

Person and Animal: a closeness without prejudice

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Abstract

The debate on the notion of the person and its importance for the Law is one of the most passionate of recent years. The fact that the synonymy of the person and the human being has for centuries been accepted without a shred of a doubt is largely related to the formation of legal systems in the western world and their transposition of decidedly anthropocentric categories. However, the gradual widening of these categories to incorporate new ideas and social demands has vigorously awoken the questions surrounding the notion of the person and of legal personality and its possible extension to animals also. Reflections that contribute to this debate will here be presented, briefly and without prejudice.

Keywords: person; legal person; personality; animals; sentient beings; animal sentience; de-objectification

Resumen - *Persona y Animal: una aproximación sin prejuicios*

El debate sobre la noción de persona y su importancia para el Derecho, es uno de los más apasionantes de los últimos años. Que la sinonimia entre persona y ser humano se haya aceptado sin resquicio de duda durante siglos, tiene mucho que ver con la formación de los sistemas jurídicos del mundo occidental y la trasposición a los mismos de categorías marcadamente antropocéntricas. Sin embargo, la paulatina apertura de dichas categorías a nuevas realidades y demandas sociales, ha despertado con vigor los interrogantes sobre la noción de persona y de personalidad jurídica y de su posible extensión también a los animales. Aquí se presentan de modo breve y sin prejuicios, algunas reflexiones para contribuir a dicho debate.

Palabras clave: persona; persona jurídica; personalidad; animales; seres sintientes; sintiencia animal; descosificación.

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1. Proposal

Words are often semantically loaded with a meaning that does not belong to them. A clear example is the term person, which is usually identified with the human being, as if it were a perfect synonymy, an identity accepted without a shred of a doubt by society and the Law. However, it has not always been this way.¹

The discussion on the meaning of person and on the “burden of humanity” the term is loaded with is subject to one of the most impassioned debates of the moment,² for any who concern themselves with the Law and try to carefully delve into the true meaning of the term person without its additives. Among other questions up for debate, it is about explaining what is understood by ‘person’, and for why and since when has it been identified with the human being, and what other perspectives allow the application of this term to other social and legal realities that are not related to the human being, such as, for example, to artificial intelligence³ or to animals. The reason for the latter is that, along with the de-objectification of animals,⁴ there must also be the attribution of another form of legal recognition of the animal’s own individuality, which would highlight not only that which, from our typical anthropocentric viewpoint, “humanises” animals and inclines them, or brings them closer to, a recognition by Law, but more specifically that which makes them individual, essential, recognisably different and, in themselves, worthy and deserving not only of protection, but of society’s legal recognition of their right to have rights,⁵ so to speak.

It cannot be denied that in recent centuries we have witnessed the human being’s exponentially increasing interest in, and a progressive recognition of, wider and more extensive laws, in regards to their quantity and what they afford,⁶ and in favour of the human being. As said by authors like Esposito, making reference to third and fourth generation human rights concerned with the centrality of the person⁷ constitutes one of the most recent topics of Bioethical thought,⁸ which has tried, with caution, to include animals so as

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¹ STANGL, J., De cómo el hombre llegó a ser persona: Los orígenes de un concepto jurídico-filosófico en el Derecho Romano, in *Revista de Derecho de la Pontificia Universidad Católica de Valparaíso*, XLV (2015) 373ss.

² KLINGBEIL, S., Der Begriff der Rechtspersonen, in *Archiv für die Civilistische Praxis*, 217/6 (2017) 849-885, DOI: 10.1628/000389917X15126389017000

³ KURKI, V./ PIETRZYKOWSKI, T. (Eds.), *Legal Personhood: Animals, Artificial Intelligence and the Unborn*. The Law and Philosophy Library, Vol. 119 ix (Springer 2017) DOI: 10.1007/978-3-319-53462-6; rev. WOOKEY, O., in *dA* 9/3 (2018) 187-190 <https://doi.org/10.5565/rev/da.350>

⁴ GIMÉNEZ-CANDELA, T., The De-Objectification of Animals (I), in *dA. Derecho Animal (Forum of Animal Law Studies)* 8/2 (2017) <https://doi.org/10.5565/rev/da.318>; The De-Objectification of Animals (II), in *dA* 8/3 (2017) <https://doi.org/10.5565/rev/da.250>; Dignity, Sentience, Personhood: Relationship between Animals and Humans, in *dA*. 9/2 (2018) <https://doi.org/10.5565/rev/da.346>; The De-Objectification of Animals in the Spanish Civil Code, in *dA*. 9/3 (2018), <https://doi.org/10.5565/rev/da.361>; LE BOT, O., El Derecho Animal: ayer, hoy y mañana, in *dA*. 8/2 (2017) <https://doi.org/10.5565/rev/da.16>

⁵ RODOTÀ, S. *Il diritto di avere diritti* (Roma-Bari 2013). Spanish translation, *El derecho a tener derechos* (Madrid 2014)

⁶ CORNESCU, A.V., The Generations of Human Rights, in *Days of Law: The Conference Proceedings 1* (Brno Masaryk University 2009) 3ss.

⁷ ESPOSITO, R., The Dispositif of the Person, in *Law, Culture and the Humanities* 8/1 (2012) 17-30; *Third Person-Politics of Life and Philosophy of the impersonal* (Cambridge 2012); LINDROOS-HOVINHEIMO, S., Private Selves – An Analysis of Legal INDIVIDUALISM, in KURKI, V./ PIETRZYKOWSKI, T. (Eds.), *Legal Personhood: Animals, Artificial Intelligence and the Unborn*. The Law and Philosophy Library, Vol. 119 ix (Springer 2017) 36ss.

⁸ PALAZZINI, L., Person and Human Being in Bioethics and Biolaw, in KURKI, V./ PIETRZYKOWSKI, T. (Eds.), *Legal Personhood: Animals, Artificial Intelligence and the Unborn*, cit. (Springer 2017) 105s. y 111s.

to extend to them forms of protection and custody, not because these rights should belong to animals, but because we choose to grant them.⁹ These efforts are almost always met with obstacles identified with forms of thinking most likely to affirm the centrality of persons in the Law (understood to be human beings),¹⁰ as well as to the standard methodological rules that exclude any efforts to even suggest¹¹ the possibility that the term person could include types of subject other than the human being¹² - a point that was certainly accepted by Kelsen.¹³

2. *Caput vs. Person*

Nowadays, the legal consideration of the person forms a central part of legal debate.¹⁴ The person is presented as a defining element in current legal frameworks and even, it has been affirmed, constitutes the defining element of western civilisation.¹⁵ It is clear that Christian Trinitarian theology has had, and still has, a large influence on this topic, and constitutes a meeting point between old world tradition and Christian humanism.¹⁶ More specifically, the western legal frameworks are indebted by the link it establishes, with its exclusive and discriminatory characterisation between person and human person, which appears to be reflected in all current codifications.¹⁷

I will not go into detail here about the term ‘person’ itself, and the widespread discussion that it has, and continues to, provoke;¹⁸ however, yes, questioning certain hypotheses in which there is a closeness without prejudice does help to understand and better apply a legal category whose principle characteristic is abstraction.

The conflict between *caput* and *person*, to differentiate the individual from its representation before society, before the Law or before collective culture, originates from the meaning of the term *caput*, which expresses the individual as its physical and ontological reality, in contrast with the term *person*.¹⁹ *Caput* has an inevitably material meaning, referring to the exterior form of the individual, as the head is what distinguishes individuals based on that which is equal, and that which is not. It is the part of the body that used to individualise and identify us, far more than the arms, the torso or the legs. This same material sense, but cloaked in abstraction, is that which is proclaimed by the term *person*, which is nothing more than the mask – an exterior aspect – by which an individual is recognised (*caput*), which is worn, and covers them, to represent a specific function that, in the ancient world, was usually the exteriorisation of a character or personality in the theatre,²⁰ or the mask work by parents in funeral processions to show the diverse vital, professional or honorary facets performed by or awarded to the deceased in life.²¹ *Caput* is the natural individuality and *person* is the appearance.

⁹DALLA BERNARDINA, S., Una persona no completamente como las demás. El animal y su estatuto, in *Gazeta de Antropología* 16/9 (2000) 1ss.

¹⁰CORTINA, A., Las fronteras de la persona. El valor de los animales, la dignidad de los humanos (Madrid 2009) 140p.; rev. HALL, R., in *dA. Derecho Animal (Forum of Animal Law Studies)* 4/4 (2013) <https://doi.org/10.5565/rev/da.153>

¹¹ROGEL VIDE, C., *Personas, Animales y Derechos* (Madrid 2018) 9ss., who indeed quotes Wikipedia as a bibliographical source to refer to Steven Wise and Peter Singer (p.107).

¹²PIETRZYKOWSKI, T., The idea of Non-personal subjects of Law, in KURKI, V./PIETRZYKOWSKI, T. (Eds.), *Legal Personhood: Animals, Artificial Intelligence and the Unborn*, cit. (Springer 2017) 57ss.

¹³KELSEN, H., *Reine Rechtslehre* (Leipzig-Wien 1934) 415ss., in his suggested contrast between “Eigentum und Person” (Property and Person), criticises the traditional dualism between objective law and subjective right, as well as other classic contrasts (interests vs. rules, free will vs. order, individual vs. society, *ius in rem vs. ius in personam*) that lead to the enshrining of the Law in artificial and paralyzing parameters; see ELBE, I., Die “Herrschaft der Norm” zwischen Geltung und Gewalt. Eigentum Recht und Staat in der Reinen Rechtslehre Hans Kelsens, in ELBE, I./ ELLMERS, S./ EUFINGER, J. (Eds.), *Anonyme Herrschaft – Zur Struktur moderner Machtverhältnisse* (Münster 2012) 184ss.

¹⁴WELKER, M. (Ed.), *The Depth of the Human Person. A Multidisciplinary Approach* (Michigan 2014).

¹⁵DE CRAEMER, A., Cross-Cultural Perspective on Personhood, *The Milkbank Memorial Fund Quarterly* 61/1 (1983) 19ss. DOI: 10.2307/3349814

¹⁶RIBAS ALBA, J.M., Persona: entre el Derecho Romano y la teología cristiana, in *SDHI* 76 (2010) 477; HATTENHAUER, H., *Persona und personae acceptio*. Christlicher Beitrag zur römischen Personenlehre, in AVENARIUS, M./ MEYER-PRITZL, R./ MÖLLER, C. (Eds.) *Ars Iuris. Festschrift für O. Behrends zum 70. Geburtstag* (Göttingen 2009) 193ss.; SACCHI, O., Il rapporto di filiazione nella Trinità divina e il contributo di Tertulliano alla costruzione dell’idea moderna di persona nella cultura giuridica europea, in *Civitas et Iustitia. Atti del XIII Colloquio Giuridico Internazionale La filiazione nella cultura giuridica europea* (Roma 23-24 Aprile 2008) 6/2 (Roma 2008) 413ss.

¹⁷The Spanish Civil Code makes a distinction between natural person (art. 29-30) and legal person (art. 35ss.), similarly to the other Western Civil Codes.

¹⁸An excellent collection of this vast bibliography is presented by, DI NISIO, V., *Persona*. Per una bibliografia ragionata, in *Persona. Periodico di Studio e Dibattito* 1 (Napoli 2012) 163-186.

¹⁹For a useful socio-political analysis based of this distinction see d’ORS, A., *Caput y Persona*, in *Nuevos papeles del oficio universitario* (Madrid 1980) 376ss.

²⁰D.3,3,25: “*in persona actoris observari*”.

²¹D. 28,5,16: “*personam alicuius sustinere*”.

It is in the origin of the term *person* as a theatrical (or funereal) mask worn by actors to “represent” a specific personality in a theatrical way or in a procession that one can find precisely the meaning attributed by the Law to the term ‘person’, as a role or appearance recognised by the Law, assumed and performed by an individual in their relations throughout life:²² as child, as parent, as party to a contract, as an heir, etc. To be a person means to be an individual (*caput*) who is recognised by the Law, someone who takes on a personality. Therefore the term has an abstraction point that makes it include the human person, whether it is, in reality, an artifice, a legal fiction, an intangible identity. The assimilation, or synonymy, between person and human being is not natural or physical; it is just widely spread and accepted. On the contrary, the person is a creation of the Law,²³ which means that to be a person in the legal sense is to be an artifice of the Law that functions to represent the individual in the legal realm.²⁴ It is no wonder that the Castilian term “personarse” can be used in none but the legal sense, signifying that the individual is present before the Law or postulates a right, assuming a specific “personality” or role assigned by the Law (e.g. as an appellant or defendant in a trial).

Therefore, the individual that relates to others within a social framework organised and regulated by the Law is a person. It would not be necessary to add that this individual is a legal person, as they are so by way of the functions attributed to them by the Law, for example, exercising their rights and assuming responsibilities, even though this is not the only and exclusive form of being, or of being a subject of the Law. In this sense, it is worth making a subsequent reflection.

3. The Person and The Legal Person

As I have already said,²⁵ it is accepted that the term person also applies to realities other than the human being in all western legal systems.²⁶ The distinction between the so-called natural person and the legal person is due to the affinity between the person and the human being. It therefore imposes the need to attribute an adjective just as artificial as the “human person”, to entities or corporations to those to which the Law attributes functions recognised and regulated by the framework. In reality, it is about nothing more than an accepted, and in this case specific, legal fiction; the attribution of personality to entities that have no human appearance or nature, if having a human appearance is indeed the determining factor to be a person, as stated in art. 30 of the Spanish Civil Code before the 2011 reform,²⁷ following the Roman tradition reflected in various texts by Ulpian that are maintained as a substrate of dominant social and legal thought.

If a human appearance is not, in fact, the determining factor for recognition as a person, we could believe that one of the most important obstacles to the widening and adaptation of the category of person has disappeared, opening a pathway for enabling “other nonhuman persons” to have the legal treatment afforded to entities with legal personhood. However, this is not the case, and the reluctance to widen the category of person is undeniable and endorsed by doctrine, at least in Spain. Making reference to the animal person is not the focus of many jurists, and this assimilation is met with scepticism and irritation by many.

4. The Person and The Animal

However, the idea of extending legal personhood to animals has already appeared as a result of the affirmation of animal sentience – a scientifically-confirmed fact that is modifying the traditional objectification of animals derived from Roman tradition.²⁸

In recent years, the application of the term person (without adjectives) to animals has started to be used and justified. A new social awareness toward animal suffering has awoken in Germany as a result of the transformation of the relationship between humans and animals in its post-industrial society,²⁹ and above

²²C.6,60,1,1: “*Legitimam personam habere, gerere*”.

²³KLINGBEIL, S., Rechtspersonen (cit.), in ACP 217/6 (2017): “Zusammenfassend kann an dieser Stelle zum Status der Rechtsperson festgehalten werden, dass alle Rechtspersonen Kunstgeschöpfe des Rechts sind, deren ontologische Heimat die Rechtswelt ist, worunter ‘die Kulturwelt in der Form und Norm des Rechts’ zu verstehen ist. Für die natürliche Rechtsperson heißt das, dass sie auf der einen Seite scharf vom Menschen als ‘nacktem’ Naturwesen abzugrenzen ist. Auf der anderen Seite ist sie aber auch nicht mit dem Menschen als Kulturperson identisch. Vielmehr lebt die Kulturperson in der Kulturwelt, während die Rechtsperson kraft Anerkennung von Seiten der Rechtsordnung in der Rechtswelt existiert”.

²⁴D.4,2,9,1: “*Singularis persona*”.

²⁵Vid. supra, n.17.

²⁶DI NISIO, V., Persona, tra diritto romano, codice civile italiano e codice civile argentino, in MASI DORIA, C./ CASCIONE, C., Tra Italia e Argentina. Tradizione romanistica e culture dei giuristi (Napoli 2013) 225s.

²⁷Disposición final tercera de la Ley 20/2011 del Registro Civil, de 21 de julio (BOE núm. 175, de 22/07/2011).

²⁸Vid. supra n. 4.

²⁹RASPÉ, C., Die tierliche Person – Vorschlag einer auf der Analyse des Tier-Mensch-Beziehung in Gesellschaft, Ethik und Recht Basierende Neupositionierung des Tieres im deutschen Rechtssystem (Berlin 2013) 369p., rev. HAMANN, C., in Tiere und Recht,

all from the enormous use of production animals as means of consumption. In fact, this should not come as a surprise for a country that in the 80s progressed away from the Gaian persons-things bipartition, declaring animals not things (“nicht-Sachen”),³⁰ as Austria had already done a few years earlier, in 1988.³¹

One interesting aspect to highlight is that a new proposal such as this has not caused negative reactions from legal dogma, partly because the introduction of the “person animal” (‘die tierliche Person’) category has not attempted to alter the established structure of the BGB on the basis of the distinction between the natural and the legal person (as usually happens), but has instead tried to maintain this distinction and add a new category of animal person without challenging or reducing the prerogatives of human beings. Essentially, the German animal protection system is firmly anchored in respect for the individual animal, which is recognised in the general animal protection law. Moreover, the absence of negative reaction against the possible introduction of a person animal category in a legal system that is perfectly aware of the abstraction that the term ‘person’ itself entails must be highlighted. In short, it is about the widening of the term person, consistent with the needs of a new society aware that in the XXI century animals cannot be treated, and nor should legal theory regard them, as mere objects.

A different position as developed in France, stimulated by the pioneering work of Jean-Pierre Marguénaud in favour of the recognition of animals as “sentient beings endowed with sensibility” in the French Civil Code;³² an innovative turn that in 2015 placed France as the country with the first codified system to align itself with Science and the Law regarding the recognition of the individuality of animals as “sentient beings”, as stated by the art. 13 of the TFEU. Recently, a proposal to recognise the legal personhood of companion animals has been formulated by a group of scholars at the University of Toulon,³³ and it is based on the idea of introducing a revised book entitled “Nonhuman legal persons” (Les personnes juridiques non humaines) into the Civil Code. In this case, the aim of the proposal is to create a special category for animals – ‘physical nonhuman persons’ – which would not cause any conflict with existing categories.

Here, also, a conflict between Humanity and Animality has tried to be avoided, for it always leads to rejection, above all from the most traditional elements of doctrine.

All in all, the conclusion to be drawn from these reflections is that granting a new legal position for animals would not be a step back, and will inevitably result from overcoming the reluctance to use the term person to refer to them, and treating them as individual subjects of the law.

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³⁰BGB 90a.

³¹ABGB 285a.

³²Cfr. MARGUÉNAUD, J.P., *Code de l’Animal* (Paris 2018).

³³REGAD, C./ RIOT, C., SCHMITT, S., *La personnalité juridique de l’animal. L’animal de compagnie* (Paris 2018) 143p.

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