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Domination and Submission. From the Idea of 'Legal Personality' Back to the Metaphor of the 'Mask'

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Abstract: The challenging concept of legal person has evolved significantly over the centuries, rooted in the ancient Roman notion of *persona* as a mask or character that conferred different legal and social roles on individuals (as well super-human entities). In modern times, the concept of legal person seems even to expand beyond the human sphere to encompass a wide range of entities, including animals, artificial intelligence (AI) and the environment. This article explores the complexities and dilemmas surrounding this evolving concept, and examines the challenges and opportunities presented by the extension of the legal *persona* to new frontiers.

Keywords: animal status; artificial intelligence; environment; *persona*; Remo Bodei; Roberto Esposito

1 Domination and Submission: A Brief Introduction

Domination and Submission is an emblematic phrase, as well as the English version of the evocative title that Remo Bodei has given to his latest book.[1] In its apparent and crude dualism, the phrase implies a complex and nuanced relationship between two extreme poles of a continuum along which the history of the Western world has moved its steps. Moreover, it has traditionally conveyed an extremely anthropocentric view of reality, which upholds the primacy of the human being as the goal and the criterion for any attribution of value: the crown of creation.[2]

Yet the world is changing at a breathtaking pace. For example, some alarmists have predicted the advent of a kind of 'Terminator' that will soon evolve to dominate

1 Remo Bodei, *Dominio e sottomissione. Schiavi, animali, macchine, Intelligenza Artificiale* (Bologna: Il Mulino, 2019), *passim*.

2 Yuval Noah Harari, *'Homo Deus': A Brief History of Tomorrow* (London: Harvill Secker, 2016), esp. chapter 3.

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and subjugate us like an inferior species; and now we hear talk of relentless autonomous devices that will make us superfluous, like enslaved people, replacing and surpassing us in terms of efficiency and cost. This new dialectic of 'domination and subjugation', with the poles reversed, no longer seems like far-off science fiction, so that many contrary reactions, at times even of sheer horror, have reaffirmed the inevitability and inescapability of the traditional interplay between persons and things, *personae* and *res*.

Consider the recent attempt by the European Parliament to introduce the category of 'electronic person' into the current political and legal debate by creating «a specific legal status for robots in the long term, so that at least the most sophisticated autonomous robots could be given the status of electronic persons responsible for repairing any damage they may cause, and possibly applying electronic personality to cases where robots take autonomous decisions or otherwise interact independently with third parties».[3] However, this attempt has not been taken up by the European Commission,[4] which has also prompted numerous AI experts to promote an open letter arguing that it would be totally inappropriate to give AI legal personality from an ethical and legal perspective[5] (since such human artefacts would still need to be qualified as mere *res corporales* under our traditional legal labels).[6]

Consider the 'quasi-scientific' scenario outlined by Shawn Bayern on the basis of current US corporate law, in which the artificial nature of corporate bodies – which until now has always implied the quid pro quo presence of human beings in terms of directorship, membership and activity – could even be overcome, thus foreshadowing and anticipating in the present, albeit in attenuated form, the darker versions of the future of the human species. Going even further than the case of the simple delegation of management responsibility to AI,[7] this legal scholar has argued that, thanks to some loopholes, a surrogate of legal personality – with the capacity to enter into contracts and own property – could be granted to autonomous systems or other software by placing them under the total control of legal entities. In fact, a limited liability company, without any ongoing legal oversight or other involvement

3 European Parliament Resolution with Recommendations to the Commission on Civil Law Rules on Robotics (2015/2103(INL)) (European Parliament, 16 February 2017) para 59(f).

4 Cf. the subsequent 25 April 2018 outline "Artificial intelligence: Commission outlines a European approach to boost investment and set ethical guidelines".

5 Open Letter to the European Commission: Artificial Intelligence and Robotics (April 2018) para 2(b).

6 Carlos Amunátegui Perelló, "Legal Status of Artificial Agents," in *A New Role For Roman Taxonomies In The Future Of Goods? Atti del convegno di Padova (19 maggio 2022)*, ed. Marco Falcon, Mattia Milani (Napoli: Jovene, 2023), 385.

7 In 2014, for example, a Hong Kong venture capital firm appointed a computer program, named Vital, to its board of directors: see Rob Wile, "A Venture Capital Firm Just Named an Algorithm to Its Board of Directors," *Business Insider* (13 May 2014).

by human owners or members, could currently be formed by the following steps: a natural person first establishes the company; then an AI system is effectively added as a director (or rather, the founder adopts an operating agreement stating that the company, without a board of human directors, will act as determined by an autonomous system, such as an algorithm); the founder transfers ownership of any physical apparatus of the autonomous system and any intellectual property encumbering it to the company; finally, the founder resigns, thus creating a perpetual zero-member company that requires no ongoing intervention by any pre-existing legal entity to maintain its status.[8] Some reactions have been pure horror: even 'the survival of the human race' could be dependent on the rejection of Bayern's theoretical interpretation technique.[9]

These questions are fully justified in today's historical context, in which, as we have just seen, 'technological hypertrophy',[10] combined with a new 'relationalist consciousness',[11] plays a dominant role. This, together with unprecedented breakthroughs in the fields of ethology, medicine, neuroscience and biology, makes it possible to perceive more and more clearly the mutual erosion of the two poles of the traditional dualism, that is, the idea of personality (understood as the sphere of rights attached to the human being) as opposed to the external world made up of (natural or artificial) things.

To be more precise, on the one hand, the *dispositif/apparatus* of the person[12] clearly suffers from 'de-humanisation': this phenomenon, in an increasingly global bio-political dimension, not only firmly establishes the subjugation of bodies as mere life,[13] but also heralds the possible evolution of *homo sapiens* (wise man) into the species evocatively called *homo deus* (human god), a natural entity with god-like mastery over our environment and the ability to create and destroy (silicon and green) life.[14] On the other hand, there is a double tendency to either 'de–realise' or 'personify' what has traditionally been conceived of as things (i.e. non-human

8 See, e.g. Shawn Bayern, "Are Autonomous Entities Possible?," *Northwestern University Law Review* 23 (2019): 24 ff.

9 Lynn M. LoPucki, "Algorithmic Entities," *Washington University Law Review* 95 (2018): 887 ff.

10 Britta van Beers, "The Changing Nature of Law's Natural Person: The Impact of Emerging Technologies on the Legal Concept of the Person," *German Law Journal* 18 (2017), 563, 574 ff.

11 Denis Franco Silva, "From Human to Person: Detaching Personhood from Human Nature," in *Legal Personhood: Animals, Artificial Intelligence and the Unborn*, ed. Visa A.J. Kurki, Tomasz Pietrzykowski (Cham: Springer, 2017).

12 Roberto Esposito, "The Dispositif of the Person," *Law, Culture and the Humanities* 8.1 (2012): 17 ff.; Giorgio Agamben, *What Is an 'Apparatus'? And Other Essays*, eng. trans. (Stanford: Stanford University Press, 2009), *passim*.

13 Giorgio Agamben, *'Homo Sacer': Sovereign Power and Bare Life*, eng. trans. (Stanford: Stanford University Press, 1998), 119 ff.

14 Harari, *'Homo Deus': A Brief History of Tomorrow*, *passim*.

entities), in one case by relegating them to a negative background, and in the other by elevating them – through various ontological or instrumental routes – from the realm of objects to the status of subjects.[15]

One cannot, therefore, fail to address the underlying problem: what actually does it mean to be a person? What actually constitutes personal identity?

2 'Personhood' and 'Thinghood' Beyond Legal Homo-Centrism

As we have seen, from a political and legal point of view, the traditional polarity of 'domination and submission' pits power against submission, which concerns exclusively the relations between persons within a given context and essentially denotes the capacity (*imperium*) to dominate other persons, i.e. *subiecti* or *subditi*[16] (subordinate, inferior human beings, sometimes even reduced in the public sphere to entities called 'things with a voice' in the private sphere).[17] From an archaeological point of view, however, another kind of relation has paved the way for the above-mentioned intersubjective relations that animate the machinery of political power. In this original vein, subjectivity (i.e. personhood or personality) is opposed to objectivity (thinghood): the *personae* or *subiecti* are understood as 'subjects of law' or 'subjects of rights', paradigmatically endowed with dominium to exercise control over *res* (*obiecta*), even though – as Foucault has convincingly argued[18] – any form of 'subjectivation' entails a certain degree of subjection.

This kind of '*homo*-centrism' permeates current common sense to such an extent that to accept that anything can be neither object nor subject (as well as to accept that a given entity can be both at the same time) is a scarcely conceivable, if arguable, assumption. On the one hand, the domain of the person, with its virtues, qualities and characteristics, is frozen in the intrinsically solid 'subject-person construct'. On the other hand, the domain of material reality – a world made up of commodities or, in

15 Cf., e.g., Christopher D. Stone, "Should Trees Have Standing? Toward Legal Rights for Natural Objects," *Southern California Law Review* 45 (1972): 450; Joshua C. Gellers, *Rights for Robots Artificial Intelligence, Animal and Environmental Law* (London, New York: Routledge, 2021), *passim*.

16 Yves Charles Zarka, "The Invention of the Subject of the Law," *British Journal for the History of Philosophy* 7 (1999): 245, 258 f.; cf. Emanuele Stolfi, "Per una genealogia della soggettività giuridica: Tra pensiero romano ed elaborazioni moderne," in *Pensiero giuridico occidentale e giuristi romani. Eredità e genealogie*, ed. Pierre Bonin, Nader Hakim, Fara Nasti, Aldo Schiavone (Torino: Giappichelli, 2019), 59 ff.

17 Varro *Rust*. 1.17.1.

18 *The Cambridge Foucault Lexicon*, ed. Leonard Lawnor, John Nale (Cambridge: Cambridge University Press, 2015), 496 ff.

other words, 'silent slaves'[19] – has ended up comprising the external world, where even human bodies are susceptible to being possessed, owned, borrowed. In this way, subjectivity and personality – two linguistic variants that primarily mean the capacity to have 'rights over things' and that provide the basis for legal and social relations – have become banners for general concepts, based mainly on Christian personalism and Kantian-Hegelian philosophy, such as human freedom and human domination.[20]

In recent years, the much-vaunted 'category' of the person, from its original internal fragmentation, has triumphantly coalesced around the archetypal figure of the individual tout court, becoming a central yet problematic notion: this has been seen both as a response to the tragic 'reification' of the human being during the dark age of Nazism, and as a consequence of decolonisation, the end of apartheid, women's liberation and other important movements.[21] Needless to say, the very anthropomorphisation of the idea of *persona* has recently played a key role, both in episodes of attributing some personality traits to artificial intelligences (e.g. in 2017, the humanoid robot Sophia was granted 'citizenship' in Saudi Arabia, and an online system with the *persona* of a seven-year-old boy is 'resident' in Tokyo),[22] and in the multi-layered international debate on the intrinsic or extrinsic qualities of who or what is a person (e.g. in the above-mentioned open letter written by the European Commission to the United Nations Secretary-General on the subject of the human rights situation in the Middle East), The above-mentioned open letter from AI experts to the European Parliament argues that legal personality is inappropriate for AI because, among other reasons, the natural person model necessarily implies all the 'human' rights guaranteed by EU law).[23]

On the contrary, until a few decades ago, only certain individuals – to the exclusion of others – were granted full personality and therefore treated as 'legal persons': just think, for example, that slaves, i.e. mere *homines* without or deprived of personality, and as such 'non-persons', could be bought and sold as property; that indigenous people could be equated with roaming beasts; that women could even be incorporated into the person of their own husbands.

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19 Arist. *Pol.* I.4 (1253b–1254a).

20 Immanuel Kant, *Metaphysical Elements of Justice.* Part I *of the Metaphysics of Morals*, 2nd ed., eng. trans. (London: Hackett Publishing, 1999), XVII, XXX f., 26, 92 ff., 136; Georg Wilhelm Friedrich Hegel, *Elements of the Philosophy of Right*, eng. trans. (Cambridge: Cambridge University Press, 1991), §§ 35 ff.

21 Roberto Esposito, *Third Person – Politics of Life and Philosophy of the Impersonal* (Cambridge, Malden: Polity Press, 2012), 61 ff.

22 Olivia Cuthbert, "Saudi Arabia Becomes First Country to Grant Citizenship to a Robot" (Arab News. 26 October 2017); Anthony Cuthbertson, "Artificial Intelligence 'Boy' Shibuya Mirai Becomes World's First AI Bot to Be Granted Residency" (Newsweek, 6 November 2017).

23 Open Letter to the European Commission: Artificial Intelligence and Robotics (April 2018) para 2(b).

Today, those who belong to the human species are considered to be 'persons', members of an ideal and superior community made up of beings who, in addition to their sentience, dignity and vulnerability, are capable of reasoning, purposeful action and responsibility. With respect to the past, today all *homines* are *personae*, whereas the opposite is not true. On the one hand, human beings consist of (or are conceived of as) natural persons who, in theory or in practice, deserve to have full personality before the law, i.e. to enjoy, by the mere fact of their birth, all kinds of legal status recognised by the law.[24] In fact, if one excludes the idea that a 'lump of human flesh', once deprived of the shield of personality, is reduced to an insignificant nothing or to a mere living material unworthy of respect, then the opposite begins to emerge. Belonging to the human species per se entails the (legal) right to (legal) personality, combined with the challenging and controversial bundle of those 'natural attachments' called human rights. On the other hand, without any connection to the natural dimension of life and rights, the law can recognise, for example, corporations and other business associations. Such entities are the most common example of instrumental personality, construed in imitation of human beings[25] as a means of entering into enforceable contracts, owning property, incurring debts, being convicted of crimes and, consequently, suing and being sued.[26] In any case, they must be created by, of and for the benefit of natural persons.

Such axiological humanism (celebrating not only human intelligence, experience and values, but also human superiority over non-human reality), which was the dominant idea in the Western world until the 21st century, has begun to be eroded by a global revolution that has, at the same time, led to a new form of humanism. This means that the basis of the attitude of believing that human life is tout court more valuable than that of others has become a questionable idea, due to a global revolution that, by originating in (and at the same time triggering) a new image of the world, has not yet finished disrupting the previous conceptual and ethical *status quo*.[27] In particular, within the framework of current practical ethics and at the level of the so-called *ius condendum*, the post-humanist approach seems to seek to flatten the traditional order and to overcome, or at least reshape, the dualism created by the

24 See, for instance, Universal Declaration of Human Rights, GA Res 217A(III) (1948), UN Doc A/810 (1948) art 1; International Covenant on Civil and Political Rights (ICCPR) (16 December 1966) 999 UNTS 171, in force 23 March 1976, art 6(1).

25 Susan Watson, "The Corporate Legal Person," *Journal of Corporate Law Studies* 19 (2018), 13; Katharina Pistor, *The Code of Capital. How the Law Creates. Wealth and Inequality* (Princeton, Oxford: Princeton University Press, 2019), 47 ff.

26 Neil MacCormick, "Norms, Institutions and Institutional Facts," *Law and Philosophy* 17 (1998), 314.

27 Tomasz Pietrzykowski, *Personhood Beyond Humanism: Animals, Chimeras, Autonomous Agents and the Law* (Cham: Springer, 2018), *passim*; Pietrzykowski, "The Idea of Non- personal Subjects of Law," in *Legal Personhood*.

totalising combination of 'personhood/thinghood' (*personae*/*res*), as the practical and theoretical expression of the dialectic of 'domination and submission'. This opposition, relevant from a legal and positive perspective, is traditionally associated – despite the recent challenges mentioned above[28] – with the naturalistic bipolarity comprising the terms 'human/non-human' (*homo/non-homo*).

As noted above, some individual positions would amount to attachments peculiar to *homines* as such, which all humans possess simply by virtue of their humanity. In other words, such attachments would exist within the dimension of so-called bare life or *zoe* (a reality in which human beings are understood at the level of their bodies, their blood and their skin), and would serve to protect the precarious and mere existence of what is called 'human embodied life'.[29] They would, in short, be human rights which, as such, would be 'impersonal' (i.e. abstracted from the legal *dispositif* of the person)[30] as well as 'pre-legal' and 'pre-political' (i.e. abstracted from the protection offered by the shield of bios, of life qualified by law and politics).[31]

It is therefore no coincidence that, on the one hand, the device of the person has been used in an attempt to develop more intensive forms of protection for non-human entities, while, on the other hand, the device itself has been heavily criticised as a supposed means of protecting human beings. Let us therefore consider the role played by the idea of the person, first in general and then specifically in relation to these two opposing lines of thought.

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28 See, e.g., Peter Singer, *Animal Liberation* (New York: Random House, 1975), *passim*; Steven Wise, *Rattling the Cage: Towards Legal Rights for Animals* (New York: Perseus Publishing, 2000); Daniel Dombrowski, *Babies and Beasts: The Argument from Marginal Cases* (Illinois: The University of Illinois Press, 1997); Julia K. Tanner, "The Argument from Marginal Cases and the Slippery Slope Objection," *Environmental Values* 18 (2009): 51.

29 John Tasioulas, "On the Nature of Human Rights," in *The Philosophy of Human Rights: Contemporary Controversies*, ed. Jan-Christoph Heilinger, Ernst Gerhard (New York: Walter de Gruyter, 2011), 26; Judith Butler, *Precarious Life. The Power of Mourning and Violence* (London: Verso, 2006); Iris Marion Young, "Structural Injustice and the Politics of Difference," in *Social Justice and Public Policy: Seeking Fairness in Diverse Societies*, ed. Gary Craig, Tania Burchardt, David Gordon (Brighton: Policy Press, 2008): 77 ff.; Werner Hamacher, "The Right to Have Rights (Four-and-a-Half Remarks)," *South Atlantic Quarterly* 103 (2004): 354 f.

30 Esposito, "Dispositif of the Person," 17 ff.

31 Yet, the strongly anthropocentric notion of legal personality, together with its understanding in terms of ownership of one's own body has also meant that human rights themselves have sometimes been conceived as attachments of the human person, on the grounds of the latter's dignity and autonomy: cf. Jeremy Waldron, *Dignity, Rank, and Rights* (Oxford: Oxford University Press, 2015). For a different account, cf. the idea of personality championed by Helmut Plessner: *Die Stufen des Organischen und der Mensch. Einleitung in die philosophische Anthropologie* (Berlin: Walter de Gruyter, 1928); *'Conditio Humana'. Gesammelte Schriften VIII* (Frankfurt: Suhrkamp, 2015), 190, 209 ff.

3 The Person as a Key Concept in Current Debates: Along the Path of the Traditional View

In the current debates, there seems to be one key idea, as a common and unquestioned starting point: it is precisely the category of the person, a cluster concept that needs to be constantly specified, shaped and reshaped.[32] The definition of its contours and content is indeed of great theoretical and practical importance, given the ubiquitous role of the person in all systems – not only legal ones – of human behaviour, thought and relationships. The person – either as a 'purely legal concept'[33] or as an 'intrinsically naturalistic idea'[34] – is a hot topic, under the umbrella of which discourses are legitimated in almost every field of knowledge (e.g. anthropology, philosophy, theology, bioethics, jurisprudence),[35] even if, in order not to turn it into the 'smile of the Cheshire Cat' after the cat has disappeared, it is necessary to consider and analyse who and what can be a person within the framework and the network of human 'relations'.[36]

Even if the concept in question is – if we are to be honest – neither the only inferential concept available nor the only legal instrument to protect natural and

32 Neil MacCormick, *Institutions of Law: An Essay in Legal Theory* (Oxford: Oxford University Press, 2007), 77; cf. John Dewey, "The Historic Background of Corporate Legal Personality," *Yale Legal Journal* 35 (1926): 660; Visa A.J. Kurki, *A Theory of Legal Personhood* (Oxford: Oxford University Press, 2019), 4.

33 Cf. David P. Derham, "Theories of Legal Personality," in *Legal Personality and Political Pluralism*, ed. Leicester Webb (Melbourne: Melbourne University Press, 1958), 5. According to this approach, legal personality is basically a fiction or an artifice which allows legal systems to create bearers of rights and holders of duties: cf. Dewey, "The Historic Background," 655; Ngaire Naffine, "Who are Law's Persons? From Cheshire Cats to Responsible Subjects," *Modern Law Review* 66 (2003): 351; Richard Tur, "The 'Person' in Law," in *Persons and Personality. A Contemporary Inquiry*, ed. Arthur Peacocke, Grant Gillett (London: Basil Blackwell, 1988), 121; see, moreover, Frederik H. Lawson, "The Creative Use of Legal Concepts," *New York University Law Review* 32 (1957): 909, 915 f.; June Sinclair, "Introduction," in *Boberg's Law of Persons and the Family*, ed. Belinda Van Heerden, Alfred Cockrell, Raylene Keightley (Cape Town: Juta and Company, 1999), 4; David Bilchitz, "Moving Beyond Arbitrariness: The Legal Personhood and Dignity of Non-Human Animals," *South African Journal on Human Rights* 25 (2009): 68; Pietrzykowski, *Personhood*, 21 f.

34 Cf. Ngaire Naffine, *Law's Meaning of Life: Philosophy, Religion, Darwin and the Legal Person* (Oxford, Hart Publishing: 2009): 22. Cf., among the supporters of a traditional concept of personality rooted in a natural stratum, Friedrich Carl von Savigny, *System des heutigen Römischen Rechts* (Berlin: Veit, 1840), § 60; Rudolf von Jhering, *Geist des Römischen Rechts auf den verschiedenen Stufen seiner Entwicklung, Teil III* (Leipzig: *Breitkopf & Härtel*, 1906), 356 f.

35 Alexander Nékam, *The Personality Conception of the Legal Entity* (Cambridge, MA: Harvard University Press, 1938), *passim*.

36 Bryant Smith, "Legal Personality," *Yale Law Journal* 37 (1928): 294.

artificial entities, to promote their interests and to enforce their will,[37] there is no doubt that personification, as the history of 'corporations' well attests, has important practical effects, precisely from the general point of view of relational aspects:[38] for example, it empowers the personified legal entities (almost like human persons), it protects some of the special interests of individuals 'behind the corporate veil', it enhances the benefits of the general interest.[39] As noted above, all Western legal systems share both a common notion of 'human' personality (along with the legal technique of personifying non-human entities) and a set of ideological assumptions, including a radically anthropocentric view of the world in which 'man' occupies an exceptional and central position. It is therefore not surprising that, under the label of personality, understood as a device for reading, explaining and ordering the world, the *summa divisio* within this general category pits 'natural' against 'artificial' persons, that is, 'inherent' against 'instrumental' personality. On the one hand, there are 'material' persons who can be blamed and rewarded as such; on the other, there are 'immaterial' persons – made up, however, of human beings through whom they act – with 'no soul to be damned and no body to be kicked'.[40] The ontological difference between the latter and the former is so obvious that the main arguments about non-natural personhood (understood as a medium for approximating the non-human to the human) tend to focus precisely on this aspect.[41] A few examples will suffice.

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37 Visa A.J. Kurki, "Why Things Can Hold Rights: Reconceptualizing the Legal Person," in *Legal Personhood*, 79. As for the interest theory and the will theory, see Matthew H. Kramer, "Rights Without Trimmings," in *A Debate over Rights. Philosophical Enquiries*, ed. Matthew H. Kramer, Nigel E. Simmonds, Hillel Steiner (Oxford, Oxford University Press: 1998), 7 ff., and, in the same volume, Nigel. E. Simmonds, "Rights at the Cutting Edge," 113 ff.

38 The issue of personality is not only a binary one, but also a question concerning the more or less wide spectrum of its contents, varying from case to case; cf., *contra*, Tur, "The 'Person'," 128.

39 Frank H. Easterbrook – Daniel R. Fischel, "Limited Liability and the Corporation," *University of Chicago Law Review* 52 (1985), 89. Henry Hansmann – Reinier Kraakman – Richard Squire, "Law and the Rise of the Firm," *Harvard Law Review* 119 (2005), 1335; Reinier Kraakman et alii, *The Anatomy of Corporate Law: A Comparative and Functional Approach*, 2nd ed. (Oxford: Oxford University Press, 2009), 5 ff.

40 «Did you ever expect a corporation to have a conscience, when it has no soul to be damned, and no body to be kicked» (Edward, First Baron Thurlow, 1731–1806): Archibald Alison, *History of Europe: From the Fall of Napoleon in 1815 to the Accession of Louis Napoleon in 1852*, I (Edinburgh, London: William Blackwood and Sons, 1852), 56; cf. John C. Coffee Jr., "No Soul to Damn: No Body to Kick: An Unscandalized Inquiry into the Problem of Corporate Punishment," *Michigan Law Review* 79 (1981): 386.

41 Some authors have shown the problems that arise when the legal personality given to corporations is stretched so far that it becomes an instrument for granting even human rights to artificial entities: see Turkuler Isiksel, "The Rights of Man and the Rights of the Man-Made: Corporations and Human Rights," *Human Rights Quarterly* 38 (2016), 294 ff.; Cristina Lafont, "Should We Take the 'Human' Out of Human Rights? Human Dignity in a Corporate World," *Ethics & International Affairs*

The well-known 'fiction theory' views 'artificial persons',[42] such as corporations, not in terms of a real and original being, but precisely as 'an artificial being, invisible, intangible, and existing only in contemplation of law', as the US Supreme Court famously stated in *Trustees of Dartmouth College v Woodward*.[43] According to this approach, a given entity – albeit one without a conscience, mind or will – is endowed with personality, like a human being, simply because a legal system wants it so. And, more precisely, it wants to do so for purely legal reasons, i.e. in order to achieve political objectives, such as the promotion of entrepreneurship, and to contribute to stability through the perpetuity granted to certain entities.[44] Legal personality is a fiction, but it becomes unquestionably real within the legal system.

According to the 'bracket theory'[45] (or symbolist or collectivist theory), a legal person is a device created by the law to allow natural persons who organise themselves as a group to reflect that association in their legal and commercial relations with other parties: legal persons are neither real nor fictitious persons. The members of the group are the only and real persons, the holders of rights and the bearers of duties, who are for convenience only referred to as the positions of the company: nevertheless, a symbolic parenthesis is put around their names and given their own. Thus, the corporate form, as opposed to the partnership, not only allows them to conduct business collectively and at a lower cost, but also protects the shareholders, who are not personally liable for the company's debts. By virtue of what is known as the 'limited liability' or 'asset shielding' principle and the implicit reallocation of risks (which the name and status of the artificial person itself must make clear to third parties), the assets of the natural persons are separated from the attachments of the legal person and are thus protected from liability in excess of the amount invested.[46]

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30 (2016): 1 ff. Cf., arguing for a constant 'naturalisation', Alexis Dyschkant, "Legal Personhood: How Are We Getting It Wrong," *Illinois Law Review* (2015): 2077.

42 Savigny, *System*, § 85; John W. Salmond, *Jurisprudence or the Theory of the Law* (London: Stevens & Haynes, 1902), § 113. Cf. Dewey, "The Historic Background," 665.

43 *Trustees of Dartmouth College v. Woodward*, 17 US 518 (1819) 636.

44 Giuseppe Dari-Mattiacci et alii, "The Emergence of the Corporate Form," *The Journal of Law, Economics, and Organization* 33.2 (2017): 193.

45 Frederik W. Maitland, "Introduction," in Otto Gierke, *Political Theories of the Middle Age* (Cambridge: Cambridge University Press, 1951), XXIV (dealing with Jhering's theory: cf. Jhering, *Geist*, 356 f.); cf. See R. Coase, "The Nature of the Firm," *Economica* 4 (1937): 386; Victor Morawetz, *A Treatise on the Law of Private Corporations* (Boston: Little, Brown and Company, 1886), 2.

46 Reinier Kraakman et alii, *The Anatomy of Corporate Law: A Comparative and Functional Approach* (Oxford, Oxford University Press: 2009), 5 ff.; Henry Hansmann – Reiner Kraakman, "The Essential Role of Organizational Law," *Yale Law Journal* 110 (2000): 387.

Thus, in the anthropocentric abstractions of positive law, human beings either remain hidden behind the veil of fiction or appear as the sole protagonists, albeit acting through symbols.

The humanist axiology that has inspired and enlivened the Western world since the Roman legal experience and its scientific developments includes the following three main aspects: legal systems are exclusively human creations that serve the human good; persons are first and foremost natural living beings belonging to the human species; artificial persons are human devices designed to achieve human ends. With this in mind, it is quite understandable that the concept of person has been closely and directly linked either to 'moral' values (such as dignity, autonomy and freedom), or to noetic and psychological criteria (such as rationality and sentience), or finally to 'artificial' constructs.

In other words, according to this traditional conception, the idea of man is regarded as 'the original idea of the person' (the original concept of the person, in Savigny's words), i.e. the 'one' endowed with moral freedom and full legal subjectivity, the 'basic unit' necessary in any legal system for the elaboration of rights and/or duties as well as legal relations.[47] On the basis of the categories developed by Roman jurisprudence, the basic conceptual schematisation corresponding to the current legal worldview starts from the core idea of 'natural persons' and then goes on to form and define a broader general category, on the one hand including artificial persons and on the other excluding non-persons.

The breadth of such a category is, in other words, only the result of an instrumental and utilitarian process, which in no way denies the centrality of the human being as the subject of rights and duties, but rather exalts it and suggests its paradigmatic importance. What is more, the existence of such a category is only the manifestation of a creative artificiality which the 'natural person' deliberately uses, by means of the law, in order to achieve a greater degree of domination over the 'thing', that is, what exists beyond the human sphere.

4 New Horizons Beyond the Traditional View: Rivers, Eco-Systems and Animals as New Legal Entities

It is well known that, contrary to – and in spite of – the scenario outlined above, something is changing worldwide, both in theory and in practice. A critical response,

47 John R. Trahan, "The Distinction between Persons and Things: An Historical Perspective," *Journal of Civil Law Studies* 1 (2008): 9 ff.; Christian Hattenhauer, "Der Mensch als Solcher Rechtsfähig – Von der Person zur Rechtsperson," in *Der Mensch als Person und Rechtsperson*, ed. Eckart Klein, Christoph Menke (Berlin: Berliner Wissenschafts-Verlag, 2011), 39 ff.

based on a legalistic and formalistic approach, suggests that the recognition of the total artificiality and consequent open plasticity of the notion of person offers the best way of resolving the questions concerning the protection afforded by the law and its ultimate beneficiaries.[48] The so-called 'anything-goes' claim assumes that there is no limit in logic – though there may be in policy – to the types and number of legal persons that can be created and then brought into the realm of human relations.[49] The relative value and utility of legal personality is thus given by its flexibility as a legal technique that constantly challenges the distinction between the natural and the artificial. Accordingly, these theories argue that the more 'open-ended' legal personality becomes, the more the law can extend its means of protection to prevent harm (such as in the areas of sexual orientation and gender identity rights, animal welfare and environmental protection).

In addition, there are many concrete indications of the overcoming of Eurocentric and anthropocentric perspectives, both at the level of legislation and case law. Indeed, in recent years, a large number of new types of non-human and non-corporate entities have been granted, not only in theory but also in practice, more or less extensive and effective legal status, just like real legal persons. This means that the traditional idea of associating 'natural personality' with the living, rational and sentient 'human body', as well as the recognition of artificial personality attributable to 'corporate bodies', together with the common and often unsatisfactory modern oppositions between 'public and private', as well as the inadequacy of substantive instruments such as subjective rights and legitimate interests, have failed to provide adequate legal protection and to properly explain the numerous ongoing debates on 'common goods' that have flourished from a political, moral and legal perspective.

In line with an 'eco-centric' or 'relationalist' approach, which seeks to address the issue of ecological damage in an innovative way and is based on the interrelation between nature and human beings, the most notable case in the field of new personalities is represented by the so-called 'environmental persons'. Certain parts of the environment, abandoning the status of things and becoming 'non-human natural entities', are thus granted either full legal standing from a procedural point of view or even fundamental constitutional rights from a substantive point of view. A few examples may suffice.

Firstly, the Whanganui River in New Zealand has been recognised as a legal person by virtue of the agreement – entitled Tutohu Whakatupua, signed on 30 August 2012 and enacted in 2017 – between the Whanganui Iwi (the tribes of Whanganui) and the Crown. In fact, the tribal communities firmly believe that the river in question, called Te Awa Tupua, is a living entity, equivalent to «an indivisible

48 Anna Grear, "Law's Entities: Complexity, Plasticity, Justice," *Jurisprudence* 4 (2013): 76 ff.
49 Lawson, "The Creative Use," 915.

whole comprising its tributaries and all its physical and metaphysical elements from the mountains to the sea».[50] Consequently, as far as the procedural aspect of Te Awa Tupua's legal standing is concerned, trustees legally established to act in 'its' best interests can bring legal actions and recover damages on 'its' behalf.[51] Secondly, the constitutions of two Latin American countries have granted full legal personality to 'Mother Earth/Nature' (Pachamama) and her components.[52] The preamble of the 2008 Ecuadorian Constitution emphasises the vital importance of Pachamama,[53] and the current Bolivian Constitution, approved by popular referendum in 2009, states that Pachamama is a true collective subject and a true living being with inherent rights, as stated in the Universal Declaration of the Rights of Mother Earth.[54]

In both cases, the starting point is given by the ancestral concepts embedded in the idea of Sumak Kawsay Yachay, that is, an alternative version of the Western worldview based on traditional and indigenous ideals of full life, harmony with nature, knowledge that implies interrelation and reciprocity. This type of personality, which gives a legal and positive meaning to indigenous customs, has

50 Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 (New Zealand), no 7, section 14(1); cf. Te Urewera Act 2014 (New Zealand), section 11(1). See Aikaterini Argyrou, Harry Hummels, "Legal Personality and Economic Livelihood of the Whanganui River: A Call for Community Entrepreneurship," *Water International* 44 (2019), 752; Erin L. O'Donnell – Julia Talbot-Jones, "Creating Legal Rights for Rivers: Lessons from Australia, New Zealand, and India," *Ecology and Society* 23 (2018), 7; cf. Elaine G. Hsiao, "Whanganui River Agreement: Indigenous Rights and Rights of Nature," *Environmental Policy and Law* 42 (2012), 371 and Catherine J. Iorns Magallanes, "Nature as an Ancestor: Two Examples of Legal Personality for Nature in New Zealand," *Vertigo – la revue électronique en sciences de l'environnement* 22 (2015). See, moreover, for the legal personality ascribed to temples in India, Shiromani Gurdwara Prabandhak Committee, Amritsar v. Shri Somnath Dass AIR 2000 SC 1421 (Supreme Court of India). The Vilcabamba River (Ecuador) was the plaintiff in a lawsuit sterted against the Provincial Government of Loja. Gabriela Delamare Nascimento Ruas, *Direitos da Natureza na constituição do Equador a partir de uma perspectiva decolonial: um estudo sobre o caso Vilcabamba* (Belo Horizonte: Universidade Federal de Minas Gerais, 2019), 19.

51 Quite the opposite, the legal representation of natural entities is usually entrusted to local communities: cf. Joshua Gellers, "Earth System Law and the Legal Status of Non-humans in the Anthropocene," *Earth System Governance* 7 (2021): 1.

52 Gabriel Eidelwein Silveira – Paulo José Libardoni, "Decolonial Communitarianism: The Constitutional Recognition of Pachamama as Subject of Law," in *The New Human Rights Agenda: Loud Voices from the Global Periphery*, 1st ed., ed. Gabriel Eidelwein Silveira, Mohamed A. 'Arafa, Paulo José Libardoni (Porto Alegre: Cirkula, 2019), 13 ff.; Eugenio Raúl Zaffaroni, *La Pachamama y el humano* (Buenos Aires: Madres de la Plaza de Mayo, 2011).

53 Constitution of the Republic of Ecuador, Article 71–72.

54 Universal Declaration of the Rights of Mother Earth (From World People's Conference on Climate Change and the Rights of Mother Earth, Cochabamba, Bolivia, 22 April – Earth Day 2010), Article 2.

some peculiar features when confronted with the common principles enshrined in the Western concept of the legal person or the legal subject.[55]

Firstly, the legal platform associated with the environmental person is merely the possession of rights: no formal obligation to third parties appears to bind Pachamama and the Whanganui River. Secondly, it does not amount to a merely burdensome legal personality,[56] nor to a human community 'in brackets' or hidden behind the veil of a legal fiction (since the environmental bundle of rights is distinct from, if not antithetical to, the human bundle of rights attached to local communities, individuals and government). Finally, the fundamentally relationalist set of ideas underlying the attribution of personhood to rivers or other parts of nature does not give rise to an 'artifice contemplated by the law' aimed at allowing human beings to control the realm of 'thinghood' more efficiently and with less risk. On the contrary, such a view considers – ontologically and not instrumentally – as a 'person' endowed with rights and legal status what the opposite Western anthropocentric perspective tends to call a 'thing' in need of protection. And it does so in order to compress and limit (rather than enhance) human interests, in the name of a global understanding that links two different types of natural person: humans on the one hand, and Te Awa Tupua and Pachamama on the other.

Not only does the personification of rivers and natural elements clash with the assumptions of dualism and humanism. Moreover, the question of an autonomous status for animals and artificial intelligences is not only unacceptable, but unthinkable for the main principles of legal personality embedded in Western legal thought. Nevertheless, a considerable crisis, which does not stop at reshaping and bending the boundaries between the thing and the person, leads us at least to rethink and review the basic elements of our knowledge and beliefs.

In recent years, and already since the twentieth century, activists and scholars have been increasingly insistent in calling for non-human animals (such as chimpanzees) to be accorded certain kinds of rights on the basis of their own intrinsic qualities – not to mention the claim that they should be accorded personhood in their own right.[57] It is a common and well-founded belief that at least some species of non-human animals are endowed with some degree of sentience and self-consciousness,

55 Raúl Llasag Fernández, *Constitucionalismo Plurinacional desde Sumak Kawasay y sus saberes* (Quito: Huaponi, 2018).

56 Such was the personality conferred on slaves or animals from the criminal law point of view: see Judith Kelleher Schafer, "Long Arm of the Law: Slave Criminals and the Supreme Court in Antebellum Louisiana," *Tulane Law Review* 60 (1985): 1247 ff. Edward Payson Evans, *The Criminal Prosecution and Capital Punishment of Animals* (London: William Heinemann, 1906), *passim*; Katie Sykes, "Human Drama, Animal Trials: What the Medieval Animal Trials Can Teach Us About Justice for Animals," *Animal Law* 17 (2011): 273 ff.

57 Pietrzykowski, "The Idea," 59; cf., in addition, Kurki, *A Theory of Legal Personhood*, 127 ff., 191 ff.

as well as rudimentary forms of capacities such as symbolic communication, counting, tool-making, transmission of knowledge, morality and politics. Since their lives can be made better or worse depending on what their existence experiences, they undoubtedly have their own relevant interests, and accordingly their own well-being cannot be reduced to a merely instrumental value for humans.[58] On the one hand, non-human animals are not simply 'things'. On the other hand, mere de-reification does not provide an effective response to the problems of their status and protection, nor does it constitute a serious breach of the dualistic division of reality into persons and things, since, at least from a legal point of view, animals end up being treated 'like' things, not 'as' things.[59] This makes it difficult to classify animals properly in order to find the most appropriate legal regime, either *de iure condito* or *de iure condendo*.[60]

For example, according to a legal-welfarist approach, animals continue to be regarded as commodities, i.e. property that can be bought, sold, used and even eaten, even though they need to be treated 'humanely', without causing 'unnecessary' suffering, and – as someone has even suggested – given legal standing.[61] Conversely, on the radical abolitionist front, there have been many theoretical attempts to persuade legal authorities to grant animals the status of 'non-human persons'.[62]

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58 Andrews Kirstin, *The Animal Mind: An Introduction to the Philosophy of Animal Cognition* (London, New York: Routledge, 2015), *passim*.

59 Mere de-reification is a solution that is incompatible with the dualistic (and humanistic) scheme in force, which is based on the division between the category of persons (as subjects of law and rights) and that of things (as objects of law and rights): on the basis of mere de-reification, animals would inconsistently belong to neither category.

60 See, e.g., Saskia Stucki, *Grundrechte für Tiere: Eine Kritik des geltenden Tierschutzrechts und rechtstheoretische Grundlegund von Tierrechten im Rahmen einer Neupositionerung des Tieres als Rechtssubjekt* (Baden-Baden: Nomos, 2016), 301 ff., has proposed the new legal category of *tierliche Personen* (animal persons); cf. Saskia Stucki, "Towards a Theory of Legal Animal Rights: Simple and Fundamental Rights," *Oxford Journal of Legal Studies* 40 (2020): 533 ff. Ideally inverting the two terms at stake (animal/person), David Favre, "Living Property: A New Status for Animals Within the Legal System," *Marquette Law Review* 93 (2010): 1021, 1062, has suggested for animals to be classified as 'living property', i.e. 'chattels', 'things', 'commodities' (not legal persons) endowed – like persons – with 'limited legal personality', and even with the right to start a tort action, albeit represented by human beings.

61 Cass R. Sunstein, "Can Animals Sue?," in *Animal Rights: Current Debates and New Directions*, ed. Cass R. Sunstein, Martha C. Nussbaum (Oxford: Oxford University Press, 2004), 251 ff.

62 Gary L. Francione, *Animals, Property, and the Law* (Philadelphia: Temple University Press, 1995); Gary L. Francione, "Reflections on 'Animals, Property, and the Law' and 'Rain without Thunder'," *Law and Contemporary Problems* 70 (2007): 9; Steven M. Wise, "The Legal Thinghood of Nonhuman Animals," *Boston College Environmental Affairs Law Review* 23.3 (1996): 471. Steven M. Wise, "Hardly a Revolution – The Eligibility of Nonhuman Animals for Dignity – Rights in a Liberal Democracy," *Vermont Law Review* 22 (1998), 793. Steven M. Wise, "Legal Personhood and the Nonhuman Rights

Despite this proliferation of theoretical contributions to the subject,[63] practical efforts to give some animals a degree of personhood have met with little success. In fact, despite the encouraging and sympathetic language occasionally used in judgments and judicial opinions (which tend both to emphasise the inadequacy of the law to deal with difficult ethical dilemmas and to suggest better ways of giving animals at least a right to liberty), the courts are unequivocal in their refusal to recognise animals as persons with the same rights as human beings. For example, in the case of Tommy and Kiko, the Nonhuman Rights Project – a non-profit corporation and civil rights organisation founded by Steven Wise – brought habeas corpus petitions on behalf of two adult captive chimpanzees who were being kept in small cages by their owners. The petitioners contended that these animals, who exhibited advanced cognitive abilities and self-awareness, should be considered persons entitled to certain fundamental rights under New York law and should therefore be transferred to sanctuaries. The Appellate Division, First Department, dismissed the case, holding that the writ of habeas corpus does not apply to chimpanzees because such animals are not 'legal persons' who can be 'unlawfully detained'. The decision was upheld on the rather curious grounds that, as animals, Tommy and Kiko cannot be held legally responsible for their actions.[64]

On the contrary, the 'animal personhood' theory and the 'animal rights' movement have recently been gaining ground in Argentina, going far beyond the orthodox view – rooted in traditional theories of personality and jurisprudence – that the New

Project," *Animal Law Review* 17 (2010): 1. Peter Singer, *Animal Liberation* (New York: Harper Collins, 1975); more specifically on the autonomy of animals and legal personality, cf. Steven Wise, *Rattling the Cage: Towards Legal Rights for Animals* (New York: Perseus Publishing, 2000), *passim*; Sue Donaldson – Will Kymlicka, *Zoopolis. A Political Theory of Animal Rights* (Oxford: Oxford University Press, 2011), *passim*.

63 See, for instance, Steven M. Wise, "Legal Personhood and the Nonhuman Rights Project," *Animal Law Review* 17 (2010): 5; cf. Steven M. Wise, "A New York Appellate Court Takes a First Swing at Chimpanzee Personhood: And Misses," *Denver Law Review* 95 (2017): 266 ff.

64 Nonhuman Rights Project, Inc. v. Nonhuman Rights Project, Inc. v. Lavery, 152 A.D.3d 73, 54 N.Y.S. 3d 392 (1st Dept. 2017); the motion for leave to appeal this decision to New York's Court of Appeals was denied. Yet, the reasoning was openly criticised in the concurring opinion issued by Justice Eugene M. Fahey: see Nonhuman Rights Project, Inc. v. Lavery, 31 N.Y.3d 1054, 100 N.E.3d 846 ff. (2018/Fahey, J. concurring). Cf. Matter of Nonhuman Rights Project, Inc. v. Presti, 124 A.D.3d 1334, 999 N.Y.S.2d 652 (4th Dept. 2015), lv. denied 26 N.Y.3d 901, 2015 WL 5125507 (2015); People ex rel. Nonhuman Rights Project, Inc. v. Lavery, 124 A.D.3d 148 ff., 998 N.Y.S.2d 248 (3rd Dept. 2014), lv. denied 26 N.Y.3d 902, 2015 WL 5125518 (2015); Matter of Nonhuman Rights Project, Inc. v. Stanley, 2014. N.Y. Slip Op. 68434(U) (2nd Dept. 2014). Cf. Nonhuman Rights Project, Inc., ex rel. Happy v. Breheny, Sup Ct, Bronx County, Feb. 18, 2020, Tuitt, J, index No. 260441/19; cf. Nonhuman Rights Project, Inc. v. Breheny, Case No. 2020–02581 Sup. Ct. App. Div. (1st Dept. 2020).

York courts have consistently upheld.[65] On the one hand, Argentine judges hearing two habeas corpus petitions have openly argued that sentient animals do not have to bear (or rather fulfil) duties in order to be properly reclassified as legal persons. On the other hand, they have strongly anchored the decisions in the traditional notion of legal personality itself, understood merely as the capacity to hold rights and/or bear duties, i.e. in terms of 'subjectivity'. The case of the chimpanzee named Cecilia was the only one to be fully successful, as habeas corpus protection was granted without being overturned by a higher court. The Third Court of Guarantees issued a revolutionary ruling in 2016,[66] pointing out that the law identifies the legal person with the legal subject (conceived as the centre for the imputation of norms and/or rights) and declaring that most animals, just like humans, are made of flesh and bones, are born, suffer, drink, play, sleep, have the capacity for abstraction, love, are sociable, and so on. As a result, according to the Court, the category of person would include not only human beings but also, for example, great apes.[67] According to this judgment, Cecilia the chimpanzee, as a person and no longer as an object, seems to be fully endowed with the fundamental protection of freedom and integrity: she would be a subject of habeas corpus or, which is the same thing, a legal person for the purposes of habeas corpus. Two years earlier, the Federal Criminal Court of Cassation had, in a similar manner, but with a different reasoning, reclassified the orangutan Sandra as a 'non-human legal person', claiming that a dynamic rather than a static interpretation of the law made it imperative to recognise the animal as a *sujeto de derecho*, since it was already a holder of rights.[68]

These two primates would be the first non-human natural 'legal persons' in history.

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65 See, moreover, Corte Constitucional del Ecuador [C.C.E.] [Ecuadorian Constitutional Court], 22 Diciembre 2020, J.R. Ávila & J. A. Grijalva, Caso 253-20-JH (Ecu.).

66 Saskia Stucki, "Toward Hominid and Other Humanoid Rights: Are We Witnessing a Legal Revolution?," *Verfassungsblog*, 30 Dec 2016.

67 Tercer Juzgado de Garantías de Mendoza [J.G.Men.] [Third Criminal Court of Mendoza], 3/11/2016, "Presentación Efectuada Por AFADA Respecto del Chimpancé 'Cecilia' Sujeto No Humano," [Expte. Nro.] P-72.254/15, (Arg.).

68 Cámara Federal de Casación Penal [C.F.C.P.] [Federal Criminal Cassation Court], Second Chamber, 18/12/2014, "Orangutana Sandra s/Recurso de Casación s/Habeas Corpus," No 2603/14 (Arg.); Juzgado Contencioso Administrativo y Tributario No. 4 de la Ciudad de Buenos Aires [J.C.A.T.] [Court for Contentious – Administrative and Tax Proceedings No. 4 of the city of Buenos Aires], 21.10.2015, "Asociación de Funcionarios y Abogados por los Derechos de los Animales y Otros c. GBCA Sobre Amparo," No. A2174-2015/0 (Arg.); Cámara Contencioso Administrativo y Tributario de la Ciudad Autónoma de Buenos Aires [C.C.A.T.B.A.] [Contentious Administrative and Tax Court of the City of Buenos Aires], 14.6.2016, "Orangutana Sandra – Sentencia de Cámara – Sala I del Fuero Contencioso Administrativo y Tributario CABA," (Arg.). See, moreover, the following Oregon Supreme Court's judgments: *State v. Fessenden/Dicke* 355 Or 759 ff. (2014); *State v Nix* 355 Or 777 (2014).

5 Removing the Person from the Stage

As recently pointed out, both realist and legalist approaches tend to support the common idea of the 'disembodied person', albeit in two very different contexts. The former tends to emphasise certain axiological or empirical criteria (such as moral values or psychological, rational and sentient aspects) as to 'who or what' can be given personality, whereas according to the latter 'anything goes' due to the plastic and flexible artificiality of the notion of legal personality. More precisely, neither seems to have fully developed «a legal concept of person capable of expressing what is ultimately at stake in the coming era of human enhancement technologies: our embodied, human nature.»[69] On the contrary, the *dispositif* of legal personality – sometimes stretched to cover entities without a human body (such as corporations, animals, parts of the environment, artificial intelligence), sometimes essentially limited to moral or spiritual (i.e. non-bodily) qualities peculiar to human beings, though not exclusively so – would lead to a fundamental disembodiment, leaving human life per se, in its precariousness, vulnerable and unprotected.

Feminist literature, for example, which advocates a non-representational view of politics, has found the doubling of 'person-rights' rather problematic.[70] Dworkin, in theorising the 'rule of life' in law, has argued for the abolition of the idea of the legal person and the recognition of the fundamental value of life understood as *zoe* (bare life) and the dignity of life understood as *bios* (political life).[71] Giorgio Agamben himself seems to share an anti-identitarian and anti-personal conception of the political dimension (since every identity is, for the philosopher, a 'mask'), at least when he urges everyone to «be only your face» and to «go to the threshold» without remaining «the subjects of your qualities or abilities, do not remain below them.»[72]

Roberto Esposito is one of the last and most vehement opponents of the semantics associated with the apparatus of the 'person' (as well as the 'body' as the

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69 Britta van Beers, "The Changing Nature of Law's Natural Person: The Impact of Emerging Technologies on the Legal Concept of the Person," *German Law Journal* 18 (2017): 593.

70 See, e.g., Carol Pateman, *The Sexual Contract* (Stanford, CA: Stanford University Press, 1988), *passim*.

71 Ronald Dworkin, *Life's Dominion. An Argument About Abortion, Euthanasia, and Individual Freedom* (New York: Vintage Books, 1994), 82 ff., 90 ff.

72 Giorgio Agamben, *Nudities*, eng. trans. (Stanford: Stanford University Press, 2011), 46; cf. Giorgio Agamben, *Means Without End*, eng. trans. (Minneapolis: University of Minnesota Press, 2000), 100; Giorgio Agamben, *The Coming Community*, eng. trans. (Minneapolis: University of Minnesota Press, 1993), 5. This approximation seems to be not accurate: it is true that the person is first and foremost the mask, the character: but it is also true that the mask hides the individual, in order to homologate him or her to the peculiar traits that it stereotypically represents. The mask is a person, and the person is in itself an anti-identitarian role rather than an expression of identity.

primary banner of 'political identification') in the discourse and practice of politics and law. According to the Italian philosopher, the category under discussion is at the heart of the problem. Its scope should not be expanded, nor should its applicability be rethought and reapproached. Rather, the whole concept of the person should be dismantled and discarded, since its centrality, especially in legal thinking, has led to more than a few shortcomings, such as the failure to protect those most in need of protection. The traditional view, which is a practical and conceptual obstacle to equality and *com-munitas*, should be replaced by the perspective of the 'impersonal' or – which is the same thing – the 'third person', in which life is neither subject nor object, but important in itself because of its immanence. Without the screen of the person-*dispositif* with its 'im-munitary exceptions', there would be no obstacle to thinking an innovative relationship between politics and life. Every 'being' would be recognised, without further qualification, as the holder of fundamental rights,[73] and 'flesh' (i.e. that which is at once communal and singular, generic and specific, undifferentiated and different, not only devoid of spirit but unrelated to the body; a mundane material that precedes and follows the constitution of the subject of law) would bring about the dissolution of the hierarchical order that separates the human and animal species, as well as the living and the non-living.[74]

The origins of the Western idea of personality in Roman law are a crucial point in his critique of the legal and cultural apparatus of the person. According to Esposito, in Roman law «no man was a person by nature … since man came into life from the world of things, he could always be thrown back into it.»[75] In other words, the Roman distinction between the 'natural individual' (*homo*) and the 'legal subject' (*persona*) would create an unbridgeable gulf between the individual and his embodied life, making it possible for the latter to become a *homo* and, as such, even a mere 'thing', a body under the ownership (*dominium*) of another person. Rights would fall on the side of the legal persona, i.e. a legal artifice designed to leave the impersonal dimension of embodied life, denoted by *homo*, in a rights-less state.

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73 Roberto Esposito, *The Third Person*, eng. trans. (London: Polity, 2012), 3, 83; cf. Roberto Esposito, *'Immunitas': The Protection and Negation of Life* (Cambridge: Malden: Polity, 2011), *passim*; Roberto Esposito, *Terms of the Political – Community, Immunity, Biopolitics* (New York: Fordham University Press, 2013), *passim*.

74 In his general attempt to dismantle the notion of person, Esposito suggests a way out of current legal and political dilemmas by using the metaphor of the 'flesh' (*caro*, *sarx*) as a possible connective device towards an «impersonal» life (or life lived in the «third person»), as a possible means to imagine a new form of *communitas*, even if he believes that bodily confines themselves are always needed (since «it is in the body and only in the body that life can remain what it is and even grow, be strengthened, and reproduce»: see Esposito, *'Immunitas'*, 113, 121; cf. Roberto Esposito, *'Bíos': Biopolitics and Philosophy*, eng. trans. (Minneapolis: University of Minnesota Press, 2008), 159 ff.

75 Esposito, *Third Person*, 3.

According to Esposito, by removing this legal apparatus, rights could be seen as a platform truly tied to each individual's embodied life, that is, to the *zoe* that marks each animal being, rather than to the bios implied in the general and artificial notion of *persona*. By overcoming the body-person dualism that flourished in the Roman legal tradition and is embedded in early modern and current conceptions of 'natural rights', the divide between such embodied life and legal artificiality could be overcome, as required by a novel conception of law that assigns entitlements to *homines* rather than *personae*. All in all, a return to the flesh, a return to the concrete idea of *homo*, dropping the mask of personality, is the proposal that Esposito puts forward with both rhetorical and argumentative force, identifying Roman law as the main cause of the dissociation between rights and human beings. The idea is not new: «In the creation of masks, lawyers have let their capacity for fiction run amok … masks are monsters as dangerous as those that emerge from the sleep of rational rule. Masks are a kind of 'human self-alienation'. Masks conceal persons. To remove the masks is to distinguish between them and the persons. By the latter I mean particular flesh and blood and consciousness».[76] But is this idea, which both dreams of a primary natural reality without law and implies an oppressive and unjust nature for the legal instrument of the person, a sound and tenable one, not only on a theoretical and practical level, but also on a historical one?[77]

6 To have a 'Persona' in Rome is to Put on a 'Mask'

Persona, as noted above, is a central, if questionable, concept in contemporary debates:[78] what does it really mean 'to be a person'? First of all, it should be pointed out that when using the word *persona* in an etymological sense, it would be much more appropriate to say 'to have a person' rather than 'to be a person'.

True it is that the Latin term *persona* originally meant 'mask', and it was through such a prototypical mask that individuals acquired their own role and social identity. The image of the mask is a metaphor in law that exemplifies the legal *persona* in that it conceals the private sphere and at the same time allows participation in the public sphere: this is evident in the portrait of a veiled woman in Florence, in the Uffizi,

76 John Noonan, *Persons and Masks of the Law* (Toronto: McGraw-Hill Ryerson, 1976), 26.

77 The merits of such claim are subtly implied in some intense passages included at the end of the second part of Bodei's *Dominio e sottomissione*. Here the Italian philosopher seems to prefer masks and artificiality to flesh and nature (Bodei, *Dominio e sottomissione*, 276, 278).

78 Neil MacCormick, *Institutions of Law: An Essay in Legal Theory* (Oxford: Oxford University Press, 2007), 77.

where a panel shows a mask with the legend '*sua cuique persona*', i.e. 'to each his own mask'.[79] There is a long tradition of thinking of the person in terms of the mask and the related category of appearance. Within this tradition, the mask or *persona* emerges as a technique for establishing a legal relationship, first to life and then to other lives. But what kind of mask?

Most scholars today accept that the Latin *persona* is linguistically derived from the Etruscan *phersu*: it is therefore quite plausible, if not indisputable, that the Romans adopted the word in question from the Etruscans, together with the customs and institutions associated with it.[80] *Phersu* is in fact a noun that appears twice in the surviving documentation: it is inscribed on the right and left walls of the Tarquinian tomb of the Augurs (dated around the 6th century BC) and corresponds to an enigmatic figure – apparently more human than demonic – wearing a 'bearded mask' and taking part in more or less violent games to honour the deceased; once he is shown fleeing, once he is shown winning a fight.[81] If the Etruscan suffix *-na* usually denotes the possessive adjective formed from a noun, then *phersu-na* would mean 'belonging to *phersu*', while the Latin *persona* could end up referring to *phersu*'s most striking feature, his mask.[82] Indeed, as Polybius attests, the role of masks in the background of Roman funerary rituals is striking. Describing Roman funerals, the 2nd-century BC Greek historian notes that each mask represented an exact 'double' of one of the ancestors.[83] Following Polybius' line of thought, the funerary rituals and the use of masks could therefore help to enhance Rome's greatness, inspire new generations to heroic deeds, and connect the Romans to their ancestors and their traditions. In other words, as some scholars have pointed out, the *persona* was originally the double of the deceased, a mystical reflection of the ego of the deceased, which, according to very ancient religious beliefs, could survive with the soul in a simulacrum or material imago of the body itself after the destruction of the body: the

79 Ridolfo del Ghirlandaio, *Portrait of a Veiled Woman*, c. 1510. Palazzo degli Uffizi, Firenze: cf. Jeanne Gaaker, "*Sua cuique persona*? A Note on the Fiction of Legal Personhood and a Reflection on Interdisciplinary Consequences," *Law & Literature*, 28.3 (2016): 287 ff.

80 Enrico Montanari, "*Phersu* e *persona*," in *Categorie e forme nella storia delle religioni* (Milano: Jaca Book, 2001), 155 ff. Giacomo Devoto, "L'etrusco come intermediario di parole greche in latino," *Studi Etruschi* 2 (1928): 315; cf. Bernardo Albanese, s.v. *Persona (diritto romano)*, in *Enciclopedia del diritto*, vol. 33 (Milano: Giuffrè, 1983), 169.

81 Enrico Benelli, *'Thesaurus linguae Etruscae'*, I, *Indice lessicale* (Pisa, Serra: 2009), s.v. *φersu*; Stephan Steingräber, *Etruskische Wandmalerei* (Stuttgart: Belser, 1985), no. 42; Frederik Poulsen, *Etruscan Tomb Paintings*, eng. trans. (Oxford: Clarendon, 1922).

82 Dieter H. Steinbauer, *Neues Handbuch des Etruskischen* (St. Katharinen: Scripta mercaturae, 1999), 121; Giuliano and Larissa Bonfante, *The Etruscan Language*, 2nd ed. (Manchester: Manchester University Press, 2003), 99; Ingrid Krauskopf, "Phersu," in *Dizionario della civiltà etrusca*, ed. Mauro Cristofani (Florence: Giunti, 1985), 281 ff.

83 Polybius, *Histories* 6.53.5, 54.1–3.

heir had to wear the *persona* of the deceased in order to represent a symbolic unity with the past.[84]

In fact, as is generally acknowledged, the Latin *persona* is clearly equated in several ancient sources with the Greek word *prosōpon*. In its earliest occurrences, this Greek term would simply mean 'face'; but in its later uses, in both theatrical and religious contexts, *prosōpon* clearly also takes on the meaning of 'human mask', 'role', 'character'.[85] The theatre, as it was introduced in Rome, was undoubtedly inspired by the Greeks, probably via Tarentum:[86] consequently, both the "mask" (worn by actors and priests) and the consequent meaning of "social role" (as well as "standing" in the realm of law), via the Latin term *persona*, became a normal convention in the Roman world as well.[87]

As a result of this supposed duality, which is relevant on a political, legal and religious level, on the one hand the burial mask would function as a material sign of tradition, capable of bridging the present and the past; on the other hand, the theatrical mask would give life to the present on the way to the future. This peculiar aspect was wisely captured by Hanna Arendt in her seminal book On Revolution: the philosopher does indeed believe that *persona*, in its fundamental meaning, refers to the mask that ancient actors had to wear on stage, both to hide their own (natural) face and – according to the false etymology attested in the *Attic Nights* of Gellius[88] – to make the voice come out (*personare*), and thus to figure and appear as a tragic or comic figure. However, Arendt also seems to implicitly accept the theory of the funerary origin of the Roman masks/*personae* when she emphasises that the voice

84 René Brouwer, "Funerals, Faces, and Hellenistic Philosophers: On the Origins of the Concept of Person in Rome," in *Persons. A History*, ed. Antonia LoLordo (Oxford: Oxford University Press, 2019); cf. Francesco Maroi, "Elementi religiosi del diritto romano arcaico," in *Archivio Giuridico* 25 (1933) ff. As is well known, all the commentaries on the work by Quintus Mucius, which most likely had a lemmatic structure, followed the order of exposition of their model (*libri iuris civilis*): perhaps it is no coincidence that this one, in fact, dealt in an opening position, with regard to the *personae*, precisely with hereditary successions and wills (cf. Otto von Lenel, *'Palingenesia iuris civilis'* I (Lipsiae: 1889), 557, nt. 2.

85 Hom. *Il*. 7.212; 18.414; *Od*. 19.361; Hes. *Op*. 594; Dem. 18.283; Ar. *Poet*. 5 1449a36; Ar. *hist. anim*. 1.8 491b,9 (Bekker); *Suda* s.v. *Thespis* (θ 282); Diog. Laert. 4.46; cf. Polyb. 15.25.25, 5.107.3, 12.27.10, 18.11.5, 27. 7.4.

86 G. M. Brown, "The Beginnings of Roman Comedy," in *The Oxford Handbook of Greek and Roman Comedy*, ed. Michael Fontaine and Adele C. Scafuro (New York: Oxford University Press, 2014), 401.

87 See Fest. 238.13 (Lindsay); Cic. *de or*. 3.221; Luc. *r.n*. 4.297; Phaed. 1.7.1; Mart. 3.43.4; cf. Ter. *Eun*. 31–34; Cic. *Mur*. 6; Hor. *ars* 126; Sen. *cl*. 1.1.6. See Osvaldo Sacchi, "*Phersu*/*Persona?* Contributo per un'etimologia di *prosōpon*," *Diritto@Storia* 9 (2010); Onorato Bucci, *Persona. Una introduzione storico-giuridica alla civiltà greco-romano-giudaico-cristiana* (Roman, Serafica: 2006), 61 ff.; Remo Martini, "*Prosōpon* e *persona*: notazioni semantiche," in *Scritti in ricordo di Luigi Amirante*, ed. Elio Dovere (Napoli: ESI, 2010), 222 ff.

88 Gell. 5.7.1; cf. Boeth. *adv. Euty. et Nest*. 3.11–13.

that the actors would make come out in order to play their own theatrical role 'represented' the voice of the ancestors, making the Roman tradition resound.[89]

However, if the Greek example, in its meaning of (human) face, includes a primordial 'natural' dimension, as opposed to the theatrical aspect implied in the derivative sense of mask, the Latin counterpart abandons any reference to the physical body and includes an 'artificial' reference, which the opposition between *homo* and *persona* makes more than clear.[90] In Gaius's legal textbook, the term *persona* is used to denote one of the three possible main categories of Roman law: 'all the law we use is either about persons, or about things, or about actions'; Gaius's subdivisions regarding persons begin immediately thereafter: 'the *summa divisio* in the law of persons is this: all persons are either free or slaves'.[91] At the beginning of the 6th century, Justinian adapted Gaius' work and turned it into his Manual, where the law of persons begins in chapter 3 of the first book and is developed in the following twenty-three chapters, with a detailed taxonomy that, as someone has noted, "bears remarkable similarities to Pollux's taxonomy of masks used in the theatre".[92]

But who were the *personae* according to classical Roman law? Indeed, *personae* did not differ from *homines* in the sense that the latter were simply human beings, pure individuals, embodied lives, considered and treated as things under *dominium*, whereas the former were the sole holders of rights and bearers of duties.[93] Such a contrast makes no sense in Rome. Accordingly, it is not correct to argue that the concept of *persona* has been and can be used as a means of separating the identity of a real living being from that of a purely artificial role. It is not true that children and especially slaves did not qualify as *personae*. Both were *personae* because they were characters on the stage of law. *Filii* and *servi* were clearly *homines* and "individuals wearing a mask", "actors" playing different "roles" according to their own status: in other words, the Roman *ius civile* could not fail to recognise in such human beings – in addition to their intellect, their ability and their physical form – their "natural"

89 Hannah Arendt, *On Revolution* (Harmondsworth, Penguin: 1976), 106 f., n. 42.

90 See, moreover, Marcel Mauss, "A Category of the Human Mind: The Notion of Person; The Notion of Self", *The Category of the Person*, ed. Michael Carrithers et alii (Cambridge: Cambridge University Press, 1985), 18. Against such a duality see Thomas Hobbes, *Leviathan*, introduced by K. Minogue (London, Dent: 1987), 83 f.

91 Gai. 1.8; Gai. 1.9; cf. D. 1.5.3; Inst. 1.2.12; Theophilus *Paraphr*. 1.3 pr. Cf. Clifford Ando, "Self, Society, Individual, and Person in Roman Law," in *Self, Self-fashioning, and Individuality in Late Antiquity. New Perspectives*, ed. Maren R. Niehoff, Joshua Levinson (Tübingen: Mohr Siebeck, 2019), 375 ff.

92 Brouwer, "Funerals," 3 ff.

93 Cf. Alessandro Corbino, "*Status familiae*," in *'Homo', 'caput', 'persona'. La costruzione giuridica dell'identità nell'esperienza romana*, ed. Alessandro Corbino, Michel Humbert, Guido Negri (Pavia: IUSS Press, 2010), 183 f.

capacity to will, to consent, to be parties to contracts, to bear and fulfil obligations, as (legal and economic) 'actors' at all levels and in all areas of Roman business.[94] Having the capacity to act and at the same time lacking legal capacity (or legal standing in court) was by no means a contradiction in terms, as it would be today, given that capacity to act is a *quid pluris* with respect to personality and legal capacity: *filii* and *servi* (as well as women married by *manus* marriage) were not endowed with full 'subjectivity' (i.e. full legal capacity); in their legal role as *personae*, they could undoubtedly be 'legally active'.

From several "patrimonial" aspects of Roman slavery law, it is clear that *servi*, but not *filii*, was conceived as a *res*: slavery was indeed defined by late classical jurists as "an institution of *ius gentium* by which a human being, contrary to nature, is subjected to the dominating power of another".[95] A slave is a piece of property, a commodity, like an ox.[96] It is therefore not wrong to point out that during the Republic and the first centuries of the Empire, the *servi*, as mere *homines*, lacked any "legal, patrimonial and proprietary capacity", as well as any "procedural standing", until the *ius naturae* gradually inspired more and more "human" disciplines and treatments.[97] However, we must be aware that such a perspective becomes an ahistorical one, since it tends to read the past – especially the hierarchical stratifications that underpinned and shaped Roman society as a whole – through contemporary categories. The Roman *ius personarum* – and, by extension, every other area of relations between individuals – was centred not on the simple concept of 'capacity', but on a multifaceted and multi-layered system of 'statuses', implying different duties and powers depending on the community to which one belonged. Thus, the indignant assertion that a slave was not a real "person" in the world of law is misleading, inaccurate and totally inadequate for understanding (and not judging) the Romans and their culture.

The relationship between "slavery" and "lack of legal capacity" – often overemphasised in order to portray the cruel oppression that the Romans allegedly reserved for slaves – is misleading because the two poles in question do not correspond exactly. In fact, a *filius familias*, though *civis* and *liber* (and as such with all the duties and rights deriving from his legal status), was an *alieni iuris* individual in the same way as a *servus*: in other words, an individual with a living *pater familias*, as well as a human being considered as property, was said to be under the power or *potestas* of another:[98] But even if the former was intended to become a *sui iuris*

94 Cf. Gai. 2.95; D. 41.1.5.9.

95 Florent. 9 *inst*. D. 1.5.4.1.

96 Varro *Rust*. 1.17.1; cf. Gai. 1.52.

97 Cf. Martin Schermaier, "Neither Fish nor Fowl: Some Grey Areas of Roman Slave Law," in *The Position of Roman Slaves Social Realities and Legal Differences*, ed. Martin Schermaier (Berlin – Boston: De Gruyter, 2023), 237 ff.

98 Gai. 1.48-49; cf. Gai. 1.55; D. 50.16.195.2.

individual and the latter could only wish for *libertas* and *civitas*, *iure privatorum*, both were definitely excluded from a full "capacity" of holding rights and duties, prerogative only of the *pater familias*, if one is allowed to use modern categories.

Roman law seems to have introduced the category of *persona* as opposed to *homines*, far from justifying dominion for the former and submission for the latter. *Personae* were all human beings who either played a role on the stage of the legal world (as *servi*, *filii*, *patres*) or were simply on that stage (*mulieres*, *impuberes*, etc.); in Rome, being a person was not simply a matter of having rights and obligations. It was a question of tradition and shared values (as the funerary mask, mainly for the élite, might suggest): when an individual wore this mask, he/she was recognised as part of a shared world and as a participant in it. Secondly, it was a question of relations between legal actors (as the theatrical mask might suggest): when individuals wore this mask, they could be active participants, as representatives or authors, within the limits and with the consequences provided by the law. In Roman law, even those *homines* who did not enjoy what we would now call full legal personality or subjectivity, such as slaves and children, were considered *personae*, as were those who, although in the role of *patres* or legally independent *uxores*, were not psychologically mature, *personae*, but were considered vulnerable to exploitation and were placed under curatorship or tutela (as *sui iuris* individuals under the age of puberty, minors, spendthrifts and lunatics, women). In an anthropocentric conception of law (where the slightest or most unlikely theoretical and practical possibility of conferring personality on parts of the natural world other than human beings, such as animals, rivers, mountains, etc., never arose), personality did not amount to the capacity to have rights and/or to bear duties, nor was it – in individual cases – an exclusive quality of fully sentient and rational (human) beings.[99]

Personality is a derivative quality attributed to those who are recognised by the law in the legal world: it is not a biological fact considered per se that underlies this concept (so much so that it is not the face, as in the Greek world, but the mask that represents the cultural referent of personality); it is not this concept that is an inescapable precondition of rights and duties (so much so that even those who are subject to the dominical or paternal power of another can be persons). It is not nature that creates persons (but law that creates them); it is not the person who is the ideal protagonist of the comedy or tragedy of law, the centre of the system (but, in a choral logic, one of the actors, primary or secondary, on the stage of law). Whoever was a *pater familias* was not only a *persona*, but something more, being a *sui iuris* (legally independent) individual, i.e. without a living ascendant in the male line: he was recognised as having the capacity to own property (even if he could not dispose of it independently); and he was not susceptible to being owned; he was endowed with

99 Gai. 1.142-143.

liberty and the protection of life; he was endowed with the capacity to suffer harm and the capacity to sue for restitution or compensation (even if someone else was sometimes needed to represent him). However, even those who were not *patres*, qualified either as *liberae personae alieni iuris* and sometimes even as *res*,[100] played a distinct role in Roman society: they had the capacity to enter contracts and perform other legal acts, although they were not held fully liable for their actions.[101]

7 Some Tentative Concluding Remarks on the Legal 'Dispositif' of the Person

The previous section has presented an alternative line of thought that goes back to Roman law. This, by rediscovering the practical-operational relevance of the notion of *persona* as 'role' played in the stage of law (i.e. the status enjoyed by those who are recognised as actors and characters within a given legal system), could be used as a source of inspiration for finding adequate and balanced answers to all the pressing questions of definition and protection that the world today poses. After all, it is not insignificant that the Latin term *persona* is feminine in grammatical gender, but semantically 'gender-neutral' and 'status-inclusive' and, consequently, under the banner of *persona* are united men, women, children, free and slaves (and implicitly also super-human entities are included): but do we have the right to extend this concept to non-human entities, both natural and synthetic?

For example, the attribution of "legal personality" to sentient animals – which is the traditional view – is undoubtedly a bold, if not dangerous step,[102] even if it is based on a vision that cannot ignore the liminality between human and non-human persons. Such an approach completely overturns the anthropocentric understanding of legal systems with an innovative and unprecedented re-proposal of the dualism between things and persons, even if at the same time it paradoxically confirms it by proposing a properly anthropocentric categorisation for non-human animals.

The law does indeed confer personality on corporations in order to promote the interests of human beings: for the artificial person, this means the capacity to own

100 Hans-Dieter Spengler, "*Homo et res*," *Handwörterbuch der Antiken Sklaverei*, vol. 2, ed. Heinz Heinen et alii (Stuttgart: Franz Steiner Verlag, 2017), 1444 ff.

101 Carlo Pelloso, "*Serviles personae* in Roman Law. 'Paradox' or 'Otherness'?," *Journal of Global Slavery* 3 (2018): 92 ff.

102 It should be noted that, in contrast, it has been pointed out that the modern and contemporary categories of personality and subjectivity may not be particularly adequate for assessing the legal status of non-human animals: see Pietro Paolo Onida, *Studi sulla condizione degli animali non umani nel sistema giuridico romano* (Torino: Giappichelli, 2002), *passim*.

property, to enter into contracts, to incur debts, to be liable for torts, and to sue and be sued. In contrast, rivers and other natural entities have recently been endowed with a narrower, but more beneficial, 'positive' personality: this basically means rights without duties for the environmental person, and more restrictions and constraints for the human person. Animals, which are closer to the latter category than to the former (even if they have very specific characteristics), would be given legal personality mainly in order to put them on an equal footing with human beings, or rather to distinguish them from inanimate things: firstly, in the name of their right to physical integrity and freedom. But what would it mean, in strictly abolitionist terms, to give animals 'full personality'? Animals could be owners (whose assets would have to be managed by humans) rather than property; they could become creditors or debtors (and even parties to a contract); they could have legal capacity (albeit with the need to be represented in court); they could be held liable for crimes and torts, as they have been in the past.

Animals are neither artificial nor natural persons (human or environmental). Giving them the status of full legal persons would miss the point entirely and raise some very difficult legal questions. First, legal artificial personhood is based on instrumental considerations aimed at advancing human interests, whereas the rationale behind animal personhood is to limit, rather than expand, the ways in which the human good can be pursued through the use of animals. Second, animals have recently been personified – in singular and particular cases – because of their similarity to human beings and their intrinsic difference from things (i.e. because of their sentience). On the other hand, natural beings have been personified because of their essentiality to life in general and their intrinsic difference from human beings. In other words, in the former case, the rights and interests of human beings are used as a paradigm and must be limited in order to make room for other living beings similar to them (i.e. non-human animals). In the latter case, the limitation is based on the general heterogeneity that exists among the constituent elements – human and non-human animals, environment – of a harmonious and all-encompassing whole, usually called nature or ecosystem. Third, while many similarities undeniably link the human species to other sentient animals, the former appears as a unique case because of the unparalleled scope of its cognitive and deliberative capacities.

The updated Roman notion of personality – once transported into a system willing to overcome atavistic anthropocentrism and abandon some of its most radical tenets – would operate from a very different perspective. The questions would not simply be: how much do animals resemble humans? Do they have intrinsic qualities of their own, or are there utilitarian reasons for treating them as persons? Are animals subjects of rights and duties? From the perspective of generalised *ius civile*, the questions would be: can animals play a role on the (artificial) stage of law? What is their (legal) role and status? What particular attachments can supposedly be

attached to their legal mask? Moreover, the problem of the insurmountable contradiction (existing within the framework of the traditional concept of personality) of an entity that can be both property and a person would not arise. Animals – or at least certain animals, such as pets – could perhaps be considered as persons in their own right, as co-persons deserving protection by and under the law, even if they are not authentic holders of full legal capacity. Their role (member of the family, worker, guide or assistant, means of entertainment) would imply a certain degree of possible interaction with human beings, and their undeniable position in the legal world could be recognised by the law in terms – as innovative as they are ancient – of legal personality as a role, even if, as is more than obvious, this position can in no way be said to be analogous to that of slaves and children in Roman law in the field of contracts and obligations.

Beyond the ideological significance and the terminological aspects, such a 'disguise' would be a mere formality in any case. Historically, of course, Roman law gave very different concrete answers to the 'animal question'. Within the boundaries of classical civil law – where, moreover, the spheres of the *res* and the *personae* could not only communicate but also partially overlap, as can be seen in the case of slavery – animals were and remained things capable of forming 'object of rights' (*res corporales*), as opposed to *personae* (*homines* with multiple roles on the legal stage). But there was also, in the elaborations of the jurists, a law shared by humans and animals, namely *ius naturale* (where the opposition between res and *personae* is less relevant than the concept of animal, which includes both humans and other animals in a unifying perspective as entities belonging to the same universal system).[103] And it is precisely through the conceptualisation of such an *ius* that the idea of the affinity between all living beings, and consequently of respect for non-human animals, is transmitted from Greek philosophical culture to Rome. *Ius naturale*, in other words, ignored important differences between typical members of the human species and non-human animals in order to emphasise important similarities between humans and non-humans. *Ius civile* did exactly the opposite, and only here the inclusion of *animalia* as *res* mattered, while within *ius naturale* itself the reference to the device of *persona* was irrelevant.

Legal personality, in the traditional view, consists in the capacity recognised to typical members of the human species to have rights and duties that are clearly inappropriate to animal needs and qualities. In classical Roman law, legal personality consisted in donning a mask: it was conferred on *servi* and *filii* – i.e. on dependents without what we would now call full legal personality, the former being *res* of their *domini*, the latter subjects of their fathers' *potestas* – only by virtue of their (human) capacity to deliberately decide on their own actions and thus to act

103 Ulp. 1 *inst.* D. 1.1.1.3.

rationally and cognitively. All in all, extending either status of 'person' to animals would seem to be a doubly confusing operation: it would mean both mixing the levels of *ius naturale* and *ius civile* and, with regard to the latter only, proposing an extremely drastic and misleading revision of the legal content derived from the notions of personality.

Granting only rights without duties (and thus excluding any form of negative personality) is the same approach, in theory and in practice, that is taken in giving personal status to 'nature'. Remaining within a conceptual and operational system in which only human beings exist as natural persons, while corporations are recognised as artificial persons (under whose veil aggregations of human beings continue to be hidden anyway), one might assume that such a transition from thing to person is a purely artificial device. Indeed, it would avoid problems of 'standing' by enabling human individuals to act on behalf of a non-human person (nature itself or some of its constituent parts), rather than imposing on them the onerous burden of proving standing in their own capacity.[104]

Only when one abandons the perspective of a biunivocal relationship between the person and the human pole, and only when one takes into account that in ancient Rome even superhuman beings were personified and their property protected, and that religion was a utilitarian instrument aimed at the security and welfare of the Roman people and thus at securing and making life flourish in the interests of human beings, does the situation appear different. The protection of nature itself – as a complex of 'superhuman entities' whose care is directed towards the preservation and enhancement of human life itself – becomes less exotic and extravagant through the device of the environmental (mask) person and the 'sacralisation' of ecology.

104 The problem of protecting the environment, without transferring nature from things to persons, could also be addressed in the light of Roman law. As a matter of fact, it already provided, alongside private and criminal actions, a further class of actions, the so-called popular actions, aiming at interests which are, in fact, neither public nor private in the strict sense. They are not public because individuals are already responsible for responding to environmental damage; they are not private because individuals are not considered *uti singulus*, but as part of the *populus Romanus*, or as part of a more limited or different collectivity (e.g. a *civitas*). The *civis* is a member of the people and sues simultaneously in his own interest and in the interest of his community (Paul. 8 *ad ed*. D. 47.23.1). Thus, the Roman jurists seem to place at the basis of the granting of popular action the existence of a category of things that are neither properly public, nor properly private, but are res *in usu publico*: these things, corresponding to limited and exhaustible resources (unlike the *species* of things labelled as *res communes*, 'common goods' susceptible to be partially removed from common use through appropriation) and open to immediate use by the *cives*, who, accordingly, are entitled not to be affected in such use (cf. Gai. 2 *inst*. D. 1.8.1 pr.; Gai. 2.10-11; Marcian. 3 *inst*. D. 1.8.2.1; Inst. 2.2.1; Pomp. 9 *ad Sab*. D. 18.1.6 pr.): from this point of view, the rationale behind the idea seems to consist in considering that what happened to one may also happen to others who, like that one, have the right to use public places without being exposed to danger. See, e.g., Antonio F. De Bujan, "La acción popular, *actio popularis*, como instrumento de defensa de los intereses generales, y su proyección en el derecho actual," *Revista Genral de Derecho Romano* 31 (2018): 1 ff.

Nature would be a personified entity which could certainly not be held responsible and liable for torts and crimes, and which could certainly not incur debts. However, due to the exceptional status granted to it, nature could certainly be said to be the subject of ad hoc protection and care, comparable to what the Romans reserved for their gods and their 'properties' (such as sacred woods, for example);[105] and nothing excludes the possibility that nature, or certain elements of it, could also be the beneficiary of legacies and donations.

If the case of Pachamama and that of the Whanganui River amount to a revival of indigenous traditions and a formalisation of local customary conceptions, to confer personality on nature, even taking into account the historical possibility of recognising 'superhuman' entities as *personae*, would be an operation as bizarre in relation to the pillars of Western culture as ultimately useless, given the problems of preservation and legal standing (problems that have not remained unresolved by recovering the procedural concept of *actio popularis* and the substantive figures of *res communes omnium* or *res in usu publico*, without any shift from the pole of thinghood to that of personhood).[106]

Both animal and environmental masks would represent two cases of 'positive personality'. The role played by some animals in human society and the 'animal characters' with their own qualities and limitations, as well as the essential nature of nature for human and non-human beings, could inspire the creation of a type of persona with only some rights and no duties, as opposed to an electronic status hypothetically granted to AIs.[107] But if it is only a question of protecting natural entities such as animals, rivers or entire ecosystems, is it really necessary to deny the Western tradition, the concept of *ius* proposed by Hermogenianus, the predominantly humanistic notions of person? Does this desire for otherness, for widening the 'company of actors' and for creating new traditions not conceal an intimate fear of responsibly reclaiming the role that human beings have to play on the stage of law and society? Is it really necessary to remove our 'masks' and those of our ancestors? Are we really ready to turn *quia* into *ut*, and *ut* into *quia*?[108]

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105 *Les Bois sacres* (Naples: Collection du Centre Jean Berard, 1993).

106 Marcian. 3 *inst*. D. 1.8.2 pr.-1 (cf. Irnerius *Summa Inst*. 2.1). See, moreover, Pomp. 9 *ad Sab*. D. 18. 1.6 pr.; Ulp. 10 *ad ed*. D. 50.16.17 pr.; *Inst*. 3.19.2: cf., e.g., Paola Lambrini, "Alle origini dei beni comuni," *Iura* 45 (2017): 434 ff.; Mario Fiorentini, "*Res communes omnium* e *commons*. Contro un equivoco," *Bullettino dell'Istituto di Diritto Romano* 113 (2019): 173 ff.

107 Floridi, in criticising the European Parliament's idea of creating an ad hoc status for AIs, has implicitly recalled the idea of *persona* (and not of legal personality) that Roman law conferred on *servi* and *filli*: *domini* and *patres* were hold liable for their dependents' torts and breaches of contract (Luciano Floridi, "Robots, Jobs, Taxes, and Responsibilities," *Philosophy & Technology* 30 [2017], 4).

108 Rudolph von Jhering, *Der Zweck im Recht* (Leipzig: Breitkopf & Härtel, 1877): 25.

Bionote

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