

Visa A.J. Kurki

Tomasz Pietrzykowski *Editors*

# Legal Personhood: Animals, Artificial Intelligence and the Unborn

# Law and Philosophy Library

Volume 119

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Visa A.J. Kurki • Tomasz Pietrzykowski  
Editors

# Legal Personhood: Animals, Artificial Intelligence and the Unborn

 Springer

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ISSN 1572-4395

ISSN 2215-0315 (electronic)

Law and Philosophy Library

ISBN 978-3-319-53461-9

ISBN 978-3-319-53462-6 (eBook)

DOI 10.1007/978-3-319-53462-6

Library of Congress Control Number: 2017934878

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Printed on acid-free paper

This Springer imprint is published by Springer Nature

The registered company is Springer International Publishing AG

The registered company address is: Gewerbestrasse 11, 6330 Cham, Switzerland

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# Introduction

As is well known among jurists, law has a special conception of personhood: corporations are persons, whereas slaves have traditionally been considered property – ‘things’ – rather than persons. This peculiar state of affairs has not garnered the interest of legal theorists for a while; the theory of legal personhood has been a relatively marginal topic in jurisprudence for at least 50 years. However, many recent developments call for a theoretical investigation of this topic. Animal rights activists have been demanding that certain animals be recognised as legal persons in various countries. In some US states, so-called foetal personhood amendments – redefining fetuses as legal persons for some limited purposes – have been proposed and passed. Moreover, technological progress heralds brand new conundrums: Could and should autonomous artificial agents be endowed with legal personhood? How should we relate to the prospect that interspecies – including human–animal – biological mixtures could be created in the future? All this demands not only adopting appropriate regulative measures but also a serious reconsideration of the philosophical underpinnings of the legal conceptions of personhood. The contributors of this book analyse and explain these recent developments.

The first part of the book, entitled ‘Identifying the Legal Person’, is focused on putting the debates over legal personhood in context. In the first chapter, Bartosz Brożek analyses legal personality against its historical background, showing how the concept is used in different ways both in legal and moral debates. Ngairé Naffine, on the other hand, shows how ‘person’ is used in legal contexts both to denote a legal status – ‘the strictly legal person’ – and also, firstly, as the unit that underlies methodological individualism and, secondly, as the composite of a set of legal rules which make assumptions about human beings. This multifaceted nature of our debates over personhood will be present in many of the subsequent chapters. Susanna Lindroos-Hovinneimo looks at the privacy legislation of the EU and the understanding of the legal person that underlies this legislation. An analysis of legal individualism, Lindroos-Hovinneimo’s chapter ties in with Naffine’s distinctions between the ‘strictly legal person’ and the person of methodological individualism in an interesting way.



The overarching theme of Part II is the legal personality of animals. However, while addressing this topic, the authors also analyse and criticise some of the main assumptions that underpin the concept of legal personality. Tomasz Pietrzykowski examines the strict dualism embedded in our categories of person and thing. He uses nonhuman animals as an example of beings whose legal status could be changed from things to ‘non-personal subjects’ – not quite legal persons but not quite things either. He argues that such subjects should differ from traditional persons in that they are treated as the holders of a single subjective right – the right to be taken into account, i.e. to have their interests duly considered and balanced in all legal decisions that may affect them. Visa A.J. Kurki addresses the question of the correct definition of legal personhood in conjunction with the recent trials in New York concerning whether chimpanzees should be accorded limited legal personality. Kurki claims that the trials are founded on a mistaken premise: legal personhood cannot be equated with the holding of legal rights, because animals already hold rights without being legal persons. Rafał Michalczyk takes a rather different approach, looking at how practical and economic reasons could lead to software agents receiving the status of legal personality – and the rights associated with that status – before nonhuman animals.

Attempting to establish the correct definition of legal personality raises a related question: what is the relationship between being human, being a person and being a legal person? Bioethical and biojuridical questions pertaining to humanity and personhood are discussed in Part III. As an introduction, Laura Palazzani discusses the trends of ‘personism’, according to which personhood can be separated from humanity, and ‘personalism’, which claims an intrinsic connection between these concepts. Following Palazzani’s essay, Denis Franco Silva offers a critical examination of the idea that the personhood could be founded on an idea of human nature. In their chapter, Ana Paula Barbosa-Fohrmann and Gustavo Augusto Ferreira Barreto offer a somewhat contrasting view, arguing for an alternative interpretation of Kant’s conception of personality that can include those in a persistent vegetative state or with Alzheimer’s disease. In the final essay of the volume, Agnieszka Bielska-Brodziak and Aneta Gawlik analyse an instance where humanity, legal personality and personhood are in an interesting relationship. According to Polish law, a child’s sex must be determined as male or female before he or she can be issued a birth certificate, and the child remains legally unborn until the certificate is issued. This raises the question of whether the child only becomes a legal person after the certificate is issued.

For the most part, the chapters are self-sufficient and can be read independently of one another. However, we should mention a particular terminological point. Many contributors coming from civil law jurisdictions use the phrase ‘legal subject’ or ‘subject of law’ when addressing legal persons, whereas such phrases may seem odd to common lawyers. This usage dates back to Friedrich Carl von Savigny, who introduced *Rechtssubjekt* as an umbrella term to denote both natural and artificial persons, i.e. individual human beings and corporations. Apart from English, most European languages have adopted ‘legal subject’ as a synonym for ‘legal person’. However, some of the contributors maintain that these two phrases should not be

used synonymously; Pietrzykowski, for instance, argues that animals should be treated as ‘non-personal subjects’.

The essays represent both analytic and normative jurisprudence, though most of the chapters are primarily analytic in nature. However, the aim of this volume is not to argue for a single understanding of legal personhood. Rather, many of the authors’ positions stand in direct opposition to each other and rely on various theoretical and philosophical traditions. The purpose of the book is thus not to settle the relevant contemporary debates but rather to problematise the assumptions that underlie the Western legal doctrines of personhood and to suggest ways in which our theoretical categories could be built on firmer ground.

**Part I**  
**Identifying the Legal Person**

# Chapter 1

## The Troublesome ‘Person’

**Bartosz Brożek**

When a bioethical discussion touches upon the notion of the person it usually takes the shape of an argument which has a decisive character, often in form of a simple syllogism: one should not kill a person; X is a person; therefore: one should not kill X with, in the place of X – according to the problem considered – terms such as “*nasciturus*”, “someone terminally ill who has requested euthanasia”, or “someone who’s life functions are maintained by medical apparatus” are employed.

On the other hand, one may also encounter such positions as that noted by Hugo Engelhardt:

Not all people are equal. [...] Not all people are persons. Not all people are conscious, understanding and able to praise or criticise something. A foetus, a new-born, the mentally handicapped, those in a deep coma – are examples of people who are *nonpersons* (Engelhardt 1996: 135–138).

One should note that Engelhardt does not question the syllogistic scheme above. He rather rejects the validity of one of its premises i.e. that a *nasciturus* or someone who is mentally handicapped is a person.

It is difficult to escape the uneasy feeling that something has gone terribly wrong here. Too much seems to hang together with the definition of a person one embraces. In what follows, I will try to show that the feeling is fully justified.

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This paper is partially based on B. Brożek, “The Notion of the Person in Bioethical Debates”, published in (Stelmach et al. 2010). This contribution was made possible through the research grant ‘Naturalizacja prawa’ awarded by the National Science Center.

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© Springer International Publishing AG 2017

V.A.J. Kurki, T. Pietrzykowski (eds.), *Legal Personhood: Animals, Artificial Intelligence and the Unborn*, Law and Philosophy Library 119,  
DOI 10.1007/978-3-319-53462-6\_1

## 1.1 From Mask to Theology

The notion of the person (Lat. *persona*) stems from the word *prosopon*. This term referred to a mask in Greek (and Roman) theatre and its application in philosophy came somewhat later since we cannot find any trace of it in Ancient philosophy (Wiles 1991). It was initially utilised in Roman law but Roman jurists did not equate the word *persona* with the word *homo*. One man could, from the legal perspective, be many persons. As it was termed: *unus homo sustinet plures personas*. It functioned thus so that *persona* identified (some) legal status of a man, independent of their other statuses (Ball 1901: 78). Romans could thus be one person as a Roman citizen, another as *pater familias*, yet other if they performed certain public offices. It is not difficult to see why the word *persona* was so appealing in this context: for the law, a man – depending on the legal context – wore different ‘masks’: as a senator, the head of the family, a praetor etc.

It was exactly the legal notion of the person which was utilised in *Adversus Praxean* by Tertullian, a thinker who undoubtedly was aware of the basic notional categories of the Roman law. In his exploration of the mystery of the Holy Trinity he claimed that the Father, the Son and the Holy Spirit are different persons, although one should acknowledge that each of the persons in the Trinity is one and the same God (Tertullian 1973). This conceptual solution of the problems surrounding the Holy Trinity was not accepted immediately however. It only came about in the fourth century AD during a debate on the meaning of the Greek word *hypostasis* (Boethius 1918). The problem focused on in what way it was possible to express the fact that the Holy Trinity was one and tripartite at the same time. The unity of the Trinity had been express by saying that the Trinity is one substance (*ousia, substantia*), while the tripartite nature had been captured with the help of the Greek term *hypostasis*. The problem was that *hypostasis*, like *ousia*, was translated into the same Latin word, *substantia*. In order to eliminate misunderstandings, the translation was altered to *subsistentia*. However, by the fourth century this subtle distinction had fallen into obscurity, a direct way to conceptual problems or even heresy. As a result, they reverted to Tertullian’s notion of *persona*: it was formulated as God is one but in three *personae* in documents from the Council of Alexandria in 362 AD.

However, in the sixth century the controversy arose once again. In his work *Contra Eutychem et Nestorium*, Boethius introduced his own formulation – and perhaps the most famous – of the definition of a person: *persona est rationalis naturae individua substantia*: a person is an individual substance of rational nature (Boethius 1918). He explained that we “are related in this manner to what the Greeks called *hypostasis*” (Boethius 1918). Boethius differentiated between the notion of subsistence (*essence*) and substance. *Subsistentia (essentia)*, related to the Greek term *ousia*, refers to being which is not impaired (i.e., enjoys the so-called independent existence). In turn, *substantia (hypostasis)* refers to being which may be the basis for impairment (impairment may belong to it). A person (*persona*) is that *substantia* which is individual and rational. In the conception of Boethius, man is simultaneously *subsistentia, substantia* and *persona*.

Meanwhile, God is a unified *subsistentia* but also three *substantiae* (and thus three persons). Boethius highlights, however, that talking about the three divine substances has been forbidden by the Church as it leads to certain heresies. What is interesting in this consideration is that Boethius 'inverts' the traditional translation of the Greek concepts. Normally '*ousia*' is identified with '*substantia*' and '*hypos-tasis*' with '*subsistentia*'.

The notion of the 'person' played, perhaps surprisingly, a minor role in Scholastic ethics, largely remaining at the service of theology. Józef Bocheński noted:

There is no equivalent expression to 'person' in Aristotle, in his philosophy. It does not feature yet this has not stopped him from becoming one of the greatest moralists in history. In St Thomas Aquinas, the expression *persona* often features in dogmatic theology. Yet in moral philosophy it appears only once, namely in his article *De acceptione personarum*. It takes into account man in his personal relation to a candidate, not his value. It is the only example in which St Thomas uses the expression 'person' in his ethics, which does not prevent him from being a great moralist (Bocheński 1998: 130).

The close connection between the notion of the person and Thomism only featured with the twentieth century Personalists. This fact is important for two reasons. Firstly, Personalism, even though it was not an official doctrine of the Catholic Church, played a role in the conceptions of its representatives which is hard to overestimate. As a result, Personalism has become undoubtedly one of the most important voices in bioethical discussions. On the other hand, however, it is important to stress that the marriage of Thomism with the Personalist approach is, while at least historically charming, artificial. For Boethius, the notion of the person had a technical character. Its introduction was indispensable in terms of Boethius's great effort of trying to unite Greek philosophy with Christian faith. It was not meant to – and did not – play a crucial role in ethical discussions. Such a utilisation of the notion of the person is much later. Put plainly, it became a reaction to different conceptions of the person which have arisen in modern times.

## 1.2 The Early Modern Conceptions of the Person

At the forefront of these theories, two undoubtedly stand out: the conceptions of Locke and Kant. In *Essays Concerning Human Understanding* Locke wrote: "we must consider what PERSON stands for; which, I think, is a thinking intelligent being, that has reason and reflection, and can consider itself as itself, the same thinking thing, in different times and places" (Locke 1961: 280). Locke formulates in this passage the *psychological* conception of a person: the crux of personhood is the ability to reflect and, in particular, to reflect on oneself and thus have a feeling of identity in different times and places. This vision is fundamentally different from the classical conception of the person. It is important to remember that Locke is one of the main philosophers responsible for the "subjective turn" in philosophy, the appreciation of the subject which Descartes undertook – more or less *explicit* – with his fundamental ontological division of the *res cogitans* and the *res extensa*. In

other words, in modern philosophy the person is not a psychophysical unity – the person is a thinking subject, *ego cogitans*. Such an understanding of the person is opposed by Kant in his *Critique of Pure Reason*:

By this *I*, or *he*, or *it* (the thing), which thinks, nothing is represented beyond a transcendental subject of thoughts = *x*, which is known only through the thoughts that are its predicates, and of which, apart from them, we can never have the slightest concept, so that we are really turning round it in a perpetual circle, having already to use its representation, before we can form any judgment about it. And this inconvenience is really inevitable, because consciousness in itself is not so much a representation, distinguishing a particular object, but really a form of representation in general, in so far as it is to be called knowledge, of which alone I can say that I think something by it (Kant 2007: A346).

Kant thus argues that the psychological definition of a person is inadequate since – at the level of theoretical reason – any potential representation of the self already presupposes a kind of personal identity, which is a form of cognition. Self is not a representation but an empty idea, whose only role is to unify our inner experiences. Things change as soon as one considers the practical reason. In the *Metaphysics of Morals* he states that “A person is a subject whose actions may be imputed to him. Moral personality is therefore nothing other than the freedom of a rational being under moral laws (whereas psychological personality is usually understood as an ability to be conscious of one’s identity in different conditions)” (Kant 1996: 6232). In other words, for Kant the person is defined by the fact that she is responsible for her own acts. This conception may be termed the *ethical* theory of the person. It is worth emphasising again that it was developed against the backdrop of Kant’s metaphysical project. As we know, Kant attempted to show that metaphysics – at the level of theoretical reason – is impossible. He stated that in our cognition, such notions as the world, the soul or God could correspond to no object. Those notions played a role of the transcendental ideas whose task is to organise our experience. Metaphysics is possible, however, on the grounds of practical reason and it was to this sphere that the Kantian notion of the person belongs.

The above presentation of the three most important conceptions of the person – the classical, the psychological and the ethical – shows that attempts to compare these views abstracted from their general metaphysical background, from the very foundation on which they were constructed, is a senseless task. One may not refer to the classical definition of Boethius if one does not *simultaneously* accept the metaphysics of Aristotle, which was structured by the ontological principles of form, matter, cause and goal. The psychological conception is rooted in the fundamental separation of mind and body. Finally, the ethical conception is groundless for those who ignore the basic Kantian distinction between theoretical and practical reason. In other words, each of these three basic definitions of the person are accompanied by metaphysical baggage; accepting any of them commits us to a certain view of the world.

### 1.3 The Contemporary Debate Over Person

The twentieth century debate over the notion of the person – broadly speaking – lies between two positions. The first may be termed the descriptive and the second, the axiological. The descriptive conception of the person stems mainly from analytic philosophy, directly tied to the tradition of Locke, and defines the person according to certain empirical (mental) criteria. In turn, the axiological approach places emphasis on the fact that the person is a bearer of values. In this school, the positions are of the classical (mainly Thomist) and – perhaps more importantly – the Kantian and neokantian origins.

One of the most famous examples of the descriptive theory of the person is that proposed by Peter Singer. It defines the person as the bearer of certain mental attributes: an ability to feel and understand, self-awareness and autonomy, the ability to imagine oneself in the future, etc. These characteristics are not fulfilled by all people – e.g. those who are in a coma. On the other hand, such an understanding of personhood may be ascribed to some animals (e.g., non-human primates) (Singer 1975). A similar position has been expressed, already quoted in this essay, by Hugo Engelhardt: “Not all people are equal. [...] Not all people are persons. Not all people are conscious, understanding and able to praise or criticise something. A foetus, a newborn, the mentally handicapped, those in a deep coma – are examples of people who are *nonpersons*” (Engelhardt 1996: 135–138).

Advocates of the descriptive conception of the person – at least those who are engaged in a reflection of an ethical character – do not limit their deliberations to such definitions. These definitions are used in ethical discourse. The descriptivists claim that a person is someone entitled to certain rights whereas non-persons are not entitled to such. For example, Singer claims, with the support of his conception of the person, that in ethics and law it is necessary to reject the dichotomy of ‘human – non-human’ and put in its place a division of ‘person – non-person’, in which rights are ascribed to persons only. Singer’s theoretical manoeuvre is typical for the advocates of the descriptive conception of the person. A ‘person’ is defined solely on the basis of descriptive, psychological criteria, but then the definition is utilised normatively, to decide legal and ethical controversies. Thus, the descriptivist approach suffers from a kind of ‘methodological schizophrenia’: the notion of the person is defined descriptively, but used normatively.

Another approach is offered by the advocates of the axiological conception of the person. In this case, the ethical value of a person is ontologically prior and defines personhood. In such a consideration, the person is independent of any contingent mental attributes which stem from, for example, a serious impairment, or the stage of personal development (foetus, infant etc). The axiological view of the person may be ascribed to various contemporary philosophical schools, such as personalism or neokantianism. Of course, their conceptions of the person differ in more or less important aspects, but they share the conviction that the person is a bearer of values and hence a moral agent, responsible for her actions.