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The Legal Person and its Other: A Comparative View on Drawing and Effacing Boundaries in Various Cultural Contexts

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_Abstract

Focusing on the project of "de-humanizing law" calls for a discussion of the concept of the legal person for two reasons. Firstly, legal processes of personification have at times gone beyond the anthropocentric bias in legal thinking; secondly, the definition of personhood has often brought about de-humanizing results. By scrutinizing various culturally and historically dependent drawings of the boundaries of personification, it can be shown that the presumed equivalence between legal persons and humans does not hold. This can be illustrated through an analysis of legal personification of animals as well as some recent legal attempts to attribute personality to nature. In contrast to these inclusionary processes of personification, there have always also been efforts to deny certain human beings the status of legal persons. Despite becoming more inclusive historically, modern law does not eschew with creating abnormal non-persons (beasts, monsters, dangerous beings, etc.) in order to underline the construction of individual/rational attribution and accountability. Defining legal personhood not only implies a differentiation between persons and non-persons, but, especially in the Western world, between persons and things. Whereas bio-political issues have somewhat challenged this division, there are examples showing that in some contexts this division was never made clearly in the first place. Finally, the analysis of problems that current international copyright law faces when dealing with questions of traditional knowledge and cultural heritage reveals the occidental bias concerning the conception of personhood, namely its link to an individualized image of the ingenious author.

1_Introduction

The project of "de-humanizing law" ties in with the growing corpus of posthumanist theories that challenge liberal, humanist, and Enlightenment models of selfhood and rationality in very heterogeneous manners and with diverging normative implications[1] — models that are suspected to form the basis of Western law as well. The critical project of posthumanism involves questioning the divides between humans and nature, reason and unreason, mind and body, culture and nature, human life and the world of things and technology. This project calls for a discussion of the concept of the legal person for two reasons. Firstly, a historical view as well as a comparative look at current legal-cultural practices and ideas reveal that legal processes of personification have at times gone beyond the anthropocentric bias in legal thinking (or, as a downside, have induced the anthropomorphic representation of the non-human world); secondly, the definition of personhood, which is one of the foundations of legal systems, has often brought about de-humanizing results in violent and exclusionary ways. Scrutinizing the

various culturally and historically dependent drawings of the boundaries of personification provides ample evidence for the contingency and cultural diversity of legal practices and narratives as well as for Ngaire Naffine's claim that "the greatest political act of law is the making of a legal person."[2]

Aside from cultural presuppositions and political struggles, the never-ending controversy about law's 'population' is kept alive by the persistence of conflicting perspectives on the nature of law in general. From a moral philosophical point of view, the concept of the legal person is closely linked to ideas about human dignity that reveal normative assumptions. This view stands in contrast to a positivist account of law, in which a legal person operates as a functional unit within a given legal system. Irrespective of the concrete form of a legal order, the involvement of legal persons is essential for legal proceedings to take place. The legal concept of personhood ascribes rights and duties and entails certain modes of causality, responsibility and attribution of action to actors, which are, however,

> mere constructs, semantic artifacts produced by the legal discourse itself. […] The densely populated world of legal persons, the plaintiffs and defendants, the judges and legislators, the parties to a contract, the corporations and the state, is an internal invention of the legal process.[3]

The term "invention" refers to the self-referentiality and the epistemic dimension of law, which constitutes its own objects as *legal* objects.[4] This holds true for the concept of the legal person in general. While legal orders often discriminate between natural and legal persons, i.e., between human individuals, on the one hand, and corporations and other collective actors on the other, systems theorists such as Michael Hutter and Gunther Teubner describe both entities as "semantic fictions."[5] To be sure, this is not the exclusive insight of systems theory. Commenting on the debate about the ontological status of natural and legal persons, which has been ongoing since the nineteenth century, the Neo-Kantian philosopher Gustav Radbruch remarked concisely:

> Being a person results from an act of personification by the legal order. All persons, the physical ones as well as the legal ones, are creations of the legal order. Thus, in the strictest sense, physical persons are "legal persons." Hence, there cannot be an argument about the "fictive," i.e., artificial nature of any person, be it physical or legal.[6]

While Radbruch considered the problem of persons' "meta-juridical substrate" worthy of debate, he focused on the question of whether there was a "pre-legal essence"[7] lurking behind those collective agents recognized as legal persons. Yet it was self-evident

to him that "behind any physical person, there is a human being,"[8] which is a highly problematic assumption, at least at second glance. The genealogy of the concept of the person as well as current debates are far from suggesting the simple identification of persons as human beings, which can be illustrated by a short look at the personification of animals (2). Furthermore, some indigenous groups' struggles for recognition have recently led to the legal solution that in several cases nature is treated as a legal person as well (3). In contrast to these inclusionary processes of personification, there have always been efforts to deny certain human beings the status of legal persons: women, slaves, Jews and many other groups. Moreover, it can be shown that, despite having generally become more inclusive historically, modern law does not eschew with creating abnormal non-persons (beasts, monsters, dangerous beings, etc.) in order to underline the construction of individual/rational accountability (4). Defining legal personhood, however, does not only imply a differentiation between persons and non-persons. Especially in the Western world, the differentiation is also between persons and things — the *summa divisio* (highest division) of Western legal cultures (Alain Supiot). Whereas bio-political and bio-ethical debates meanwhile have challenged this division, there are also examples showing that in some contexts this division was never made clearly in the first place (5). Finally, the analysis of current problems that international copyright law faces when dealing with questions of traditional knowledge and cultural heritage reveals another occidental bias concerning personhood, namely, the link that is made between personhood and an individualized image of the ingenious author (6).

2_From Animal Trials to *Zoopolis*: The Human-Animal-Divide in Historical Perspective

European legal history provides a plethora of cases in which the status of a person was ascribed to non-humans. As Walter Hyde has shown,[9] trials against animals and inanimate objects seem to have been part of the normative order in ancient Greece. Despite the lack of trial records, Hyde has collected many classical sources (including Aristotle) that refer to the institution of the Prytaneion. This was the Hotel de Ville of every Greek city, serving inter alia as a law court that dealt with three rather curious kinds of murder cases: firstly, unknown murderers or those who could not be found were nevertheless tried at the court; secondly, inanimate objects that had accidently caused the death of a human being were put on trial, e.g., stones or iron bars; and thirdly, animals that had killed a person were tried as well. Extending the group of accountable 'persons' in these

cases may have been due to the metaphysical assumption that moral responsibility was not limited to human beings.[10] According to Hyde, however, what was much more important was the Greeks'

> general notion that the moral equilibrium of the community had been disturbed by the murder and that somebody or something must be punished or else dire misfortune, in the form of plagues, droughts, and reverses in men's fortunes, would overtake the land. So the ideal legislation of Plato on this point was based upon the same idea which was at the bottom of all the murder laws of Athens, — that the Erinys or avenging spirit of the dead man must be appeased.[11]

Thus, what seems peculiar from a modern perspective can be understood as a ritual of purification: the court proceedings had a symbolic function that remains present in an allegedly disenchanted modernity, too.[12]

More prominent than these trials was the punishment of animals in Europe from the thirteenth century onwards, a practice that extended into the Modern Age.[13] Vermin such as mice, rats or grasshoppers, which had eaten the crops of a village or had done similar damage, were tried before ecclesiastical tribunals, and were often excommunicated. Secular courts, on the other hand, punished pets or farm animals that had killed or injured humans. All of these trials rigorously respected the ordinary procedural rules applied in legal proceedings against humans: the animals were delivered a summons to appear in court, or, this message was proclaimed publicly at the assumed whereabouts of the defendants. They were served notice of the concrete accusation, were assigned a counsel, and, if convicted of murder, were executed like their human counterparts according to *lex talionis*. Animals were not objects but legal subjects, who were accredited with reason and freedom of will and hence also with being animated by motives, not instincts. The killing of the animals subsequent to their trials represented more an act of criminalization than an expression of revenge because it was based on the assumption that the accused animals were legally responsible.

Peter Dinzelbacher has suggested two explanations for this from a contemporary perspective strange legal practice.[14] Firstly, cultural representations of the analogy of human beings and animals proliferated in the High Middle Ages, e.g., in the epics of *Reynard the Fox*. Thus, animals were no longer regarded as simple beasts but were thought of in an anthropomorphizing way, greatly contrasting Christian antiquity and the Early Middle Ages when the boundaries between the two species, man and beast, were drawn very sharply. Secondly, the personification of animals can be understood

as a striking element of the larger enterprise to regulate all segments of everyday life through law. This totalizing endeavor makes the juridification of the modern world criticized by Jürgen Habermas[15] and others appear rather harmless. Anthropomorphizing irresponsible creatures served to make their behaviors legally commensurable and expressed the fierce will of secular and religious authorities to assert their rule in a disciplining manner.[16] All these facets resulted in "fantasies of legal omnipotence"[17] most likely unparalleled in other parts of the world.

In current debates about animal rights, analogies between animals and human beings have again been brought forward: this time, however, they are not motivated by disciplining rationalities but by ethical considerations. The increasing awareness of animals' sensitivity and capacity for suffering signals a break with the Cartesian tradition of considering animals insensitive machines, and also with the refusal to increase their legal status above being a thing, a piece of property.[18] This awareness has fueled the struggle of activists and scientists who long to see certain animals granted subjective fundamental rights. This struggle for recognition has resulted, so far, in legal acts of partial personification, as the right of animals to have basic rights does not go in hand with full legal capacity in the sense of accountability.[19] For some theorists, however, this partial personification does not suffice, which has resulted in recent demands to consistently regard "animals as persons."[20] Sue Donaldson and Will Kymlicka even go so far as to plea for the attribution of citizenship to domesticated animals, for a *zoopolis* that revises categories of political membership and political action, thereby suppressing the boundaries between animals and human beings.[21] While being critical of the notion of 'personhood' in general, and lamenting its cognitivist bias,[22] they opt for a fundamental rights approach towards animals insofar as they should "have inviolable rights in virtue of their sentience or selfhood, the fact that they have a subjective experience of the world."[23] One important consequence of this alternative view is that animals would, on the one hand, be granted not just certain negative rights but also positive ones such as the right to be politically represented, given the fact that the direct voting is not feasible; on the other hand, in a rather communitarian tradition, the authors discuss the moral obligations of these new co-citizens, e.g., the duty of domesticated animals to stick to a vegan diet.[24]

Radical theorists of posthumanism such as Rosi Braidotti view large parts of the animal rights movement ambivalently. While Braidotti praises the movement's ambition to overcome "anthropolatry," she criticizes its reliance on a humanist apparatus of conceptions and values.[25] "Western philosophy's anthropological machine," the political implications of which Giorgio Agamben has revealed,[26] is hard to overcome.

3_The Personification of Nature

While this short historical overview of the development of the human-animal constellation highlights not only the moral, but also the political ideas and ideologies that are involved in legal personification, far-reaching cultural differences have come to the fore in recent ecocentric initiatives. While the constitutional guarantee of the protection and conservation of nature is relatively far-spread, there are some projects, especially in Latin America, that aim to go even further. As early as 1972, Christopher D. Stone asked the often-quoted question "Should trees have standing?"[27] — a thought-provoking approach that has been answered affirmatively during the last couple of years.

The 2008 Ecuadorian Constitution does not content itself with celebrating *Pacha Mama* (Mother Earth) in the preamble, but makes it clear in Articles 71 and 72 that *Pacha Mama* is a legal subject that has "the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes" as well as "the right to be restored."[28] Similarly, the Bolivian parliament passed the "Law of the Rights of Mother Earth" in 2010, recognizing nature as a legal person, too. While being embedded in a larger political counter-project against neo-liberalism and colonial history, these innovative efforts to overcome anthropocentrism in a legal context can be explained by the increasing recognition of indigenous cultures in Latin America.[29] The people of the Andes revere the Goddess *Pacha Mama* in their cosmological narratives as the benign source of fertility, which means that there is a pre-legal personification preceding the recognition of *Pacha Mama* as a legal subject.

In New Zealand, a related case can be found. In 2011, a Maori tribe (Iwi) and the government made an agreement that established legal personhood for the Wanganui River in order to guarantee its health and well-being. The local tribes regard the river as sacred — part of a whole river system with various physical and metaphysical elements that are viewed as a living entity.[30] Thus, most of these innovative practices of

personifying nature stem from pressure on the part of indigenous communities and their supporters. The fact that the City of Pittsburgh adopted an ordinance in 2010 banning corporations from natural gas drilling in the city by explicitly subordinating the rights of corporations to the rights of the people, the community, *and* nature[31] may signal that there is a more general legal-conceptual evolution under way. In any case, these legal decisions help to irritate in a productive way all those, especially Western, anthropocentric conceptual schemes in which 'personhood' is tied to rationality and individualism.

4_The Legal Rationality of (De-)Personification: Human Dignity and the Specter of Beastly Non-Persons

In contrast to these recent efforts to forge a more inclusive concept of personification that extends beyond the human community, a large part of legal history has been shaped by the opposite dynamics, namely the decision to deny certain human beings the status of legal persons. While there is a non-teleological general development towards a more inclusive understanding of legal personhood, the infamous War on Terror and the related security paradigm have been implemented using practices of de-personification. Moreover, as will be shown, the production of non-persons is central to the very functioning of modern law.

As a normative concept of legal dogmatics and system building, the legal person is a kind of "concentrate of historical long-term developments,"[32] which cannot be understood through a focus on legal discussions alone. John Dewey justified the venturing of non-lawyers into the field of legal personality by emphasizing "that discussions and theories which have influenced legal practice have, with respect to the concept of 'person,' introduced and depended upon a mass of non-legal considerations: considerations popular, historical, political, moral, philosophical, metaphysical, and, in connection with the latter, theological."[33]

The 'invention' of legal persons by given legal systems that was discussed at the beginning of this article should not be taken as a *creatio ex nihilo* but as a legal operation drawing upon a rich, often extra-legal "distillate of cultural history."[34] Roman private law already registered the concept of the person without conceiving of it in a legally technical way. Being largely congruent with the term "human being," the concept was not yet linked to the legal logic of inclusion and exclusion that pervades the modern use of the word. Thus, for the Romans, it was not a contradiction to regard slaves as

persons, as the social position of a person was marked by *status*. Whether someone — a man in this case — had legal capacity, i.e., was treated as having rights and duties, depended on the question of whether he belonged to the group of the free (*liberi*) or slaves (*servi*), to the citizens (*cives*) or strangers (*perigrini*), and on his *status familiae*, from the *pater familias* to the *servus* working in the household.[35]

Therefore, this antique conceptualization of personhood differs crucially from modern legal thought. Not only are rights and duties attributed through the status of legal personhood in modern legal conceptualizations, but personhood has been animated by experiences and cultural reflections of violence and injustice[36] that make the "sacredness of the person"[37] a fundament of civilization. Emile Durkheim described the process of rendering personhood sacred in the context of the Dreyfus Affair at the end of the nineteenth century.[38]

Christian theology is often taken to be a precursor to this process of sacralization through its transferring the "metaphysical dignity of the divine person"[39] to the human being. In the early sixth century, Boethius' definition of the person as "naturae rationabilis individua substantia" (an individual substance of a rational nature) was groundbreaking in applying the concept of 'person' to humans.[40] However, it was in thirteenth-century scholasticism, and especially in the work of Alexander of Hales and Thomas Aquinas, that rational capacity was systematically interwoven with the attributes of freedom and dignity, determining the occidental use of 'person' to this day.[41] Francisco Súarez made use of natural law constructions to conceive of all human beings as *personae morales* who were invested with universal subjective rights. In the context of colonialism, regarding human beings as legal persons was a revolutionary position.[42]

This re-conceptualization of legal personality and rights was further refined when humans came to be considered as the source of validity of their own rights, most notably in enlightenment philosophy's autonomy doctrine, which is directed at the rational self-subjection of individuals to moral laws. Niklas Luhmann has shown how the meaning of 'subjective rights' has changed accordingly. A person is no longer just the addressee and passive bearer of rights, as the medieval term *subjectum iuris* suggests but also their author. The Cartesian revolution and the subsequent developments of subject philosophy entail the turn to the validation and legitimation of law in a subjective and self-referential fashion.[43]

Thus, Immanuel Kant equates human with person and legal person by tying legal rights and obligations to the moral essence of all humans. Thereby he upholds and further develops the traditional distinction between rational and self-contained persons, on the one hand, and mere things, on the other hand, which will be discussed in the following section. Kant's definition of "person" in the *Metaphysics of Morals*, assigns the status to "a subject whose actions can be imputed to him,"[44] while not yet making the link between rights and obligations and personhood explicit. The imputation of actions, however, is closely linked to the idea of autonomy, i.e., self-rule of the moral person, "the freedom of a rational being under moral laws."[45] A person's rational and moral capacity for self-rule conditions her dignity, which entails the right to be respected by others: "Every man has a legitimate claim to respect from his fellow men and is in turn bound to respect every other."[46] As this respect is directed towards "the dignity of humanity in every other man,"[47] the fusion of the human, the person, and the legal person is complete.

At the end of the sixteenth century, when 'person' was introduced as a systematic legal concept for the first time, this equation was not yet clear. While Hugo Doneau (Donellus) identified all those subjects participating in legal actions as persons, he remained in the tradition of Roman law's conception of *status*, which assigned a person's social position. The emphasis on social stratification dominated private law debates up until the eighteenth century, although it was increasingly confronted by the natural law focus on egalitarianism.[48] But even in Kant there is much to be learned about the fragility of the crucial identification of the human being and the legal person. According to him, some humans lose their status as a person by committing a "crime against humanity as such."[49] While rape and pederasty should be punished by castration, according to him, "bestiality" results in "permanent expulsion from civil society."[50] Rousseau was even more radical when he made it clear that each person's violation of the social contract was to be answered by, at least, exiling the culprit and, in especially grave instances, executing him: through their deeds, criminals lose their status as a respectable person (*personne morale*) and become public enemies.[51]

Friedrich Carl von Savigny adopted Kantian morality in his legal thinking, stating that "the original concept of the person or the legal subject has to cohere with the concept of the human being."[52] Savigny was quick to modify this assertion by pointing to the fact that some humans can be designated as being without legal capacity

(*Rechtsfähigkeit*), and legal capacity can be attributed to more than just single human beings.[53] The second modification paved the way for the juridical concept of the person that is detached from the question of human morality, making legal capacity a key instrument in legal operations.[54] The first modification, which is directed at the denial of legal capacity, underlines, as in Kant's conceptualization, the potential of exclusion and inclusion with which the concept of the person is endowed. It always runs the risk of being haunted by its 'other': "Browsing the archives, the demarcation between persons and non-persons proves to be historically variable, up to the point at which the distinction becomes blurred and non-persons (*Unpersonen*) are treading the stage of law."[55]

The historical list of human beings who have been partially or entirely denied the status of a legal person is long: slaves, African Americans, members of indigenous groups, women, but also Jews and other minorities persecuted by the Nazi regime.[56] In 1935, Karl Larenz, suggested getting rid of the primacy of subjective rights in favor of the 'objective' law of National Socialism. Larenz, it should be remembered, was a notorious Nazi jurist who nevertheless was allowed to enjoy a considerable academic career in the Federal German Republic after the war. He consistently underlined the duties of the "Rechtsgenossen" (the subjects of the legal order) who were only considered legal persons if they were "Volksgenossen" (people of German lineage, i.e., of 'correct' racial descent). All those who did not qualify for this status were assigned a position outside the law.[57]

In response to these horrible reinterpretations of legal personhood, German Basic Law emphasizes the inviolable freedom of each person and the "right to free development of his personality" in Article 2. The strengthening of the ethical content of the concept of the person in German constitutional law and beyond, however, has not prevented attempts to create new non-persons or even anti-persons of law. This came to the fore in recent debates about preventive custody or the legal status of "unlawful enemy combatants," a legal category that was originally coined in 1942 by the U.S. Supreme Court and was then revitalized in the context of the so-called War on Terror after the 9/11 terrorist attacks, in order to deny detainees vital procedural rights:

> The U.S. legal approach in the "war on terror" has, to a large degree, shifted from what criminal law theorists have called a "criminal law for citizens" to a "criminal law for enemies." While the "criminal law for citizens" treats its addressees as

> law-abiding persons, the "criminal law for enemies" treats its subjects as "dangerous individuals" who cannot be convinced but only forced into submission to the law. The U.S. approach to the "war on terror," however, ventures beyond the "criminal law for enemies" period by placing the "enemy combatant" beyond the law: criminal law becomes a moot point where detention is solely based on a person's alleged dangerousness. In this process, the "enemy combatants" are stripped not only of rights but also of their legal personality that is the basis for having rights.[58]

But there is also an ongoing controversy in German legal theory about the necessity of special legal treatment for dangerous individuals under the label of *Feindstrafrecht* (criminal law of the enemy). Penologist Günther Jakobs not only acknowledges law's capacity for de-personification, but largely affirms it when he speaks of the fight ("Bekämpfung") against individuals "who have turned away permanently or at least with a certain insistence from law, in other words: who do not provide the minimum of cognitive guarantee that is indispensable for being treated as a legal person."[59] Jakobs is even more explicitly punitive when discussing the detention of criminals whose risk of relapse is calculated as high, arguing that in those cases "the control of a source of danger and not the treatment of a person is at stake, as with a wild animal."[60] Such justifications for depriving certain individuals of their legal personality suggest accepting what Kant called "bestiality" in a comprehensive sense as the constitutive other of legal personality.[61] In this regard, modern law is a reflection of Western philosophy, according to which "the human being is considered to be a composite of rationality and animality, classifiable as a person only to the extent that it is able to dominate the animal that dwells inside it."[62] Many legal systems rest on distinguishing between 'normal,' accountable, and rational legal subjects and 'abnormal' non-persons; this renders a re-reading of Michel Foucault's lectures on the Abnormal profitable, especially his analyses of the historical discourses on monstrosity.[63] Furthermore, cultural representations of this other side of legal personality play a part in practices of de-personification and de-humanization.[64]

5_Persons and Things: The Fragility of the Western *Summa Divisio*

Current debates about which humans should be recognized as legal persons have become even more controversial in light of diverging opinions about human nature. During the last thirty years, biopolitical and bioethical debates about the possible scope of technological reproduction and the beginning and end of human life have made the

concept of the human appear porous.[65] This has destabilized the equation between human beings and legal persons and has raised normative questions that defy unanimous answers. Given the fierce struggle about fundamental values that is at stake here and which is often animated by religious and traditional convictions, this is hardly surprising. Moreover, pragmatic legal solutions are often not at hand when traditional categories and concepts are found to no longer apply.[66] Embryos, for instance, are attributed with legal personhood in many legal cultures. Thereby certain subjective rights (e.g., in heritage issues) are ignored, and legal capacity is denied to the embryo in private law matters; hence, in these cases, there is a recognition of an at least gradual prenatal legal personality. The status of embryonic stem cells has proven even more controversial from a legal as well as a societal perspective. In this case, delicate moral reflections need to be made about the bearer of personality and dignity, about personal identity, potential persons and the like.[67] The aforementioned sacredness of the person surfaces again in a highly sensitive setting, as Roberto Esposito has argued, because "[o]nly a life that has crossed beforehand through the symbolic door of the person is believed to be sacred or is to be valued in terms of its qualities […]."[68]

Biopolitical debates concerning the boundaries of personality and the 'human' touch on one of the pillars of occidental legal culture in a sensitive way. In his anthropological exploration of the *homo juridicus*, Alain Supiot has shown that the systematic distinction between persons and things is a *summa divisio* (the highest division) that not only pervades Western legal thought but also the whole perspective on the social world. According to Supiot, whereas it is evident that treating persons as things amounts to a sacrilege, to treat things as persons has to be viewed as irrational.[69] One core trait of Marxist and neo-Marxist theories, which heavily influenced other critical approaches, consists in deciphering social practices that reify subjects.[70] This criticism ties in with the Kantian concept, according to which the respect of the autonomous person ultimately relies on the essential differentiation of persons and things.[71] Yet the *summa divisio* Supiot analyzes, proves fragile when not just the reification of persons (who are often taken as a given) is considered but also the very boundaries between persons and things. From which point on does a cell cluster count as a human being and not as mere matter or biomass? Which status do we confer to "potential persons" like frozen embryos?[72] Moreover, does the *summa divisio* become obsolete when we pay tribute to the fact that

> the increasing recognition that each human body or individual is potentially either person *or* thing brings with it an awareness that techniques of personification and reification are constitutive rather than declaratory of the ontology upon which they are based[?][73]

Leaving bioethics and attendant legal issues aside, it is striking how differently the distinction between persons and things is thought of in various cultural contexts. Bruno Latour has argued that this distinction is not only irrelevant in many parts of the world but also that it is improper to consider this as an exotic failure:

> the savages are not the ones who appear strange because they mix what should in no case be mixed, "things" and "persons"; we Westerners are the odd ones, we who have been living up to now in the strange belief that we had to separate "things" on the one hand and "persons" on the other into two distinct collectives, according to two incommensurable forms of collection.[74]

Latour invites us to see that an awareness of the different cultural schemata that form the world is only a first step in a more thorough de-centering of the Western perspective. An example from the concrete legal world demonstrates that this distinction between person and things does not always work according to Western standards. What Alain Supiot labels as "irrational," i.e., the treatment of things as persons, is for instance a common legal practice in Hindu culture. Divine idols are not regarded as things, as property that can be possessed and traded, but as legal persons who are endowed with rights, duties, and interests of their own, a conception that has often come into conflict with the implementation of British common law doctrines in India.[75] More generally, and this will be shown in the last part of this article, the domain of property law is worthy of investigation, as it is infused with cultural conflicts that are to a large extent due to diverging conceptions of personhood and accountability in a non-penological sense.

6_Person and Authorship — The Cultural Background of Intellectual Property

The genesis of the Western concept of person shows how it rests upon the model of the sovereign, individual subject— not least through the aforementioned construction of non-persons.[76] All attempts to disenchant this phantasm on the part of psychoanalysis, 'post-structuralism' or biotechnology have not induced legal thinking to get rid of this conception; Sven Opitz has argued that, for systematic reasons, modern law has to stick to the liberal fiction of a legal subject that is capable of autonomous decisions for which it takes responsibility, because otherwise law would no longer be intelligible.[77] As convincing as this point is, it must be pointed out that from a comparative point of view

there are indeed other cultural conceptions of accountability and imputation that challenge this fiction.

Cultural anthropologists like Clifford Geertz have therefore denied the universality of the Western version of personality for a long time:

> The Western concept of the person as a bounded, unique, more or less integrated motivational and cognitive universe, a dynamic center of awareness, emotion, judgment, and action organized into a distinctive whole and set contrastively both against other such wholes and against its social and natural background, is, however incorrigible it may seem to us, a rather peculiar idea within the context of the world's cultures.[78]

In many parts of the world, a relational conception of personality prevails, according to which a person is thought of as a knot in a web of social relations, and not primarily as a clearly delimitable entity;[79] consequently, anthropological research has discovered "dividualist" instead of "individualist" images of personhood in India and Melanesia.[80] These different notions of personhood collide dramatically in property and copyright law disagreements, and especially in intellectual property lawsuits. The central position that the concept of property occupies in Western legal thought goes back to Enlightenment philosophy, where the traditional Roman law conceptions of property and of *ius commune* were infused with the pathos of freedom and autonomy.[81] John Locke takes the subjective right to property to the extremes by claiming a natural right to property that comprises the person's entire physical and mental sphere of freedom, namely "lives, liberties and estates," for the security of which the citizens contractually unite.[82] Locke's theorem that "man has a property in his own person"[83] is related to his dubious theory of acquisition; this conception has often been criticized as "possessive individualism."[84] International copyright law has been shaped by such individualist accounts of personhood, which were then further enriched by the romantic fiction of an ingenious and autonomous author. As Rosemary Coombe has underlined:

> Laws of copyright […] were developed to protect the expressive works of authors and artists — increasingly perceived in Romantic terms of individual genius und transcendent creativity — in the service of promoting universal progress in the arts and sciences. Copyright laws protect works, understood to embody the unique personality of their individual authors, and the expressive component of the original is so venerated that even a reproduction or imitation of it is deemed a form of theft.[85]

This concept of authorship is linked to a special idea of attributing 'works' of art or science to an individual person, and this practice directly contradicts the traditional conceptions of many indigenous communities. Hence, the strategy of pharmaceutical

corporations, scientific or cultural organizations to access and exploit the traditional knowledge of these communities has severe consequences,[86] which are manifested in legal-cultural conflicts that reveal the particularity of the Western legal perspective with regard to personality, subjectivity, and individuality — the very foundations of the *homo juridicus* that Supiot describes. A short illustrative example may be in order. It is almost impossible to protect the comprehensive biological knowledge of the Kayapo tribe in Brazil by means of patent or copyright law, as this knowledge is not innovative but has been passed down through many generations. A single person cannot be attributed as the source of this knowledge for two reasons: firstly, it is collective knowledge; secondly, it is a form of knowledge which is not of human origin but which emanates from nature itself.[87] Conceptualizing the genesis of knowledge and, hence, authorship in way that recognizable by law can take highly divergent paths based on cultural variety.[88]

For many years, Terri Janke has reported on similar problems of those indigenous communities in Australia that are fighting for the protection of their artworks. Classical copyright law fails to come to terms with traditional drawings, sculptures, and other cultural expressions that do not aim at originality, and the first material manifestations of which cannot be attributed to a single author. It is precisely the long history of these artworks that not only characterizes their need for protection but also impedes their actually being protected by applicable copyright law.[89] Beyond those practical problems, a concept of authorship emerges that, once again, defies Western schemes of the individuality of legal personality through the emphasis on the priority of the community:

> Indigenous knowledge is more often held for the benefit of a community or group as a whole not an individual creator and there can be strict protocols governing the use of Indigenous knowledge directed at gaining community approval. Indigenous artists and creators often feel uncomfortable about identifying as the "creator" of Indigenous knowledge, not wanting to undermine their community's traditions and customs. A distinction exists, between their role as "artist" having the right to depict story in art form and the communal right of the clan group as the cultural owner.[90]

By weighing author and personality rights against public interests, by separating ideas from their manifestations, and by distinguishing between material and immaterial works, copyright law misses the specific social embedding and function of traditional knowledge:

> The law rips asunder what First Nations people view as integrally related, freezing into categories what Native Peoples find flowing in relationships that do not separate texts from ongoing creative production, or ongoing creativity from social relationships, or social relationships from people's relationship to an ecological landscape that binds past and future generations in relations of spiritual significance.[91]

Yet it is not only Western law that disrupts holistic traditional notions of knowledge, but also social actors who try to exploit this knowledge for their individual or corporate artistic, scientific, economic or ecological interests.[92] The often cosmological narrative framing of traditional knowledge is either misconceived or ignored by these actors. This explains why indigenous groups seek legal protection only partly for monetary reasons but also for fear of seeing the ritual and symbolic reproduction of their knowledge desacralized. The potential symbolic violation represents a far more damaging experience than any material loss.[93]

The attribution of traditional knowledge has motivated various proposals to reform the system of copyright law entirely. This, however, raises the question of to what degree this system is able to adapt to the needs of indigenous groups without undermining its foundation as law.[94] While the idea of recognizing collective or communal authorship is called for,[95] it is also often discarded in order to establish a *sui generis*-protection,[96] which might legally recognize the de-personification of knowledge production; suggestions go as far as making the traditional knowledge itself a legal subject, and therefore the bearer of fundamental rights.[97]

While such struggles for recognition express highly divergent cultural views of the world, the cosmos, knowledge, and personality, legal and political efforts to cope with these conflicts also contribute to altering the cultural identities that are at stake. As championed by ethno-centrists as well as activists eager to enact legal change,[98] cultural incommensurability presumes the existence of immutable and clear-cut individual cultures. Thus, speaking in the name of culture always implies, voluntarily or not, the global claim to be able to speak for the 'real' essence and identity of a community. Such a performative depiction of a homogenous entity, however, contradicts an understanding of culture as an intellectually and practically reproduced system of signification that is open to interpretive struggle and re-signification.[99] Accordingly, the political dimension of 'culture talk' is marked by the will to closure for strategic reasons or due to ignorance.[100]

As the analysis above has demonstrated, law can be conceived of as a cultural technique that contributes not only to the fixation but also to the reformulation of subjectivities and identities. Therefore, observing law as a cultural process permits one to grasp the manifold normative, narrative, organizational, epistemic and symbolic presuppositions and effects of legal processes.[101] Thereby the contingency and particularity of legal forms and practices is revealed as well as the political struggles and violence that stand behind the self-proclaimed sobriety and rationality of law.

_Endnotes

1 Cf. Francesca Ferrando, "Posthumanism, Transhumanism, Antihumanism, Metahumanism, and New Materialisms. Differences and Relations," in *Existenz*: *An International Journal in Philosophy, Religion, Politics, and the Arts* 8.2 (2013), 26–32; Stefan Herbrechter, *Posthumanism*: *A Critical Analysis* (London/New York: Bloomsbury, 2013).

2 Ngaire Naffine, "Who are Law's Persons? From Cheshire Cats to Responsible Subjects," in *The Modern Law Review Limited* 66.3 (2003), 346–367, here: 347.

3 Gunther Teubner, "How the Law Thinks: Towards a Constructivist Epistemology of Law," in *Law & Society Review* 23.5 (1989), 727–758, here: 741.

4 For a consideration of the specific epistemic effects of various procedural techniques, see Jan Christoph Suntrup, "Michel Foucault and the Competing Alethurgies of Law," in *Oxford Journal of Legal Studies*, 37.2 (2017), 301–325, <https://doi.org/10.1093/ojls/gqw019>.

5 Michael Hutter and Gunther Teubner, "Der Gesellschaft fette Beute: *Homo juridicus* und *homo oeconomicus* als kommunikationserhaltende Fiktionen," in *Der Mensch – das Medium der Gesellschaft?*, eds. Peter Fuchs and Andreas Göbel (Frankfurt, Main: Suhrkamp, 1994), 110–145, here: 131; my translation.

6 Gustav Radbruch, *Rechtsphilosophie* (Heidelberg: C.F. Müller, 2003 [1932]), 125. Cf. also Jeanne Gaakeer, "*'Sua cuique persona?'* A Note on the Fiction of Legal Personhood and a Reflection on Interdisciplinary Consequences," in *Law & Literature* 28.3 (2016), 287–317.

7 Radbruch, *Rechtsphilosophie* (cf. note 6), 125; my translation.

8 Radbruch, *Rechtsphilosophie* (cf. note 6).

9 Cf. Walter W. Hyde, "The Prosecution and Punishment of Animals and Lifeless Things in the Middle Ages and Modern Times," in *University of Pennsylvania Law Review* 64 (1916), 696–730.

10 Cf. Hyde, "The Prosecution and Punishment" (cf. note 9), 698.

11 Cf. Hyde, "The Prosecution and Punishment" (cf. note 9), 698.

12 Cf. Werner Gephart, *Recht als Kultur: Zur kultursoziologischen Analyse des Rechts* (Frankfurt, Main: Klostermann, 2006), 255–259.

13 Cf. Peter Dinzelbacher, *Das fremde Mittelalter: Gottesurteil und Tierprozess* (Essen: Magnus, 2006), 103–156; Hyde, "The Prosecution and Punishment of Animals" (cf. note 9); Edward P. Evans, *The Criminal Prosecution and Capital Punishment of Animals* (London: William Heinemann, 1906); Paul S. Berman, "Rats, Pigs, and Statues on Trial: The Creation of Cultural Narratives in the Prosecution of Animals and Inanimate Objects," in *New York University Law Review* 69 (1994), 288–326.

14 Cf. Dinzelbacher, *Das fremde Mittelalter* (cf. note 13), 132–145.

15 Cf. Jürgen Habermas, *Theory of Communicative Action. Vol. 2: Lifeworld and System: A Critique of Functionalist Reason* (Boston: Beacon Press, 1987), 356–373. While Habermas laments the tendency towards a "colonialization of the lifeworld" by the legal system, Francis Fukuyama's neoconservative approach holds the expansion of liberal rights to be responsible for the alleged decline in solidarity and social capital (cf. Francis Fukuyama, *Trust: The Social Virtues and the Creation of Prosperity* (New York: Free Press, 1995), 316.

16 Cf. Dinzelbacher, *Das fremde Mittelalter* (cf. note 13), 153.

17 Cf. Dinzelbacher, *Das fremde Mittelalter* (cf. note 13), 132; my translation.

18 Cf. Erica R. Tatoian, "Animals in the Law: Occupying a Space Between Legal Personhood and Personal Property," in *Journal of Environmental Law and Litigation* 31 (2015), 147–166, here: 148.

19 Cf. Gunther Teubner, "Rights of Non-Humans? Electronic Agents and Animals as New Actors in Politics and Law," in *Journal of Law and Society* 33.4 (2006), 497–521.

20 Cf. Gary L. Francione, *Animals as Persons: Essays on the Abolition of Animal Exploitation* (New York: Columbia University Press, 2009).

21 Cf. Sue Donaldson and Will Kymlicka, *Zoopolis. A Political Theory of Animal Rights* (Oxford/New York: Oxford University Press, 2011). For the purpose of attributing citizenship to animals, the authors disentangle the concept in order to avoid the identification of citizenship and the capacity of political participation, which would exclude not only animals, but also a considerable number of humans from citizenship rights. Thus, Donaldson and Kymlicka discuss three dimensions of citizenship: nationality, popular sovereignty, and democratic agency (cf. 55–61).

22 Cf. Donaldson and Kymlicka, *Zoopolis* (cf. note 21), 30.

23 Cf. Donaldson and Kymlicka, *Zoopolis* (cf. note 21), 31.

24 Cf. Donaldson and Kymlicka, *Zoopolis* (cf. note 21), 149.

25 Cf. Rosi Braidotti, *The Posthuman* (Cambridge, UK/Malden: Polity Press, 2013), 76.

26 Giorgio Agamben, *The Open: Man and Animal* (Stanford: Stanford University Press, 2004), 79–80.

27 Cf. Christopher D. Stone, "Should Trees Have Standing? Towards Legal Rights for Natural Objects," in *Southern California Law Review* 45 (1972), 450–501.

28 "Constitution of the Republic of Ecuador", Georgetown University, accessed February 7, 2017, <http://pdba.georgetown.edu/Constitutions/Ecuador/english08.html>.

29 Cf. Cristina Espinosa, "Interpretive Affinities: The Constitutionalization of Rights of Nature, Pacha Mama, in Ecuador," in *Journal of Environmental Policy & Planning* (published online 2015), <https://doi.org/10.1080/1523908x.2015.1116379>.

30 Cf. Dinah Shelton, "Nature as a Legal Person," in *VertigO. La revue électronique en sciences de l'environnement*, special issue 22 (2015), here: par. 31.

31 Cf. Shelton, "Nature as a Legal Person" (cf. note 30), 28.

32 Reinhard Damm, "Personenrecht: Klassik und Moderne der Rechtsperson," in *Archiv für die civilistische Praxis* 202 (2002), 841–879, here: 846; my translation.

33 John Dewey, "The Historic Background of Corporate Legal Personality," in *The Yale Law Journal* 35.6 (1926), 655–673, here: 655.

34 Ulrich Palm, "Die Person als ethische Rechtsgrundlage der Verfassungsordnung," in *Der Staat* 47.1 (2008), 41–62, here 43.

[35] Cf. George Mousourakis, *Fundamentals of Roman Private Law* (Berlin/Heidelberg: Springer, 2012), 85–118; Wolfgang Schild, "Rechtsperson; Rechtspersönlichkeit," (Art. "Person, IV, Recht"), in *Historisches Wörterbuch der Philosophie*, Vol. 7: P–Q, eds. Joachim Ritter and Karlfried Gründer (Darmstadt: Wissenschaftliche Buchgesellschaft, 1989), 322–335, here 322.

[36] Cf. Lynn Hunt, *Inventing Human Rights: A History* (New York/London: Norton, 2008).

[37] Cf. Hans Joas, *The Sacredness of the Person* (Washington, DC.: Georgetown University Press 2013).

[38] "This human person (*personne humaine*), the definition of which is like the touchstone which distinguishes good from evil, is considered sacred in the ritual sense of the word. It partakes of the transcendent majesty that churches of all time lend to their gods; it is conceived of as being invested with that mysterious property which creates a void about sacred things, which removes them from vulgar contacts and withdraws them from common circulation. And the respect which is given it comes precisely from this source. Whoever makes an attempt on a man's life, on a man's liberty, on a man's honor, inspires in us a feeling of horror analogous in every way to that which the believer experiences when he sees his idol profaned" (Emile Durkheim, "Individualism and the Intellectuals," in *Emile Durkheim on Morality and Society. Selected Writings*, ed. Robert N. Bellah (Chicago/London: University of Chicago Press 1973), 43–57, here: 46).

[39] Palm, "Die Person als ethische Rechtsgrundlage" (cf. note 34), 44; my translation.

[40] Cf. Matthias Lutz-Bachmann, "Der Mensch als Person: Überlegungen zur Geschichte des Begriffs der 'moralischen Person' und der Rechtsperson," in *Der Mensch als Person und Rechtsperson: Grundlage der Freiheit*, eds. Eckart Klein and Christoph Menke (Berlin: Berliner Wissenschafts-Verlag, 2011), 109–120, here: 111.

[41] Cf. Lutz-Bachmann, "Der Mensch als Person" (cf. note 40), 113.

[42] Cf. Lutz-Bachmann, "Der Mensch als Person" (cf. note 40), 114–117.

[43] Cf. Niklas Luhmann, "Subjektive Rechte: Zum Umbau des Rechtsbewußtseins für die moderne Gesellschaft," in id., *Gesellschaftsstruktur und Semantik*. Vol. 2 (Frankfurt, Main: Suhrkamp, 2000), 45–104, here: 81.

[44] Immanuel Kant, *The Metaphysics of Morals*, introduced and transl. by Mary Gregor (Cambridge, UK/New York: Cambridge University Press, 1991 [1797]), 50.

[45] Kant, *The Metaphysics of Morals* (cf. note 44), 50.

[46] Kant, *The Metaphysics of Morals* (cf. note 44), 255.

[47] Kant, *The Metaphysics of Morals* (cf. note 44), 255.

[48] Cf. Christian Hattenhauer, "'Der Mensch als solcher rechtsfähig' – Von der Person zur Rechtsperson," in *Der Mensch als Person und Rechtsperson. Grundlage der Freiheit*, eds. Eckart Klein and Christoph Menke (Berlin: Berliner Wissenschafts-Verlag, 2011), 39–66, here: 45–52.

[49] Kant, *The Metaphysics of Morals* (cf. note 44), 169.

[50] Kant, *The Metaphysics of Morals* (cf. note 44), 169.

[51] Cf. Jean-Jacques Rousseau, *Du Contrat Social* (Paris: Flammarion, 1966 [1762]), 72 (II, 5).

[52] Friedrich Carl von Savigny, *System des heutigen Römischen Rechts.* Vol. 2 (Berlin: Veit, 1840), 2.

[53] Cf. von Savigny, *System des heutigen Römischen Rechts* (cf. note 52), 2.

[54] Cf. Schild, "Rechtsperson; Rechtspersönlichkeit," (cf. note 35), 28.

[55] Sven Opitz, *An der Grenze des Rechts: Inklusion/Exklusion im Zeichen der Sicherheit* (Weilerswist: Velbrück, 2012), 166; my translation.

[56] Cf. for some examples from the US-American context Gaakeer, " *'Sua cuique persona?'* " (cf. note 6), 298–299. Hannah Arendt has demonstrated in her study on totalitarianism how physical extermination was preceded by a gradual process depriving the victims of their legal personality: "Only in the last stage of a rather lengthy process is their right to live threatened; only if they remain perfectly 'superfluous,' if nobody can be found to 'claim' them, may their lives be in danger. Even the Nazis started their extermination of Jews by first depriving them of all legal status (the status of second-class citizenship) and cutting them off from the world of the living by herding them into ghettos and concentration camps; and before they set the gas chambers into motion they had carefully tested the ground and found out to their satisfaction that no country would claim these people. The point is that a condition of complete rightlessness was created before the right to live was challenged." (Hannah Arendt, *The Origins of Totalitarianism* (Cleveland/New York: Meridian, 1962), 296). According to Giorgio Agamben, this bio-political or rather thanato-political production of "bare life" (the status of *homines sacri*) was not a consequence of totalitarianism but rather its source and legitimation (cf. Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford: Stanford University Press, 1998), 119–120). This judgment is based on Agamben's questionable grand narrative that occidental politics is essentially focused on the exclusion of bare life (cf. here: 7).

[57] Cf. Karl Larenz, *Rechtsperson und subjektives Recht: Zur Wandlung der Rechtsgrundbegriffe* (Berlin: Junker & Dünnhaupt, 1935); cf. also Opitz, *An der Grenze des Rechts* (cf. note 55), 168–169.

[58] Christiane Wilke, "War v. Justice: Terrorism Cases, Enemy Combatants, and Political Justice in U.S. Courts," in *Politics & Society* 33.4 (2005), 637–669, here: 638–639.

[59] Günther Jakobs: *Staatliche Strafe: Bedeutung und Zweck* (Paderborn: Schöningh, 2004), 42; my translation.

[60] Jakobs: *Staatliche Strafe* (cf. note 59), 41; my translation.

[61] Cf. Opitz, *An der Grenze des Rechts* (cf. note 55), 171.

[62] Roberto Esposito, *Persons and Things: From the Body's Point of View* (Cambridge, UK/Malden: Polity Press, 2015), 7.

[63] Cf. Michel Foucault, *Abnormal: Lectures at the Collège de France 1974–75* (London/New York: Verso, 2003). Foucault is dealing here with the challenges the natural-juridical complex of monstrosity (as a disturbance of legal categories, e.g., the laws of marriage or inheritance, *and* as a transgression of the law of nature) means to the law. Foucault gives an account of how, historically, the category of 'monster' did not primarily refer any more to physical deformations viewed as 'abnormal' (such as hermaphroditism or conjoined twins) but to 'abnormal' behavior and mental dispositions, marking the ascent of medico-legal expert opinions in court. Furthermore, Foucault anticipates current developments in penal law when speaking about the "appearance of the 'dangerous' individual that cannot be given either a medical meaning or a legal status but is nonetheless the fundamental notion of contemporary expert opinion. By asking doctors today the strictly absurd question 'Is this individual dangerous?' — a question that contradicts a penal law founded on the principle that one can only be sentenced for actions and a question that postulates a natural kinship between illness and transgression — the courts, through transformations that must be analyzed, have renewed the ambiguities of the age-old monsters." (here: 324–325).

[64] Cf. Greta Olson, *Criminals as Animals from Shakespeare to Lombroso* (Berlin/Boston: de Gruyter, 2013).

[65] Cf. *Die Diffusion des Humanen: Grenzregime zwischen Leben und Kulturen*, eds Jörn Ahrens, Mirjam Biermann, and Georg Toepfer (Frankfurt, Main: Peter Lang, 2007).

66 Cf. Leigh Turner, "Bioethics in a Multicultural World: Medicine and Morality in Pluralistic Settings," in *Health Care Analysis* 11.2 (2003), 99–117; Damm, "Personenrecht" (cf. note 32), 871–876; comparing different constitutional solutions: Judit Sándor, "Bioethics and Basic Rights: Persons, Humans, and Boundaries of Life," in *The Oxford Handbook of Comparative Constitutional Law*, eds. Michel Rosenfeld and András Sajó (Oxford/New York: Oxford University Press, 2013), 1142–1161.

67 Cf. Marcus Düwell, *Bioethics. Methods, Theories, Domains* (London/New York: Routledge, 2013), 116–120, 222–232.

68 Roberto Esposito, "The *Dispositif* of the Person," in *Law, Culture and the Humanities* 8.1 (2012), 17–30, here: 18.

69 Alain Supiot, *Homo Juridicus: Essai sur la Fonction Anthropologique du Droit* (Paris: Seuil, 2009), 59.

70 Cf. Axel Honneth, *Reification: A New Look at an Old Idea* (Oxford/New York: Oxford University Press, 2008).

71 Cf. Kant, *The Metaphysics of Morals* (cf. note 44), 50. This Kantian conception has, as shown above, the downside that human beings who do not qualify as autonomous persons do not deserve respect and are ultimately, given the Kantian architectonics, even vulnerable to thing-like treatment (see for this controversy Thomas Gutmann, "Würde und Autonomie: Überlegungen zur Kantischen Tradition," Preprints of the Centre for Advanced Study in Bioethics Münster 2010/2, accessed February 15, 2017, <https://www.uni-muenster.de/imperia/md/content/kfg-normenbegruendung/intern/publikationen/gutmann/02_gutmann_-_w__rde_und_autonomie.pdf>). Furthermore, a look at Kant's conception of family law, especially marriage law, shows that the distinction between persons and things is blurred here because it deals with the right "of possession of an external object as a thing, and use of it as a person" (Kant, *The Metaphysics of Morals* (cf. note 44), 95. Finally, Kant's infamous discussion of the "sexual union" is one example for the general unease to locate the human body within the scheme of persons and things (cf. Esposito, *Persons and Things* (cf. note 62), 44–49, 99–147).

72 Alain Pottage, "Introduction: The Fabrication of Persons and Things," in *Law, Anthropology, and the Constitution of the Social. Making Persons and Things*, eds. Alain Pottage and Martha Mundy (Cambridge, UK/New York: Cambridge University Press, 2004), 1–39, here: 29.

73 Pottage, "Introduction" (cf. note 72), 9.

74 Bruno Latour, *Politics of Nature: How to Bring the Sciences into Democracy* (Cambridge, MA/London: Harvard University Press, 2004), 45.

75 Cf. Kartick Maheshwari and Vishnu Vardhan Shankar, "Stone Gods and Earthly Interests: The Jural Relations and Consequence of Attributing Legal Personality to Hindu Idols," in *National Law School of India Review* 16 (2004), 46–67.

76 Supiot numbers individuality, subjectivity and personality among the core attributes of the occidental *homo juridicus* (cf. Supiot, *Homo Juridicus* (cf. note 69), 48–53).

77 Cf. Opitz, *An der Grenze des Rechts* (cf. note 55), 179.

78 Clifford Geertz, "'From the Native's Point of View:' On the Nature of Anthropological Understanding," in *Local Knowledge: Further Essays in Interpretive Anthropology* (New York: Basic Books, 2000), 55–70, here: 59.

79 Cf. Jürg Wassmann, "Forschungsprojekt Person, Space and Memory in the Contemporary Pacific — the Experience of New Worlds: Einleitung in die ethnologischen Studien," in *Menschenbilder und Wissenschaftskulturen. Studien aus dem Marsilius-Projekt "Menschenbild und Menschenwürde,"* eds. Frank Martin Brunn, Claus R. Bartram, and Thomas Fuchs (Heidelberg: Winter, 2011), 25–32.

80 See Marilyn Strathern, *The Gender of the Gift: Problems with Women and Problems with Society in Melanesia* (Berkeley/Los Angeles: University of California Press, 1988), 14–15; Chris Fowler, *The Archaeology of Personhood: An Anthropological Approach* (London/New York: Routledge, 2004), 23–52.

81 Cf. Marietta Auer, *Der privatrechtliche Diskurs der Moderne* (Tübingen: Mohr Siebeck, 2014), 163.

82 John Locke, *The Second Treatise of Civil Government*, ed. Andrew Bailey (Peterborough, Ontario: Broadview Press, 2015), chap. 9, § 123.

83 Locke, *The Second Treatise* (cf. note 82), chap. 5, § 27.

84 Rosemary Coombe, *The Cultural Life of Intellectual Properties: Authorship, Appropriation, and the Law* (Durham/London: Duke University Press, 1998), 219, 241–245.

85 Coombe, *The Cultural Life of Intellectual Properties* (cf. note 84), 219.

86 Cf. Gunther Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (Oxford: Oxford University Press, 2012), 162–165.

87 This cultural conception collides with the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPS) administered by the World Trade Organization in 1994 (cf. Laura Nader, *The Life of the Law. Anthropological Projects* (Berkeley/Los Angeles: University of California Press, 2002), 222–223).

88 Cf. Claudia Ituarte-Lima, "Categories of Intellectual Property and Biodiversity in Western Inspired Legal Cultures," in *Law and Anthropology*, eds. Michael Freeman and David Napier (Oxford/New York: Oxford University Press, 2009), 313–350.

89 Terri Janke, "New Tracks: Indigenous Knowledge and Cultural Expression and the Australian Intellectual Property System," May 31, 2012, accessed July 12, 2017, <http://apo.org.au/system/files/38273/apo-nid38273-68691.pdf>, here: 10.

90 Janke, "New Tracks" (cf. note 89), 12.

91 Coombe, *The Cultural Life of Intellectual Properties* (cf. note 84), 229.

92 Gunther Teubner and Andreas Fischer-Lescano: "Cannibalizing Epistemes: Will Modern Law Protect Traditional Cultural Expressions?," in *Intellectual Property and Traditional Cultural Expressions in a Digital Environment*, eds. Christoph Beat Graber and Mira Burri-Nenova (Cheltenham: Edward Elgar, 2008), 17–45.

93 One example is the exploitation of the Ayahuasca plant for medicinal purposes by an American patent holder, a plant that the shamans of an indigenous group use not only for curing illness, but for the spiritual communication with the universe and ancestors (cf. Teubner and Andreas Fischer-Lescano: "Cannibalizing Epistemes" (cf. note 92), 24–25); another one is the decision of a Canadian internet provider to display the ritual dance of a North American tribe (Tlingit) for commercial reasons (see Daniel J. Gervais, "Spiritual but not Intellectual? The Protection of Sacred Intangible Traditional Knowledge," in *Cardozo Journal of International and Comparative Law* 11 (2003), 467–495, here: 468).

94 Cf. Gervais, "Spiritual but not Intellectual?" (cf. note 93), 485–486.

95 Cf. Gervais, "Spiritual but not Intellectual?" (cf. note 93), 482–483.

96 See for the development of global copyright law: Silke von Lewinski, ed., *Indigenous Heritage and Intellectual Property: Genetic Resources, Traditional Knowledge and Folklore*, 2nd edition, (Austin/Boston: Kluwer, 2008).

97 Cf. Teubner, *Constitutional Fragments* (cf. note 86), 169–170.

98 Cf. Hardy Geismar, *Treasured Possessions: Indigenous Interventions into Cultural and Intellectual Property* (Durham/London: Duke University Press, 2013), 6, 11, 211.

99 Cf. e.g., Coombe, *The Cultural Life of Intellectual Properties* (cf. note 84), 24.

100 Cf. Jan Christoph Suntrup, "Der kulturelle Grund politischer Ordnungen und die juristisch-politische Konstruktion von Kultur," in *Die andere Seite der Politik: Theorien kultureller Konstruktion des Politischen*, eds. Wilhelm Hofmann and Renate Martinsen (Wiesbaden: Springer, 2016), 237–260, here: 248–256.

101 Cf. Jan Christoph Suntrup, "Recht als Kultur: Ein blinder Fleck der politischen Kulturforschung," in *Zeitschrift für Politische Theorie* 4.2 (2013), 170–189.