸ In argument that, for example, Andy Clark echoes,⁵⁹ Callon argued these resources, in effect, make humans who they are, give us our capacity to make decisions and their proclivities for particular decisions. Economic actors, thus, comprise not only their material bodies and its components but also myriad of socio-technological material appendages, inescapably making for a cyborg existence.

Although Callon’s primary objective in the 2005 and 2008 articles was to explain human agency, the theory can and has been used to make sense of essentially any cognitive actor, human or not. This point was made by two British sociologists, Ian Hardie and Donald Mackenzie, in a 2007 article^{60, 61}

Hardie and Mackenzie’s article reported an ethnographic study of a hedge fund. The authors attempted to make sense of how the hedge fund became an actor. Hardie and Mackenzie demonstrated that the hedge fund as an agent consisted of an assemblage of material things: Its human principals and their brains, their cognitive styles and educational resources, but also the rotating interns, the information flows and communication equipment, computers and displays, the seating arrangements in the office, and the purpose-built calculative devices lists. Each component was determinative of how the fund acted and what it did. Any change in assemblage was likely to have an effect on the fund’s behavioral inclinations. The fund’s agency, consequently, was a function of the socio-technical agencement that it was.⁶²

⁵⁸ Callon, *supra* note 56, at 4.

⁵⁹ See, e.g., CLARK, *supra* note 31.

⁶⁰ Ian Hardie & Donald MacKenzie, *Assembling an Economic Actor: The Agencement of a Hedge Fund*, 55 Soc. Rev. 57 (2007). For other deployments, see Dan Swanton, *The Steel Plant as Assemblage*, 44 GEOFORUM 282 (2013); Cédric Calvignac & Franck Cochoy, *From “Market Agencement” to “Vehicular Agencies”: Insights from the Quantitative Observation of Consumer Logistics*, 19 CONSUM. MARK. CULT. 133–147 (2016); Luis Araujo & Hans Kjellberg, *Enacting Novel Agencements: The Case of Frequent Flyer Schemes in the US Airline Industry (1981–1991)*, 19 CONSUM. MARK. CULT. 92 (2015); Thomas Lemke, *New Materialisms: Foucault and the “Government of Things,”* 32 THEORY, CULT. & SOC. 3 (2015); Philip Roscoe, *Economic Embeddedness and Materiality in a Financial Market Setting*, 61 Soc. Rev. 41 (2013).

⁶¹ Callon himself also pointed out that “[a]gency . . . can be attributed to heterogeneous and unexpected entities which are not necessarily human beings (“the French economy” that creates unemployment; “biotechnology” which generates ethical problems; “genes” which are said to cause severe diseases and/or impairments).” Callon, *supra* note 56, at 4.

⁶² Hardie & MacKenzie, *supra* note 60, at 75–76.

If we understand that the material setup of agents, humans and non-humans alike, has a bearing on their agency, and on what the agents do, the cyborg regulatory impact pathway opens up. As Callon himself writes “[b]ecause agencies are made they can be (re)made, at least to some extent . . . [r]econfiguring an agency means (re)configuring the socio-technical agencements constituting it, which requires material, textual and other investments.”⁶³ Thus, if the regulators can determine the assemblages that agents consist of, it becomes possible to, again, under-determine how the agents behave. This is what is done in regulatory agencement processes. The rules force their targets to put in place particular cognitive agencements to effect predictable but under-determined behavioral changes.

Here, it is important to note that regulatory agencement practices are often tightly enmeshed with information-mediated cyborg regulation approaches. In fact, the information strategies often overflow into and are implemented through material agencement projects, as is done, for example, in the ICAAP. The availability of particular information—default probabilities in the example above—can only be secured by requiring the regulatory subjects to build complicated cybernetic sensory systems that are configured to produce the highly specific data feeds.

2. *Making a Capital Adequacy Cognition*

To illustrate what regulatory agencement does and how it works in practice, I will again turn towards the ICAAP and now its second prong—the rules on risk management systems. My claim is that these ICAAP rules are best understood as triggering a material agencement process that will result in the emergence of two cognitive machineries: 1) A distributed *capital adequacy cognition*; 2) a capital adequacy action system. The regulatory interventions ensure that banks design and deploy purpose-built large-scale, complicated technological machineries to develop a prudent capital adequacy awareness and prime the bank to act on that awareness. The objective of both agencement processes is to improve bank stability by inculcating organizational prudence—in other words, by fostering an organizational obsession with capital adequacy and ensuring that the obsession permeates the entire bank and translates into concrete action.

Both systems are tightly enmeshed with the risk measurement systems I discussed above. Work within the capital adequacy cognition feeds on the risk information the risk measurement systems produce, while the capital adequacy action system exists to deploy the resulting capital adequacy awareness to govern the banks’ everyday actions.

The capital adequacy cognition functions as the bank’s capital adequacy brain. The system consists of two sequential processes.

⁶³ Callon, *supra* note 56, at 4.

First, the board and senior management, high-level actors in the banks' hierarchical structures, must engage in an analytical process that attempts to situate the risks the bank faces in relation to the capital resources available to the bank. The rules, for example, provide that bank management is "responsible for understanding the nature and level of risk being taken by the bank and how this risk relates to adequate capital levels," and instruct the management undertake "[t]he analysis of [the] bank's current and future capital requirements."⁶⁴ The post-crisis Basel II.5 additional ICAAP guidance adds detail to the process. Management has to develop an integrated view of the risks across the bank's organizational silos and also understand the correlations, concentrations, and interplay of risks taken in all quarters of the bank.⁶⁵

Second, once the analytical process is finalized, the bank is required to put the resulting risk awareness to use in planning its future. Bank management is directed to formulate a "strategic plan [that] clearly outline[s] the bank's capital needs, anticipated capital expenditures, desirable capital level, and external capital sources."⁶⁶ Bank boards receive another mission. They are to set the bank's "tolerance" or "appetite" for risk. By setting the risk tolerance, the board articulates how much the bank is willing to lose in a few bad cases to make a desired level of profit under most circumstances.⁶⁷

The regulatory agencement process, thus, forces banks to set up multimember bodies of humans to monitor and process data feeds within a tightly regulated framework. The bodies have detailed, prescribed tasks, and their work is coordinated and embedded in purpose-built workflows that ensure a capital adequacy awareness will emerge.

It is important to note that the process is not normatively neutral. Instead, material resources are carefully choreographed to ensure that the decisions made within the process reflect capital adequacy concerns at the expense of profit maximization. This normative loading takes place through a mix of agencement and information-mediated strategies. The stratagem seems to be to entrench a particular organizational sensibility by inundating the bank's high-level bodies with prudentially geared tasks, devices, vocabularies, ontologies, and data. Ultimately, as these endless prudential calculations, assessments, and plans come to be performed regularly, a prudential sensibility will become immersed into the banks' organizational fabric and incorporated into its decision-making routines. The prudential tasks, thus, seem designed to overpower the bank's natural behavioral proclivities. Consequently, reckless risk-taking should be suppressed when the capital adequacy implications of the decisions are always present. The methods, however, guarantee nothing.

⁶⁴ BASEL COMMITTEE ON BANKING SUPERVISION, *supra* note 40, § 728–30.

⁶⁵ BASEL COMMITTEE ON BANKING SUPERVISION, *supra* note 41, at 12–15.

⁶⁶ BASEL COMMITTEE ON BANKING SUPERVISION, *supra* note 40, § 728.

⁶⁷ *Id.* § 730.

They can only increase the likelihood that the bank will make responsible decisions when the resources needed to make them are at its disposal.

3. Priming the Bank for Action

The ICAAP rules also require that the situational risk awareness that the capital adequacy cognition produces is deployed to affect and condition the bank's concrete actions. The rules seem to assume that banks are made up of a network of semi-independent actors—business line managements, credit committees, down to credit officers, and individual traders. These actors may, if not coordinated, entertain and perform divergent understandings of risk, incentives, and interests. The challenge is in ensuring that the hard-fought capital adequacy awareness is translated into concrete action when the down-stream actors make real-life trade-offs between credit and other risks, capital reserves, and return opportunities. The high-level capital adequacy cognition has to be able to influence the lower level actors, and to force what is a plural, hard-to-control collection of individual agents to act in accordance with capital adequacy cognition's vision. To accomplish this task, the rules sketch out a complicated set of control and coordination devices designed to subdue the potentially unruly downstream actors.

The ICAAP control devices come in three varieties. The rules distinguish between, first, controls, processes, and procedures; second, policies; and third, limits. The devices all deploy different assemblages to affect the independent risk actors within the banks.⁶⁸

The rules on controls, processes, and procedures follow well-known management patterns. They require the banks to build management systems that implement everyday hierarchical organizational accountability practices that any large-scale organizations are likely to use. The objective is to ensure that banks are coordinated bureaucratic organizations. The rules require the bank to put in place procedures to govern who or what entity has the authority to, for example, approve loans and make investment decisions, and how these decisions are made and reviewed. The idea is to script workflows that can put the capital adequacy cognition's vision of appropriate measures into action. The devices, however, retrace familiar legal patterns. They regulate the actors much like traditional command-and-control regulation does—by imposing external behavioral requirements.

Policies, by contrast, seem to put in play another imaginary. These devices work through framing, and they seem to do so in a more circumspect fashion than controls, processes, and procedures. The devices sometimes force action and script, but typically only articulate the scaffolding for the downstream actors to use while making decisions. This modality of control leaves the downstream actors some room for maneuver and improvisation while at

⁶⁸ BASEL COMMITTEE ON BANKING SUPERVISION, *supra* note 41, at 14.

the same time ensuring centralized control. A credit policy is a good example.⁶⁹ The policy allocates authority to extend or decline credit to diverse actors within the bank. A credit officer may, for example, approve applications of a certain maximum loan size to customers whose credit scores exceed a set threshold. The policy might also articulate pricing terms as a function of credit scores. It is important to note two issues. First, the policy does not script action; it only determines the cognitive tools and framework under which action should be planned and strategized, and it may prime certain action. Second, policies are important tools in homogenizing cognitive operations within the bank. Without a credit policy, each credit officer would be left to perform credit risk as a function of her individual agencement, perhaps conditioned and shaped by the psycho-morphs, prostheses, and plug-ins flowing from past training or experience. This would lead to the performance of multiple credit risks within the bank. Once a policy is imposed on the actors, however, the ontology and performance of credit risk is—at least partly—homogenized within the bank.

Limits⁷⁰ similarly set the ontological frame for their target's cognitive work. The effects are less determinate, however, as limits often only determine the outer bound for action. For example, a trading position value-at-risk limit provides a trader a target ontology by which to assess the risks she takes, but constrains her actions inside this ontology by restricting the amount of value-at-risk capital they may employ.

IV. Nudging as Intra-person Agencement

Nudging provides another example of how regulation by agencement works. Nudging is a novel, fast-spreading,⁷¹ but ethically controversial⁷² and politically disputed⁷³ approach to regulating human behavior⁷⁴. The approach sets itself apart from traditional regulatory

⁶⁹ BASEL COMMITTEE ON BANKING SUPERVISION, *supra* note 40, § 397.

⁷⁰ See *e.g.*, *id.* at § 688.

⁷¹ On the state-of-play in Europe, see, *e.g.*, Joana Sousa Lourenco et al., BEHAVIOURAL INSIGHTS APPLIED TO POLICY: EUROPEAN REPORT 2016 (2016).

⁷² For a sample of countless articles, see, *e.g.*, Cass R Sunstein, *Nudging and Choice Architecture: Ethical Considerations*, YALE J. ON REG. 1 (2014); Andreas Kapsner & Barbara Sandfuchs, *Nudging as a Threat to Privacy*, 6 REV. PHIL. PSYCHOL. 455 (2015); Jeff King & Christopher McCrudden, *The Dark Side of Nudging: The Ethics, Political Economy, and Law of Libertarian Paternalism*, CHOICE ARCHITECTURE IN DEMOCRACIES: EXPLORING THE LEGITIMACY OF NUDGING 75 (Alexandra Kemmerer et al. eds., 2016); T. M. Wilkinson, *Nudging and Manipulation*, 61 POL. STUD. 341 (2013); Pelle Guldborg Hansen & Andreas Maaløe Jespersen, *Nudge and the Manipulation of Choice*, 1 EUR. J. RISK REG. 3 (2013).

⁷³ On a critique of the "Third Way" political program of nudging, see, *e.g.*, Pierre Schlag, *Nudge, Choice Architecture, and Libertarian Paternalism*, 108 MICH. LAW REV. 913 (2010).

⁷⁴ A legal framework for understanding and evaluating nudging is still largely missing. See, *e.g.*, Alberto Alemanno & Alessandro Spina, *Nudging Legally: On the Checks and Balances of Behavioral Regulation*, 12 INT. J. CONST. LAW 429 (2014).

modalities by emphatically being what the others are not. Nudging skirts, by design, the command, threat, incentive, and social norm imaginaries of regulation. The fathers of nudging, Richard Thaler and Cass Sunstein, frame the practice by defining a “nudge, . . . [as] any aspect of the choice architecture that alters people's behavior in a predictable way without forbidding any options or significantly changing their economic incentives.”⁷⁵

The impact mechanism underlying nudges effectively inverts the traditional regulatory approach. Instead of trying to override undesirable choices likely to emerge without an intervention, a nudge seeks to manipulate the choice architecture—the setting for the choice—to cause a person to make a desirable choice instead of the less favored choice.

Nudges differ in their orientation and mechanisms. Robert Baldwin distinguishes seven nudge types.⁷⁶ *Informational nudges* are relatively innocuous. They work by manipulating the informational premises underlying decisions, but sometimes also prime action by laying out possible action paths and activating people's desire to conform with others, as humans are essentially herd animals.⁷⁷ *Persuasive nudges* put emotions into use. Pictures of cancerous lungs on cigarette packs, for example, typically evoke repulsion. The emotional response is likely to decrease people's willingness to smoke. *Default choice nudges* exploit human laziness and our aversion to expend resources to make explicit choices.⁷⁸ *Architectural nudges* work by arranging the physical environment in a way that makes desirable choices easy and undesirable choices burdensome.⁷⁹ *Commitment devices* work to diminish our impulsivity,⁸⁰ while *transactional shortcuts* can be used to make desirable actions easier than the undesirable ones. Finally, *exemption nudges* lift restrictions that would otherwise be applicable to certain measures, when the actions are desirable.

⁷⁵ RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 6 (2008).

⁷⁶ Robert Baldwin, *From Regulation to Behaviour Change: Giving Nudge the Third Degree*, 77 *MOD. L. REV.* 831, 833 (2014).

⁷⁷ THALER & SUNSTEIN, *supra* note 75, at 56–60.

⁷⁸ The results of appropriate default choice architecture are sometimes striking. Studies have, for example, shown that people enroll in organ donor programs in great numbers if the enrolment is an opt-out choice on a driver's license application form, while the enrolment rate is much lower if people are required to tick a box to opt in on the very same form. On default choice nudges, see, e.g., Cass R. Sunstein, *Deciding by Default*, 162 *UNIV. PA. L. REV.* 1 (2013).

⁷⁹ Healthy snacks, for example, can be placed close to typical routes and easily visible in stores or in academic conferences, while the unhealthy ones are stacked in hard-to-find places. See, e.g., Ida Kongsbak et al., *Increasing Fruit and Vegetable Intake Among Male University Students in an Ad Libitum Buffet Setting: A Choice Architectural Nudge Intervention*, 49 *FOOD QUALITY & PREFERENCE* 183 (2016).

⁸⁰ Gharad Bryan, Dean Karlan & Scott Nelson, *Commitment Devices*, 2 *ANNU. REV. ECON.* 671–98 (2010).

Nudging and the cyborg imagination seem, at first glance, to be an ill-fitting pair. Nudging utilizes our developing knowledge of human cognitive patterns and proclivities. In particular, second and third-degree nudges⁸¹ target human behavioral or volitional limitations and “automatic” responses by latching on to what are distinctly human rationality deficiencies, including our proneness to fall for confirmation and availability biases, overwhelming emotionality, optimism, laziness, vulnerability to framing, and general ineptitude in dealing intuitively with probabilities and, consequently, with risks and pay-outs. Thus, nudging in effect weaponizes the messiness of the human cognitive condition. It has, seemingly, nothing to do with cyborgs.

The affinities between cyborg imaginations and nudging theory, however, become visible when we look at the imagination of human cognition underlying the practice. The key idea is that choice architects can know human cognition works. The cognitive model posits that human cognition is a function of different processes that fire and activate under certain conditions.⁸² The art of nudging, then, is about utilizing this knowledge, and ultimately about bypassing, enlisting, and counteracting the countless cognitive tendencies, traits, and errors that human cognition contains. Consequently, if the choice architects are able to push the choice to a specific setting and, consequently, influence which systems and cognitive patterns are triggered, they can under-determine—on the balance of probabilities—what people will do.

In this frame, nudging emerges as a prime example of the real material agencement of human beings. The underlying theory and, consequently, nudging perform and enact humans as information processing entities that comprise multiple discreet wetware circuitries. Human behavior becomes, then, susceptible to regulators’ influence when and if the regulators can design interventions that reliably trigger specific circuits over the other possible cognitive patterns, and ultimately arrive at an intervention that gives rise to desired decisions. This imagination is, essentially, a cyborg imaginary. Humans are cognitive machines whose composition can be manipulated at will. The interventions are, however, fleeting, and unwind automatically once the choice architecture discharges, unlike the more enduring manipulations that take place in the material distributed macro-cognitions.

⁸¹ Baldwin, *supra* note 76, at 843.

⁸² For an introduction, see DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011). Surprisingly, the neuroscientific foundations and explanations of nudging still seem somewhat fuzzy. See Gidon Felsen & Peter B. Reiner, *What Can Neuroscience Contribute to the Debate Over Nudging?*, 6 REV. PHIL. PSYCHOL. 469 (2015).

V. *Psycho-morphing*

1. *What is Psycho-morphing?*

Above, I have used agencement to primarily refer to processes which are easy to understand with the metaphor of a computer as the archetypal cognitive device. Callon's original use of the concept, however, targeted persons in the first place, and also incorporated what are typically conceptualized as psychological processes. My contention is that the cyborg regulatory imagination extends also to the intra-cranial. For purposes of clarity, I will use another concept, psycho-morphing, to explore the cultural and psychological human agencement processes that lack overt technological components.

Psycho-morphing as a concept was introduced by another actor-network theory grandee, Bruno Latour, in 2005. The concept appears when Latour discusses the nature of human cognition. Latour shares Callon's idea that human cognition is, in fact, distributed to thousands of socio-technical devices or "plug-ins," "pellets," "patches," and "applets" that reside outside human mind.⁸³ This prompts Latour, however, to turn back to the intra-cranial and ask, "What about me, the ego." If we are nothing but a collection of extra-bodily things, the internal workings of the human mind seems left out, the soul hollowed: "Am I not in the depth of my heart, in the circumvolutions of my brain, in the inner sanctum of my soul, in the vivacity of my spirit, an 'individual'?"⁸⁴

For Latour, like Callon, this is not a problem. He goes on to advance a distributed cognition theory of being human, even without the material plug-ins or the wetware circuitries. This move, in effect, extends the cyborg imaginary to psychological processes. Even our egos are always "individualized, spiritualized, interiorized" by the many things we attach to ourselves and that flow through us. These are "psycho-morphs, that . . . literally lend you the shape of a psyche."⁸⁵ Latour takes up love as an example. Our experience of love and subjectivity as lovers can be traced to the abundant cultural psychomorphs, to "poems, songs and paintings, not to mention the countless retinue of angels, cherubs, putties, and arrows."⁸⁶

The outlines of the assemblages these cultural "things" create are far messier and harder to detect and track than the real, tangible ingredients that go into the giant socio-technical assemblages in material agencement projects. Nevertheless, these "subjectifier" compositions exist and make the up ego in complex interaction with the "physical" plug-ins and the biological substrata.

⁸³ BRUNO LATOUR, REASSEMBLING THE SOCIAL: AN INTRODUCTION TO ACTOR-NETWORK-THEORY 204–06 (2005).

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

While psycho-morphs and psycho-morphing are, on the level of theory, only parts of agencement processes, keeping them apart from socio-technical material agencement processes still seems useful. Psychomorphing shines a spotlight on the plasticity of humans, and underscores that they may be encompassed by the cyborg imaginary even without the presence of material technological appendages or manipulation of biological substrate. The notion allows the cybernetic imaginary an inroad into the culturally determined parts of human existence and opens up a way to conceptualize a new, more detailed impact pathway for cyborg regulation. Regulation can, when it works through psychomorphing, encompass humans and the human psyche, reordering, on a fundamental level, the cyborgs within us. Cybernetic regulation is not only forging and cultivating non-human and hybrid cybernetic organisms. It can affect humans as well, manipulate their make-up as agents.⁸⁷

2. How Does Psycho-morphing Work in Practice?

The motivations underlying psycho-morphing interventions are clear-cut. Agencement processes typically embed humans into cognitive apparatuses that comprise a multitude of other elements. In order to function, these assemblages typically require that very particular kinds of humans be present. A CEO, an employer, or an employee in a bank's capital adequacy cognition cannot be present as anyone or as a bare human being. The human needs to have a particular identity, a specific skill set, competencies, and attitudes, and a mindset that renders her a reliable object for embedding into the assemblage as a component.

The techniques used for this purpose are often temporally distant, sometimes years or decades away, and causally diffuse from the immediate regulatory environment. This makes them difficult to trace and observe. *Training* in its different forms is, without a doubt, the most common form of psycho-morphing. Any bureaucracy or commercial organization worth its salt will require that its staff go through appropriate training to possess sufficient competence to perform its functions. Regulators, unsurprisingly, often use training requirements as parts of their regulatory schemes. The practice is mundane and uncontroversial. To me, however, training is psycho-morphing. People undergo training to make them effective information processing entities than can be embedded into expert systems.

To understand how training could be conceptualized in the cybernetic frame, take an example from Latour. In a 2004 article,⁸⁸ Latour discussed how perfume professionals,

⁸⁷ The relationship between nudging and psycho-morphing is fraught as there seems good reason to think that the rational Econs, in particular, are cultural constructs. The Econs' rationality can only be imprinted on the Humans with the help of countless years of education and training, that is, psycho-morphing and material agencement.

⁸⁸ Bruno Latour, *How to Talk About the Body? the Normative Dimension of Science Studies*, 10 *Body Soc.* 205 (2004).

“noses,” are trained. The key device in the process is a “malette à odours,” an odor kit. The kit is a collection of a wide variety purified chemicals used in perfumes. The humans undergoing training are trained to identify the fragrances. A standard account would likely argue that the kit allows the human to develop their innate ability to analyze fragrances. Latour, instead, argued that training, in fact, folds the kit into the human: “[T]he kit (with all its associated elements) is part and parcel of what it is to have a body, that is to benefit from a richer odoriferous world.”⁸⁹ A cybernetic, distributed cognition understanding of training, thus, would conceptualize the process as the fusing of material and intellectual resources to the humans.

Regulatory examples abound. One example of a way to implement the training requirements is the UK financial sector Certification Regime. The Regime requires that all employees performing FCA-specified significant-harm functions must be fit for their jobs, with the firm ensuring on a continuous basis that each person has obtained a qualification, has undergone—or is undergoing—training, possesses a level of competence, or has the personal characteristics required by the FCA general rules.

Other, non-training related regulatory psycho-morphing schemes, however, also exist. In particular, in recent years, regulators have started to focus on *mindsets* and *culture* as important targets for regulatory interventions.

The Basel ICAAP rules, again, provide a small-scale example of psycho-morphing mindsets that targets mindsets. Remember that the ICAAP rules seek to build a complicated socio-technical capital adequacy cognition. Among other things, the cognitions contain humans as their components. For example, a bank’s board and senior management, dozens of humans, constitute the prime elements of the banks’ capital adequacy cognitions. The numerous humans that make up the board and senior management, crucially, also need to have an appropriate mindset to function as expected. To do this, the rules take important but inconspicuous measures to psycho-morph the board members and senior management. First, the rules put in place a psycho-morph that provides that “senior management and the board should view capital planning as a crucial element in being able to achieve its desired strategic objectives.”⁹⁰ The move is innocuous. It attempts to reschedule the humans’ priorities. Senior management and the board should not be concerned only with profits, as bankers are typically wont to do, but take bank stability into account as an overriding priority. The revised 2009 Basel II.5 rules similarly overflow into psycho-morphing. The board of directors and senior management are now required to “possess sufficient knowledge of all major business lines” and to “have the necessary expertise to ensure that appropriate policies, controls and risk monitoring systems are effective.”⁹¹

⁸⁹ *Id.* at 207.

⁹⁰ BASEL COMMITTEE ON BANKING SUPERVISION, *supra* note 40, § 729.

⁹¹ BASEL COMMITTEE ON BANKING SUPERVISION, *supra* note 41, at 13.

More detailed psycho-morphing schemes, I argue, have sprung up elsewhere in the financial regulation landscape. In many post-crisis post-mortems, a “culture of greed” was deemed a key factor that had contributed to the financial crisis.⁹² A number of regulatory reform projects have subsequently emerged to inculcate a less toxic and predatory culture inside the banks. The UK FCA’s Conduct Rules,⁹³ introduced in 2015, probably constitute the most expansive of these projects. The rules were, paradoxically, followed by the Authority’s decision to scrap a broader review into culture in banking.⁹⁴

The Conduct Rules introduced a Code of Conduct (COCON) ruleset centering around nine high-level individual conduct and senior manager rules to guide employee and manager behavior in financial firms. The rules are on their face relatively ambiguous commands. The five individual conduct rules, for example, provide that the persons to whom they apply must “act with integrity,” “due skill and competence,” “be open and cooperative” with regulators, “pay due regard to the interests of the customers and treat them fairly”, and “observe proper standards of market conduct.”⁹⁵ Specific guidance texts on the rules, however, add considerable level of detail as the guidance enumerates a long list of “examples” that “are not intended to be an exhaustive list of the conduct that may contravene” the rules.⁹⁶ It is important to note that although a breach of the COCON regime may result in the Financial Conduct Authority imposing a sanction on the person in breach,⁹⁷ the regime is best understood as trying to instill and articulate cultural psycho-morphs that serve as markers of responsibility and accountability, rather than as rules to be followed. The Code of Conduct articulates how financial sector employees and managers should understand their position and responsibilities. The Code of Conduct, thus, serves as a reference point that the humans should use when constructing their professional psyches.

⁹² For contributions to the discussion, see, *e.g.*, GETTING THE CULTURE AND THE ETHICS RIGHT: TOWARDS A NEW AGE OF RESPONSIBILITY IN BANKING AND FINANCE (Patrick S. Kenadjian & Andreas Dombret eds., 2016); Justin O’Brien, *Fixing the Fix: Governance, Culture, Ethics and the Extending Perimeter of Financial Regulation*, 8 L. FIN. MARK. REV. 373 (2014); Alison Lui, *Greed, Recklessness and/or Dishonesty? An Investigation into the Culture of Five UK Banks between 2004 and 2009*, 16 J. BANK. REG. 106 (2015); GROUP OF THIRTY, *BANKING CONDUCT AND CULTURE. A CALL FOR SUSTAINED AND COMPREHENSIVE REFORM*, GROUP30.ORG (2015); MICHAEL POWER, SIMON ASHBY & TOMMASO PALERMO, *RISK CULTURE IN FINANCIAL ORGANISATIONS: A RESEARCH REPORT* (2013).

⁹³ Financial Conduct Authority, *supra* note 42, at COCON.

⁹⁴ See Emma Dunkley, “Banker Bashing” Draws to an End as Watchdog Scraps Review, FINANCIAL TIMES, December 31, 2015, at 1.

⁹⁵ Financial Conduct Authority, *supra* note 42, at COCON 2.1.

⁹⁶ *Id.* at COCON 4.

⁹⁷ *Id.* at COCON 3.1.1.

E. Implications

I. Three Questions

Above, I have argued that a cyborg law is emerging. In cyborg law, regulation targets information processing entities, cyborgs. The interventions seek to affect the behavioral proclivities of the cyborg cognitions by re-arranging their machinic constitutions and affecting the information the cyborgs receive.

The new cybernetic regulatory imagination raises important challenges to legal theory. To bring the article to a conclusion, I will raise two issues. The first issue pertains to what the cybernetic turn entails for our conceptions of legal agency, and what it means to act in respect of and be acted upon by the law. The second issue pertains to the eventual future transformations of legality and modalities of legal effectivity as algorithmic actors will proliferate.

II. Agentic Transformations

The cybernetic regulatory framework forces us to encounter an agentic inversion. Law is increasingly targeting and seeking to affect the behavior of non-human entities, be they organizations, technological systems, or artificial intelligence.⁹⁸ We, however, lack a theoretical framework that can accommodate the new emerging agencies and, thus, struggle to make sense of these new regulatory modalities.

As an illustration of what is stake in this agentic transformation, consider the theoretical accounts of management-based regulation,⁹⁹ the regulatory label that the ICAAP and gender equality regulatory projects attract. The accounts struggle, in particular, with mapping the targets and modalities of the interventions. For example, Cary Coglianese and Evan Mendelson argue that management-based regulation is about triggering the regulatory

⁹⁸ F. Patrick Hubbard, *Do Androids Dream: Personhood and Intelligent Artifacts*, 83 TEMP. L. REV. 405 (2010); Wendell Wallach, *From Robots to Techno Sapiens: Ethics, Law and Public Policy in the Development of Robotics and Neurotechnologies*, 3 L. INNOV. TECH. 185 (2011); Lawrence B. Solum, 70 *Legal Personhood for Artificial Intelligences*, N.C. L. REV. 1231 (1994).

⁹⁹ On management-based regulation and its close sibling, meta-regulation, see, e.g., CHRISTINE PARKER, *THE OPEN CORPORATION: EFFECTIVE SELF-REGULATION AND DEMOCRACY* (2002); Christine Parker, *Meta-regulation: Legal Accountability for Corporate Social Responsibility*, in *THE NEW CORPORATE ACCOUNTABILITY: CORPORATE SOCIAL RESPONSIBILITY AND THE LAW 207* (Doreen McBarnet, Aurora Voiculescu, & Tom Campbell eds., 2007); Cary Coglianese & David Lazer, *Management-Based Regulation: Prescribing Private Management to Achieve Public Goals*, 37 L. SOC. REV. 691 (2003); CARY COGLIANESE & EVAN MENDELSON, *META-REGULATION AND SELF-REGULATION* (2010); MIA MAHMUDUR RAHIM, *LEGAL REGULATION OF CORPORATE SOCIAL RESPONSIBILITY: A META-REGULATION APPROACH OF LAW FOR RAISING CSR IN A WEAK ECONOMY* (2013); Neil Gunningham & Darren Sinclair, *Organizational Trust and the Limits of Management-Based Regulation*, 43 L. SOC. REV. 865 (2009).

target to "respond . . . by developing its own internal regulations."¹⁰⁰ The conceptualization misses the core of management-based regulation. In empirical examples of the schemes, regulations are seldom observed but structures, processes, hierarchies, and other management devices abound. In the reflexive search for humans and rules, management-based regulation is mangled beyond recognition. Fiona Haines vocalizes the theoretical issue: She identifies a "law/practice gap." According to Haines, regulation can never directly affect practices, but needs a layer of at least social norms to affect humans.¹⁰¹

Some accounts seem to be on the verge of moving beyond rules/humans imagination as firms and other collectives are increasingly coached in anthropomorphic language, in effect creating non-human, non-individual agencies. Christine Parker, for one, has argued that corporate social responsibility practices seek to create "corporate consciences" and migrate the focus from substance to a disembodied organization "process aimed at a substance."¹⁰² Similar patterns emerge in Neil Gunningham and Darren Sinclair's work as they write:

The role of regulation ceases to be primarily about inspectors or auditors checking compliance with rules and becomes more about encouraging the industry or facility to put in place processes and management systems that are then scrutinized by regulators or corporate auditors. Rather than regulating prescriptively, meta-regulation seeks to stimulate modes of self-organization within the firm in such a way as to encourage internal self-critical reflection about its performance.¹⁰³

Ultimately, the issue of regulatory targets and modality still eludes the author's theorization attempts.

The cyborg imaginary offers a way out. It suffers from none of the problems which handicap the standard rule/human ontology of law. The framework has no trouble explaining the lack of rules or humans as mediators of regulation, nor does it struggle with the firm-level, disembodied, non-human, and non-individual emphasis of management-based regulation as the interventions affect their targets' internal process directly.

¹⁰⁰ COGLIANESE & MENDELSON, *supra* note 99, at 150.

¹⁰¹ Fiona Haines, *Regulatory Failures and Regulatory Solutions: A Characteristic Analysis of the Aftermath of Disaster*, 34 L. Soc. INQ. 31, 31, 35 (2009).

¹⁰² Parker, *supra* note 99, at 212, 235.

¹⁰³ Gunningham & Sinclair, *supra* note 99, at 866.

The break with the past is, however, radical. We seem to be on the edge of a transformation that contests our basic assumptions of what law is made of and how it functions. In particular, the cyborg transformation calls for a reconsideration of our conceptions of agency in legal and regulatory contexts. It is important to note that the change cuts further and deeper into the legal fabric than the more traditional discussions about agentic hybrids, such as trees, rivers, or other natural objects. Once the non-humans of cyborg law enter the field as active targets of regulatory interventions, we are no longer thinking about how non-humans can be accommodated and rendered partial agents in legal contexts while retaining for humans the hegemonic position they have enjoyed for centuries.¹⁰⁴ The cyborg is not a stand-in. It is the real thing.

If we take the cyborg imagination for real, the entire agentic structure inverts, in two senses. In the cybernetic imaginary, first, the subject-object of legal interventions is not a human. It is a cybernetic organism, of which humans constitute only one “sub-species.” Under this outlook, humans are dethroned from the apex of legal agency. The humans may still be subjects of legal interventions, but they fall under law’s influence because and to the extent that they are parts or containers of information processing entities.

This entails, second, that the entire intentionality of law in relation to non-humans recombines. Most attempts to ascribe a status of a legal agent to non-humans have focused on a *passive agency*, that is, on ensuring that these new agents are able to inertly enjoy and make defensive claims to rights and protections. The hybrids have not been the subjects of legal interventions as they have lacked the capability to be moved by law directly. All direct interventions flowed through and been mediated by humans. Law was able to do something for the non-human things, but nothing to them. This changes with the emergence of the cyborg imaginary. The non-humans gain a new active status inside regulatory contexts. They can be law’s immediate targets. Simultaneously, the modality changes. Law comes to penetrate its subject and affect them and their makeup directly, and not just by issuing outside signals that act as inputs in processes beyond law’s reach.

It is, however, important to keep in mind two caveats. First, the cyborg model is not a theory of everything. To the contrary, the model organizes and explains a tiny sliver of the regulatory universe. Most regulatory interventions still perform and enact distinctly non-cybernetic imaginaries. Humans are, thus, still highly relevant. Second, even in the examples discussed above, the cybernetic imaginary is augmented by other imaginaries. Bankers, for example, face the threat of prosecution for criminal misconduct. Banks may similarly lose their license if they do not comply with the ICAAP rules, while the gender equality cognitions are buttressed by a threat of a fine under Gender Equality Act Section 17 should the

¹⁰⁴ The continuing human hegemony is clearly visible in, for example, Christopher Stone’s argument; things can be subject to law in the sense of having a standing, rights, and a guardian to sue in their name. See CHRISTOPHER D. STONE, SHOULD TREES HAVE STANDING? (2010).

employer not comply with her legal obligation to draft a plan. Thus, in my account, there is no singular regulatory imaginary. Instead, regulatory projects simultaneously perform and enact multiple regulatory imaginations, sometimes even within one contemporaneous regulatory project. In this sense, the argument retraces Pierre Schlag's dizzying exposition of the aesthetic of American law. As in Schlag's account, my conviction is that law is a plural phenomenon and that multiple imaginaries of law inform and constitute its enactments.¹⁰⁵ The political and aesthetical struggles determine which of the imaginaries is enacted.¹⁰⁶

III. Future Law

The second issue I raise is future. My claim is that cybernetic regulation heuristic seems to open up a crucial vista into the future of law. As algorithmic decision-making will proliferate, the cybernetic imaginary may provide a glimpse of how law will function in the future.

Algorithmic, non-human decision-making is bound to proliferate as robots and artificial intelligence applications emerge and become more common. This change is likely to be disruptive and challenge many established patterns in regulation and legal thinking. The core factor in the process is that advances in artificial intelligence, machine learning, and robotics will inevitably render humans increasingly irrelevant as instigators of causal chains. As a result, the law's incessant anthropocentricity will become an anachronistic burden.

The cybernetic regulatory approach, however, lacks the ballast. It will be up for the task of regulating algorithm-governed entities. The approach can be attuned to a wide variety of cognitive assemblages as it is agnostic on their specific makeup, rendering any information processing entity amenable to regulation. The only requirement is that the entity can be reconfigured, rearranged, or controlled by the interventions. The plasticity of cybernetic regulation, thus, seems to offer an avenue to pursue effective governance of a world where humans are a side-show. By focusing regulatory efforts on affecting the machinic constitution of the agents, law may retain its edge.¹⁰⁷

This type of law, however, has little to do with the law that we are now accustomed to dealing with. Its basic modality will be radically different. The move is fundamental. We will move from affecting the results of external and immutable cognitive processes with signal inputs that do not affect the processes themselves to something. The new kind of law coagulates around concerted efforts at choreographing and rearranging the formerly

¹⁰⁵ See Pierre Schlag, *The Aesthetics of American Law*, 115 HARV. L. R. 1047, 1107–09 (2002). Compare also with Selkälä & Rajavuori chapter in this volume, 18 GERMAN L.J. (2017).

¹⁰⁶ Schlag, *supra* note 105, at 1110.

¹⁰⁷ For a similar argument, see MIREILLE HILDEBRANDT, SMART TECHNOLOGIES AND THE END(S) OF LAW: NOVEL ENTANGLEMENTS OF LAW AND TECHNOLOGY 217–19 (2015).

impregnable cognitions. This change reconfigures law's intentionality in two important ways.

First, traditional legal interventions typically aim at achieving binary outcomes, where the subjects either do the regulators' bidding or not. Actions are labeled legal and illegal, prescribed or proscribed.¹⁰⁸ Although the regulators do not know whether the interventions are sufficient to achieve their planned outcome, the law articulates to its subjects what specific action patterns the regulators want to emerge. Cybernetic regulation, in contrast, recognizes, acknowledges, and feeds upon the shades of grey in law's effectivity. Cyborg regulation does not seek determine its subjects' action, but works to create the material conditions that would allow a desirable, and often fuzzily understood, end-state to emerge. There is no legal or illegal as such. There may be unacceptable cognitions (cyborg illegality) and acceptable cognitions (cyborg legality), but the cyborg legality, in particular, is one of gradations, degrees, uncertainties, and better or worse implementations. The new legality focuses on the merits of the process of arriving at the end-states, not on the end-states themselves. Cyborg regulation is, correspondingly, a game of manipulating the probabilities and intensities of desired behavior through reinforcing the material processes, patterns, and assemblages that regulators think make such behavior more likely. Radical uncertainty reigns over the effects, however. The subjects are only primed to take the desired actions. The regulators cannot know whether the particular cognitive machinery will at a given instance, in fact, emerge out of the manipulations nor will they know that the cognition, it existed, would even produce the desired outcome.

Second, cyborg regulation as a template inverts the normal temporality of law. It is important to note that most legal interventions function through folding a future on their targets, by forcing them to internalize the consequences of their actions. In threat-based law, for example, the legal subject will be deterred from taking a particular decision if and when the threat of the sanction makes the once desired future undesirable after the individual factors in the sanction. The same is true of incentives-based law. In cyborg regulation, this temporality is inverted. Cyborg interventions do not attend to the future. Instead, cyborg-based regulatory interventions change the subject who makes the decision, in the present and for the future. The interventions attempt to render futures that are undesirable to regulators and unimaginable to law's subjects. They suppress choice and transgressions by proactively smothering the subjects' capacity to not do the regulators' bidding. Law turns preemptive in the present, not through the future.

¹⁰⁸ Luhmann's account of law's binary nature is probably best known. NIKLAS LUHMANN, *LAW AS A SOCIAL SYSTEM* 90–91 (2005).