

Legal Personhood from the 18th to mid-20th Century: From Neologism to Concept*

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In this presentation, I want to outline the process through which legal personhood was conceptualized in western legal cultures between the 18th and the mid-20th century. I focus on the civil law materials published in France and Germany during this period as well as the secondary literature about them. Of course scholarly writings have to be studied, which is particularly the case as far as the German scholarship is concerned. Regarding the French materials, additional attention is paid to court decisions. I choose French and German texts because, on the one hand, an important revolution and the first modern codification took place in France, and, on the other hand, legal personhood became an issue for the first time in nineteenth-century Germany. The civil law scholarship and legislation of the two countries also substantially influenced a great number of countries in Europe and beyond in the 19th and the 20th centuries. As to the limit of my scope, civil law is the locus where debates took place, even though other domains, such as political theories, experienced discussions on conceptualized legal personhood with significant effects. It is noteworthy that some civil law rules are also applied in constitutional law, especially where a monarchy is concerned. There is no need to emphasize how much inheritance issues matter to royal and aristocratic families. Regarding the time span, the two and a half centuries covered by this paper are selected to illustrate, like the advertisements of cosmetic products, the “before, during and after” of the conceptualization of our topic, legal personhood. The 18th century reminds us of a world where Latin was still an important scholarly language, at least for the studies of law. The 19th century was a revolutionary period for law in many senses. As far as the first half of the 20th century is concerned, the denial of legal personhood to certain

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types of individuals in the 1930’s and post-war international human rights law discourse are certainly worthy of consideration. Following the rules of the floor, I use the English word “person” to translate the French “*personne*” and the German “*person*” in spite of the nuances between them.

While this preliminary information about my topic could mislead you into wondering if my presentation would require some background knowledge about law to understand, the point I want to make has much more to do with words and grammar than with law. My point is that it seems to me that there are two versions of legal personhood. One is about *being a person*, the other, *carrying a persona*. Apparently, the etymon, that is *persona* in Latin, is at stake here. The divergence of the two versions of legal personhood, I argue, can be better described by the use on the one hand, and the abuse on the other hand, of the etymon in question, namely the Latin word *persona*. What I mean by abuse here is the neologism of turning a *persona* in both Latin and English into a person. The divergence opened up in the 19th century and remains in place today.

These two versions agree with each other on the effects of the legal personhood, and differ from one another in its conception. Here is the common ground shared by the two versions of legal personhood. Generally speaking, to enjoy the legal personhood, or to be a person in law, is to be able to “have one’s day in court,” that is, being taken as a party in a legal procedure, be it a plaintiff or a defendant, a claimant, or a respondent. Of course, being a party in a legal procedure presupposes having a right to enforce or an obligation to fulfill. In this sense, a person in law is, according to the civil law terminology, a subject of legal relations, a subject capable of rights and duties. A person in our everyday language, in other words, an individual, can certainly be a person in law. But several individuals can also be one person in law. So can the composition of individuals and some non-human elements, as in the case of corporate persons. Besides, a sum of capital assigned to a certain purpose can also be a person in law, as are foundations.

This is what most reference works and civil law treatises tell the reader.

The common ground ends there. Now let me go back to the two versions of legal personhood I mentioned. To begin with, legal personhood is about *carrying a persona*.

In other words, it involves playing a role. A persona here is a given set of legal relations with other personas. I call this version of legal personhood “categoricalist,” because legal personhood taken in this sense is a category that can occur to something without having any essence by itself. Of course most of the time these personas or roles are played by individuals, but practically anything may carry a persona as long as other personas enter into some kind of legal relation with it. In this sense, every single non-human, or even supernatural being, and every aggregate of human or non-human beings may enjoy legal personhood.

Let’s start with the Latin word *persona*. Many of you know this word stands for a mask used by an actor. It can also refer to a role in a play. By extension, it designates someone who holds a well-esteemed office. This is interesting for me because there is a similar idiomatic expression in Chinese, which goes literally “to have a head and a face.” Back to my topic, it is significant that in classical Latin, *persona* is never equal to *homo*, man in general, and that unlike *homo*, *persona* can never be used as a predicate. One can say that *P est homo* to mean that P is a man, but one cannot say that *P est persona* to convey the meaning that P is a person.

With regard to the uses of *persona* in the juristic Latin texts available in 18th century Europe, the word’s number raises some issues. The plural *personae* is the best known example because people read it in the chapter title *de iure personarum*, “on the law of persons,” in Justinian’s Institutes. It can be used alone, without any other complement, yet this form is not productive and hardly developed. The plural *personae* is the sum of the free, the slave, the man, the woman, the father, the son, and the rest of the roles discussed by Roman jurists. And what about the singular *persona*? It is hardly used alone, and almost always forms a term with another noun complement in genitive. A buyer is a *persona emptoris*, built up by *persona* and the noun *emptor*, buyer. A seller is *persona venditoris*. And so on. As the genitive case may imply a relation of belonging or possession, the singular *persona* is also commonly used with a personal possessive adjective, like “my person” or “your person,” *mea* or *tua persona*. What I really want to emphasize is that a singular *persona* bound to another noun in genitive goes very often with verbs like “to bear,” “to hold,” and “to carry.” These expressions all signify an act of representation, be it in the material or the immaterial sense. Another similar expression is to “take the

place of,” *locus optinere*. Obviously, neither *persona* nor *locus* in these expressions keeps its original meaning. Both of their meanings are determined by another noun complement in the genitive, namely the represented.

Probably the only occasion where the singular *persona* has some meaning by itself is its occurrence in Justinian’s codex, which states that a father and a son may be taken as the same *persona*. Here, *persona* stands for a place in the kinship tree and the order of inheritance.

Persona is also used to indicate a unity made of a plurality of parts. In the thirteenth century, we can find in the canon law literature occurrences like *persona una*, which should be translated not as “one person” taking “*una*” as the feminine “one,” but rather as “carrying a certain legal persona together [as one],” “*una*” being an adverb. Many authors think the idea of corporate personhood dates back to the thirteenth century. Yet a *persona* that many parts can carry together is nothing but an *ens morale*, an immaterial being, an imagined point. Nothing human is involved. We see the term *persona moralis* in the seventeenth and the eighteenth century. It is not what authors of our time call “moral person,” but rather an immaterial or imagined mask or role, which scholars such as Samuel Pufendorf and Christian Wolff use as a conceptual tool to analyze constructions like *persona emptoris* in Roman legal texts. In other words, the *ens morale* and *persona moralis* are still umbrella notions that cover diverse subcategories.

Indeed an idea of a subject, a unity, or a “bundle” of legal relations has long existed, but was not enunciated as “being a person” until the middle of the 19th century. The word *persona* has long existed. It just did not always have something to do with legal personhood.

Now I move to the other version of legal personhood. This version is that sense that most contemporary literature conveys. According to this version, legal personhood is the quality of ***being a person*** in law. A person is above all a human being. A more sophisticated terminology calls human beings “natural persons,” because non-individual or non-human entities are called legal, moral, artificial, or fictitious persons when they are so treated. I call this version of legal personhood “essentialist” because a person has to have a human essence, and because all the

non-human persons are created or feigned by the law. The essentialist concept of personhood, to quote Mr. Jonathan Price, uses man as measure of personhood. Therefore, it adds to the common ground some negative examples of individuals fully or partly deprived of their legal personhood. Historical examples are slaves, outlaws and some felons, married women, and, in a special context, Franciscan monks.

This essentialist idea does not exist in Latin as such. In French and German, it is also preceded by other uses of the word “person.” This word used to mean “someone,” and can appear in possessive form to denote the physical and moral or immaterial aspects of someone. The physical aspect is highlighted in “the king’s person” in the context of criminal law. There is also a technical term, “error in person,” in canon law and in the marriage law of most Western countries. Here “person” refers to the estate one belongs to, and the typical textbook example is the marriage between a serf and the daughter of a bourgeois family, which can be nullified.

In 1840, the essentialist idea of legal personhood appeared in the treatise of F. C. von Savigny. This great legal historian did his legal analysis from the perspective of jural relation. He argued that every jural relation can be analyzed by a two-party or two-person framework and that persons in this framework are subjects, or bearers, of a jural relation. He also argued that every legal right has something to do with the idea of freedom, and that freedom inhabits every individual man. Thus he concluded that only individual man is capable in law. In short, Savigny binds four things together, namely man in physical sense, person in law, moral subject, and jural subject.

An important part of Savigny’s legacy on legal personhood is a series of dualisms that is still present in contemporary legal scholarship. He opposed an “original” idea of personhood in positive law, where legal personhood has never been a privilege of the free individual man. His other dichotomies included those between natural persons and the artificially-constructed, or juristic person, between moral agents and those who are morally incapable, between nature and fiction, and between truth and falsehood.

The merit of this conception of legal personhood is also its weakness. Savigny’s idea obviously enshrines the individual, and because of that, it was criticized in the 1930’s by scholars who wanted to get rid of the old capitalist order. They saw legal

personhood as a bourgeois, individualist and ahistorical notion. Moreover, Savigny’s essentialist personhood idea also accommodates an outright anthropocentrism. It appears to me that the tension with which our organizers present the topic of this conference cannot do without this Savignian conception.

I conclude here with some remarks on the categorical concept of legal personhood. This concept matters not only because plenty of historical evidence favors it, but also because it fits the pragmatic character of law. What is important in law is not the ontology of personhood, but the jural relations which rest on two persons. Not only whoever, but also whatever can be represented may carry a persona, and become a subject of rights and duties. Yet it is also true that the categorical concept lacks normative content, and cannot by itself guarantee that whoever and whatever deserves a persona to carry gets his, her, or its due. The drafters of the Universal Declaration of Human Rights saw this problem and tried to solve it with Article 6, which provides that “everyone has the right to recognition everywhere as a person before the law.” Although this provision does not fully solve intellectual problems, it turned the center of gravity of the personhood discussion from being a person or not to the dignity of man, and thus took away from my topic most of its practical value.