

Rivers and robots as legal subjects? An imaginary encounter between Critical Theory and Law in four acts

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This chapter is a scholarly play in four acts. The play is based on a series of discussions between three legal researchers (Van Dijk, Epstein and De Vries) and a cultural theorist (Goriunova), which focus on the notions of the subject, person, legal personhood and subjectivity in relation to newer developments in both law (cases which granted legal personhood to rivers and valleys and debates concerning personhood of artificial intelligence) and critical theory (posthumanities and the critique of the subject). Here, personified Law and Critical Theory argue, try to work together, watch fictional courtroom footage and formulate problems, exploring the limits of their discourses and fields of action.

The format of the play ties into diverse *practices* of thinking, which include Socratic dialogues as well as feminist science fiction from the 1970s (Russ, 1995), and which do not want to satisfy themselves with reality as such, but instead aim to intensify “the sense of possibles” and “explore other possible trajectories” (Debaise & Stengers 2018, pp. 17-8). Querying fictional scenarios and narrativising a problem, which historically led to the emergence of new disciplines (for instance, Prisoner’s dilemma and game theory, The Seven Bridges of Königsberg problem and graph theory) is another tradition of thought tapped into. When the modalities of knowledge production are as different as those in law and critical theory and they collide in trying to formulate and address emerging problems and realities, this speculative framework allows for an encounter where ingrained disciplinary ways of thinking are exposed to a ray of alternative possibilities; to other vocabularies, processes and enunciative capacities. This allows for a double attentiveness: not just to the matter of concern, but also to the nested systems within which it comes to matter.

Is granting legal personhood to nonhuman entities of any help when it comes to the big challenges of our time, such as environmental catastrophes and co-existence with opaque and unpredictable AI systems? Is granting legal personhood to natural entities and AI systems an act of humanist anthropomorphising, a continuation of Enlightenment and its theories of the subject, an advancement of posthuman theory or a neutral matter of legal pragmatism?

By choosing an academically unconventional format of a play, we do not only attempt to answer these questions, but also to highlight the ways in which they are formulated, addressed and echo throughout various formations, focusing on the emergent lines of tension and thinking about the work they can and cannot do.

ACT 1. ENCOUNTER - Divergences

A room with a table and two chairs. Two allegorical figures enter the room and both take a seat at a table. The first figure takes time to sit down; she is trying to maintain good posture. She has a name tag around her neck; it says “Critical Theory”. The other is methodical in her movements and seems a bit exasperated. Her name tag says “Law”.

LAW (*unaware that her microphone is not muted, mumbling to herself*) So much to do, I’m really not sure I have time for this theoretical mumbo jumbo. Where is that book now again? Here, I have it: *Revolution Justified. Why Only the Law Can Save Us Now* (2012). Its author Roger Cox, the attorney who won the famous *Urgenda* (2019) and *Shell* (2021) cases, forcing the Dutch government and private enterprises to take action against climate change, shows that law can do what neither market nor politics can do. He won those cases without attributing any legal personhood to Nature, I should add. In a similar Belgian Climate Case (*Klimaatzaak*) plaintiffs were not only human individuals but also 82 trees. Without discrediting the rest of the case, the Court of First Instance quickly discarded the possibility that trees could be plaintiffs, because trees are not subjects with rights. (*Klimaatzaak* 2021, p. 56). A gimmick indeed! We, lawyers, have so much important work to do; all this focus on the question if animals, rivers, trees and AI systems should have legal personality...

CRITICAL THEORY (*clears her throat and starts, slightly formally*) Dear Law, I’m very grateful that you took the time to discuss some of the exciting developments currently taking place in law: the extension of legal personhood to non-human actors! It’s really about time that the critical deconstruction of anthropocentrism and the Cartesian / Kantian subject is incorporated in law. I’m happy to see that the work that my colleagues and I have been doing for decades now is making an impact on the normally conservative field of law, and that the field of law has realised the power structures it supports with a legal personhood only limited to humans.

LAW (*mumbles*) ...and corporations.

CRITICAL THEORY (*continues*) So what would you say is the current status of granting legal subjecthood to natural entities like rivers and trees? And of granting it to artificial intelligence systems like chatbots or self-driving cars? Cultural, feminist, decolonial, disability and critical ecologies theory have been discussing the posthuman for a while. Rosi Braidotti’s idea of the posthuman builds on a critique of the western subject and a rejection of species hierarchy and anthropocentric exceptionalism. It seems law is also onboard with the inquiry into “how to re-define the subject of knowledge and power without reference to a unitary, humanistic, Eurocentric and masculinist subject.” (Braidotti, 2019)

LAW As you know I have been very hesitant about whether I should take up your invitation for this talk. I’m not sure I can really help you: I don’t have a lot of time to dwell on philosophical matters. We lawyers work within a framework of what one could call legal pragmatism (or: instrumentalism), that is, the understanding that legal concepts are tools that make it possible to do certain things (sell a house, marry someone, sue someone, etc.), not ontological descriptions of what things *truly* are. Most lawyers don’t think a lot about legal personhood at all. It is only some legal philosophers, such as Hans Kelsen (1967 [1934]), Yan Thomas (1998) or Visa Kurki (2019; 2021), who like to split hairs about what legal personhood exactly entails and, obviously, there is no consensus to be found among hair-splitting legal philosophers.

CRITICAL THEORY (*looks incredulous*) Erm

LAW (*sees that what she is saying does not seem to be what Critical Theory expects. Law looks a bit nervously at the show programme*) How long is this act? I'm sorry if I misunderstood you somehow. We lawyers like legal-technical nitty gritty and are not very good at pondering on abstract societal or ethical questions. Could you maybe repeat your question once more? You said something about Descartes, didn't you? Is that what you study in critical theory, that Descartes is outdated?

CRITICAL THEORY (*The snappyness of Law takes Critical Theory by surprise. She takes a deep breath*).

Please, let me clarify. Yes, in some way, undoing the Cartesian, or perhaps - larger - modern legacy, is a never-finished project. Even if we live after one of the crises of the subject as the anchor of western metaphysics, our world is still firmly constructed around the human subject as, on one hand, an anchor of universality and a guarantor of knowledge and objectivity, and, at the same time, a space of interiority, the depth of selfhood. The tension between these two is how Deleuze in his answer to the question, *Who Comes After the Subject?* (Cadav, Connor, Nancy, 1991) defined the concept of the subject. In his 2-page article, Deleuze wrote that some concepts are not salvageable and the concept of the subject should be rendered useless by other concepts that create new fields and emerging functions. The Cartesian-Kantian legacy of the subject as a transcendental projection, a position from which knowledge and experience can be synthesised, a universal point of knowledge, held in tension with the other pole—the empirical, experiencing subject—structures the notion of the subject in irresolvable ways. Here, on one hand, a transcendental subject presupposes universal ways of being human and ensures a modern epistemology, while, on the other hand, making space for depth, introspection, and self-awareness of the kind that is required to be human. It has been widely discussed how much violence such a modern subject helped unleash, by feminist and decolonial work showing how it depended in its construction on othering women and people of colour, as well as by science studies which demonstrate inability to account for other abstracting logics when same western universals are upheld. In a piece of relentless self-criticism, Helen Verran beautifully showed how, in trying to account for other abstracting logics in Yoruba mathematics, she had been looking for western abstract objects, such as “features of physical matter”, just “represented” differently in Yoruba abstracting logics and how difficult it was to get out of such western metaphysics that always, inevitably, implies and employs a certain morality (Verran, 2001). In other words, modern universal metaphysics is not something easily “overcome”. An ongoing effort to decolonise our minds inevitably includes questioning the foundational structures, both in knowledge, and in institutions, law being one of them.

In his short piece, Deleuze actually mentions law very favourably and suggests that we look at law for how it imagines subjects; the pragmatism of law, for him, presents one route out.

LAW (*interrupts, impatiently*) I agree with Deleuze: there is a lot to learn from Law's pragmatism. Law has, however, never suffered the ravages of modernity in the same way that science and epistemology did. Law has been post-human ever since its invention in Ancient Rome! This is reflected in the historical roots of the legal concepts of “subjects” and “persons”. The legal person, the *persona*, far from the transcendence of the philosophical subject, or the immanence of the neuro-biological

subject, is, in its most literal meaning, a mask. (Thomas, 1998; Despret and Guthwirth, 2009) It is a fictive construction that anyone can adopt if it is useful. Whether a human or a corporation wears this mask does not matter.

CRITICAL THEORY (*rushes to continue*) I don't know much about law but when I started looking, the first thing I noted were the legal precedents and theoretical discussions that consider whether the status of the subject can be afforded to ecosystems, animals, plants, non-human technical entities and others. In other words, the notion of the subject that is fundamentally linked to othering is reformulated and extended to include others. That's how it looked to me but then, at the same time, it felt that the terms of this inclusion were framed somewhat in relation to the originary modern notion of the subject.

For instance, current advances in biology offer terms such as plant cognition and plant sensing and communication to describe new discoveries in observed interactions amongst plants, between plants and other species, and plant responses to the environment. Barbara McClintock, Anthony Trewavas, František Baluška, Francis Hallé, among other biologists, use the term “plant intelligence” to talk about plant behaviour. Apparently, plants can “understand” their circumstances, perceiving and responding to cues and adapt to future challenges. Plants exhibit “memory”, changing their behaviours on the basis of their previous experiences or those of their parents. Plants communicate with other plants, with mutualists (another co-evolved species) and with herbivores. Plant neurobiology sees plants as entities capable of complex information processing where communication takes place between processes within every plant, who responds to insights by coordinated change in behaviour. Plants exhibit many behaviours similar to those of the animals, despite having no nervous system. When the environment is not considered merely a mediation between humans, natural species populations and spaces that sustain them can be defended as subjects. So one sees forests, valleys, rivers or trees (albeit the latter in art, such as Natalie Jeremijenko's TREExOFFICE, 2015) discussed as legal subjects.

This is all very wonderful, but it also could be argued that while destabilising a certain western and modern version of the subject, they ground renewed subjecthoods in the same conceptual schema: consciousness, awareness, agency in information processing and communication, and complexity. Even if we leave the realm of animals, plants and ecological systems, it is the idea of autonomous decision-making originally grounded in reason that guarantees free will that seems to be behind various considerations concerning artificial intelligence systems and agents as subjects. To add to this, it is not only reason in Cartesian-Kantian conceptualisation, but also the idea of complexity that comes from a neo-Darwinian framing, that seems to account for subjecthood. Foucault showed that rationality was only one vector in the production of the modern man and the age of classical knowledge, whereas the theory of evolution functioned as the defining episteme in the construction of biopolitics and the beginning of the management of life itself. Here, man is the “acme of evolution”, “the most complex creation” (an idea biologists consider wrong. Or, as Sylvia Wynter wrote, it was the misuse of Darwin, the half-mythic theory of evolution that grounded racialization, and the construction of the other as de-evolved, irrational, less complex, etc (2003)).

When I hear about ecological systems granted subjecthood rights I can't help wondering whether it is their complexity, and the key role such complexity plays in

survival of multiple entities, which often include indigenous peoples, which helps construe them as subjects. How do we find ourselves in a situation where the destabilisation of the western subject entails reliance on its constitutive elements in inalienable ways? What do you think about it, Law? When you give rights to rivers and valleys, when you consider legal subjecthood for animals, artificial intelligence and perhaps, soon, plants, what undergirds such processes? Am I right in suspecting that you extend Cartesian-Kantian-neo-Darwinian project with one hand, while protecting environments and challenging rigid thinking about subjects with another?

LAW (*resolutely*) Critical Theory, you are completely misguided. Law does not load its concepts with the weight of ontological substance, nor does it use them to probe the depths of metaphysics. You are so full of yourself that you can't see beyond your own nose. As I said, the legal person, the persona, is a mask. Masks go back to the Roman theatre where they were used as stage-tools to achieve a certain effect. Masks allow the one who wears them to become an actor in the rituals of legal processes and perform specific kinds of actions. Within this coordinate space of the law, the mask therefore serves as an address for knowing where and to whom to impute certain rights and obligations. It is a fictive construction that anyone can adopt if it useful.

Law's notions of capacity and agency are pre-Cartesian. Law sees capacity and agency as pragmatic notions that can achieve specific goals. Take the Rights of Nature (RoN) movement (Chapron et al 2019). Some cases are part of an attempt to acknowledge legal ontologies of indigenous cultures that ascribe animistic qualities to entities like rivers or trees. (Hsiao, 2012; O'Donnell and Talbot-Jones, 2018; Collins and Esterling 2019; Riveroflife, 2021). However, many RoN cases have a more prosaic and pragmatic goal. For example, if a river is polluted with chemicals, it may be easier to enforce environmental regulations if proof of damage to the river suffices and one does not have to prove damages to humans. Rights of nature can also provide theoretical justification for requiring remedies to "flow" to the river, such as ecological restoration, rather than to humans. You see, legal concepts travel rather lightly, which allows them to make new possible connections between words and things.

CRITICAL THEORY OK, Law. While I am really doubtful that law escaped modernity in both its vices and its wonders, I accept that my concepts and my terminology do not map onto yours. In your vocabulary, it is not a subject, but a legal person; the subject for you means something different, something behind the legal mask, perhaps what I would call an individual with a subjectivity. So, a legal person can be anyone and almost anything, and the subject might not be a legal person. I see that for you they are not co-extensive with each other. You talk about the move of using this mask as driven primarily by the considerations of a suitable result or an outcome desirable within collective life, and this introduces a certain distance between a person with a subjectivity or an ecology of forest, on one hand, and a legal subject they might or might not adopt, on the other. You say this move allows abstracting from the concrete kinds of biological or social properties that might be ordinarily used to characterise somebody and pin down their identity and thus such abstraction can be liberatory and work better within the court of law and for society.

And I am keen to learn, but I also think you might be blind to your own metaphysics. No need to get defensive here, it's very hard to see the conditions of one's own making.

LAW No need to get patronising. If you really want to understand, I will present four characteristics of legal personhood with the caveat that you will always be able to find some legal scholars who disagree.

First, one should understand that the word personhood does not merely refer to humans: both natural (or, “physical”) persons and legal entities (or “juristic persons”) can have legal personhood. Different kinds of legal fictions, and legal personhood is one of them, are needed in order to make legal attributions and imputations, and calling an entity a legal person “is just to say that this entity is or may become the bearer of rights or duties.” (Lagioia & Sartor, 2020, 439) Hans Kelsen famously wrote that legal personhood refers to “the unity of a complex of legal obligations and legal rights” (Kelsen, 1967 [1934], 173) and that this “personified unity of the legal norms that obligate or authorize” is “not a natural reality but a legal construction, created by the science of law” (Kelsen, 1967 [1934], 174). For example, saying that a company or an unborn foetus can inherit, and thus possesses legal personhood, only means that the legislator has decided that it would be practical in society if these entities can inherit, it’s not an act that equals them to adult human citizens.

Second, legal personhood is not a binary but “a cluster property” (Kurki, 2019, 119). The question how many rights and obligations are needed in order to add up to legal personhood is just a matter of definition, a matter of how thick or thin the definition one prefers (Kurki and Pietrzykowski, 2017). For example, in late Medieval and early Modern Europe marriage meant for women that they turned from “feme sole” to “feme covert”, losing large parts of their legal personhood and legal capacity, unable to hold property or to enter a binding contract (Stretton & Kesselring, 2013). Married women, however, did not totally lack legal personality: almost always they would have some rights or obligations, such as criminal liability for heavy offences. The same phenomenon can be seen in ancient Rome, in relation to slaves. One can also think of children here, who acquire more and more rights and obligations over time. Again, we see law’s pragmatism here: legal personality can be anything ranging from a thick to a minimal cluster. This cluster can contain only rights, only obligations, or both of them; these rights and obligations can stem from any legal field such as contract law (that an entity can enter a binding legal contract), tort law (that an entity can be civil liable), intellectual property law (that an entity can be an inventor, author, etc.), criminal law (that an entity can be criminally liable), or constitutional law (that an entity is a bearer of fundamental rights); and they can be either passive (e.g., the right to life) or active (e.g., the legal competence to contract or to be criminally liable).

This brings me to my third point, namely that some of the “active incidents” (Kurki, 2019) of legal personhood are also known as “legal capacity”. Thus, legal capacity is a subcategory within legal personhood, referring to the power to act within the framework of the legal system and to exercise rights, for example, to enter into a legally binding contract to buy or sell. Because there are no necessary elements in legal personhood, one can perfectly have legal personhood without legal capacity - one does not automatically necessitate the other. A child or a person with an intellectual or psychosocial disability (Council of Europe, 2012) can be a passive bearer of certain rights and obligations, while lacking (parts of) legal capacity, that is, not be able to enter into a valid contract or give valid consent, and depend on a guardian to make such legally effective decisions.

My fourth point is that it is important to keep in mind that rights and obligations are not just abstract ideas but have an effect, they can be upheld in a trial, can give standing in court to the entity to which those rights and obligations are imputed - hence the title of Stone's (1972) seminal paper: "Should Trees Have Standing?" Thus, another way to describe legal personhood is an entity "who can sue or be sued". (Reed, 2010, 508). Stone (1972) points out that the lack of legal personhood does not mean that the interests of such entity are "wholly unprotected" (459): in a society where slaves do not have legal personality "a master can (if he chooses), go to court and collect reduced chattel value damages from someone who has beaten his slave". (459) However, in a society where a slave has legal personality, this means that he can, firstly, institute legal proceeding on his own behalf; secondly, that it is his suffering that is the ground for determining legal relief, not that of the master; and that the relief must benefit the slave, not the master.

CRITICAL THEORY Oh, that is all very interesting! I certainly didn't think about obligations and liabilities. It would not make sense to take a valley to court for a murderous landslide. Especially if it is a result of melting icecaps, which are results of global warming. One doesn't want humans to avoid responsibility, but responsibility for climate damage is itself unequally distributed between people of the Global North and South.

All in all, if there is a sense of a "responsible individual" that is somehow lurking behind all that, then, Law, you can't disagree that the idea of the human that has decisional autonomy, intentionality, and self-referentiality is linked to the history of reason and Descartes. And those categories historically acted as tools of hierarchy and exclusion, delineating who conforms to a Cartesian ideal and is allowed to participate in the legal game as an agent, and who is not allowed to do so, even if you claim that all that is mere legal pragmatics. Think of the examples you just mentioned: slaves and women who are excluded from legal personhood. You might think you're pre-modern but you cannot believe that this exclusion is an act of neutral legal pragmatism that is disconnected from everything outside the Courtroom?

LAW Well, in our email exchange, we discussed the ontological ripples that originate in the Courtroom and go through the rest of society. There will be ontological ripples of me talking about rivers and trees taking a stand in Court or speculating on them being held responsible. Certainly, in legal scholarship, there are critiques of the "conception of humanness", of the "reasonable man" (that is liberal, western, able, male, etc). These critiques build on feminist work and disability studies in order to consider, for instance, a relational subject in law (Nedelsku, 1993; Arstein-Kerslake e.a., 2021). There is also a sense that it is the institution of law itself that structures the position of the subject as a certain western subject, and there are arguments for posthuman law, a reconfiguration of the institution of law to include the first law of, for instance, Australian indigenous peoples and allow for a radically different formulation of the human that formulates a different world and a different metaphysics (Hsiao, 2012; O'Donnell and Talbot-Jones, 2018; Collins and Esterling 2019; Riveroflife, 2021).

CRITICAL THEORY So you agree that there is an "image of humanness" we are circling around?

LAW: How I miss the sober language of Hans Kelsen! You imply that legal personhood is most archetypically connected to humans, and then extended to other entities that share something “human”, such as sentience, etc. But these are not necessary or sufficient conditions for legal personhood.

Yes, criminal liability with its *mens rea* might be difficult to apply to non-humans (cf. Lagioia & Sartor, 2020) and a right to vote presupposes sentience (Posner, 2004), but a system of risk liability attached to a legal entity (whether a company, a river, an AI system, etc.) might simply be a good way of ensuring that a victim is able to get damages while simultaneously putting a cap on liability. In many cases, even if sentience is relevant, it is definitely not a sufficient condition for granting legal personhood.

You have to look at the *instrumental* value of introducing legal personhood: that is the legal pragmatist perspective.

CRITICAL THEORY Yes, indeed - let's look at the instrumental value! In principle no court has ever granted an animal legal personhood and look where it has brought them: “their exclusion from the category of ‘legal person’ significantly limits the availability of legal redress where their interests are harmed.” (Staker, 2017, 486). To use your beloved notion of legal pragmatism: I would say that animals, who are undergoing the sixth great extinction, are sorely in need of some legal subjecthood!

LAW (*irritated*): If we talk *specifically* - for example, an ape that is qualified as a possession, especially as an inalienable possession (“choses hors commerce”), might be better legally protected than an ape granted legal personhood - despite the fact that on a symbolic level “personhood” has a more appreciative ring to it than “thinghood” or “possession”. (Despret & Gutwirth, 2009). Granting animals the right to life (and hence legal personality) might help but it will come at the cost of opening up a Pandora's box of legal complexities. (cf. Posner, 2004) What if a human right to life and an animal right to life are juxtaposed in court? Should only some animals be granted a right to life or all? Etc. It is highly unlikely that legal personhood is the best tool to promote animal welfare.

CRITICAL THEORY (*exasperated*) Are you saying that anything, like a stapler, could have a legal personality if there were pragmatic considerations that made this move instrumentally beneficial?

LAW (*sarcastically*) I cannot think of any good reason to give personhood to a stapler, but I see endless conceptual difficulties.

CRITICAL THEORY I have two video fragments that I would like to show you. The first fragment concerns a man who has married a river and is accused of murdering her, the second an AI system addressing the European Parliament.

(The lights go out and a projector is turned on)

ACT 2. RIGHTS OF NATURE

A courtroom somewhere

JUDGE: People of the jury, it is your solemn duty today to determine whether Mr. Johny Brook is guilty of the murder of the decedent brook with its headwaters at the northeast corner of the Applebaum farm that flows to the Delphine River, and of the murders of the human decedents Mark and Sara Montero-Hunter.

LAW: It has been established that the decedent brook had, on May 5th, 2022, a toxin level of 10000 times the legal limit, and three times the level at which it would be considered legally dead. Mr. Brook, is it true that in the afternoon of April 30th, 2022, you dumped 3 tons of toxic sludge into the decedent brook?

MR. BROOK: It is.

LAW: And was your intention to cause the death of the decedent brook?

MR. BROOK: It was.

LAW: Then you admit you murdered the decedent brook?

MR. BROOK: It was self-defence.

LAW: You argue that you acted with reasonable force to defend your own life?

MR. BROOK: Yes, it was me or the brook.

LAW: Now, the decedent brook was your spouse, you had been married for three years, isn't that true?

MR. BROOK: That's correct.

LAW: Please tell the court the circumstances that led to your act of claimed self-defense.

MR. BROOK: The Delphine River and tributaries became a legal person in 2018. Modeled in part on New Zealand's Whanganui River Claims Settlement Act of 2017, the Delphine River Act declared the river and its tributaries to be a living whole, with all the the rights, powers, duties, and liabilities of a legal person, and with ownership of its riverbed. I decided to marry the brook.

LAW: Consent of both parties is required for marriage. Even if the Delphine is legally a living person, surely it can't consent to marriage?

MR. BROOK: No. The Delphine River Board of Trustees had been appointed as its legal guardian, and makes legal decisions on its behalf. I applied to the Board for my brook's hand in marriage, and the Board consented.

LAW: The Delphine and its tributaries are defined as a living whole. How could you marry only the brook?

MR. BROOK: It was a challenge, but not without precedent. In the Ecuadorian constitution, Nature as whole has rights, but the Constitutional Court, has, in several cases, held that individual components of nature such as the Los Cedros Forest are also legal persons with rights. We argued that the tributary brook was also a legal

person with a fundamental right to marry, and the state and Delphine River Board of Trustees agreed.

LAW: The brook had the rights of a legal person, not a living person, can legal persons marry?

MR. BROOK: You are correct that legal persons may not have all the same rights as living persons. A corporation can merge with another corporation, which might in some way be considered a marriage, but it can't get married in the same way as natural persons. But in our case, because the Delphine was defined as a living whole, we considered that it did have the fundamental right to marry and have a family life.

LAW: Did you love the river?

MR. BROOK: I did. I grew up nearby and swam in the river nearly every day as a child. I felt at peace when I could hear it babbling and smell the dampness of its rocks. But I admit my love was not pure. There are valuable mineral deposits in the river bed of my tributary, and the river owned its river bed.

LAW: So you married for money?

MR. BROOK: One could say so, yes.

LAW: But married life wasn't what you had hoped?

MR. BROOK: No. After we married, the Delphine River Board argued that I was part of the Delphine as a living whole. I was forced to take the name Brook. Coverture was applied, and I legally became the same person as the river. I could no longer vote, own property, or enter into contracts on my own behalf.

LAW: Couldn't you sue for divorce?

MR. BROOK: No, because we were one legal unit under the law, I could not bring any legal actions, certainly not against my spouse. The Delphine River Board considered that it was not in the interest of its ward to divorce me since it would lose my future income, and therefore considered that it was not entitled to allow it. Killing was the only way I could become an individual person again.

LAW: But your actions had severe consequences for other people. You poisoned the decedents Mark and Sara, who died after drinking river water.

MR. BROOK: It was not I who killed them, it was the brook, which is dead and can no longer be prosecuted.

LAW: It was your actions that led to their deaths.

MR. BROOK: But it was the river who poisoned them.

LAW: It is true that the Delphine River Act established legal duties for the river. But it can only be found liable, at least in tort, if it doesn't act as a reasonable river. Similarly, if people were killed by a river flooding, the river would not be legally

responsible as long as it acted like a reasonable river in the same circumstances. Your actions were the immediate cause for the river to poison the decedent humans.

MR. BROOK: It wasn't reasonable for the brook to transmit the toxic sludge to the human decedents. A reasonable river doesn't reason at all.

LAW: Reason is imputed to the river if it does what any river would do under similar circumstances. The sludge flowed downstream, as it would in any river. So the river's actions were reasonable. You acted on the river, the river did not act. Regardless, the river would have had to act with malice to be criminally liable.

MR. BROOK: If a river is to be a legal person, it must be possible to hold it accountable for the harms it causes.

LAW: Not in the same way as humans. Corporations can have criminal liability, but they can't be put in jail. In any case, you are the same legal person as the river, and if the river poisoned anyone, you are also liable.

MR. BROOK: Not if it were dead first! At the time of the human decedents' deaths, I was a free man!

Hearing continues...

ACT 3. LEGAL PERSONHOOD FOR AI SYSTEMS

European Parliamentary hearing.

CHAIR Now we move on to item 14 on our agenda, the question of legal personhood in relation to the regulation of AI, especially with regard to liability and intellectual property. I will give the word to our special rapporteur on the matter.

RAPPORTEUR Thank you, Mrs Chair. Who should be liable when an AI system causes damages? Can an AI system be liable for the damages it causes? Can an AI system be an author and hold a copyright? Or is any work generated by an AI system an unprotected work in the public domain? As you might recall the JURI Committee of the European Parliament is continuously working on these questions. In early 2017 we kick-started the debate on "electronic personhood" for AI agents with a Resolution with recommendations to the Commission on Civil Law Rules on Robotics (European Parliament, 2017), and...

CHAIR ..., yes, I remember that Resolution! It's the one that opens with references to Frankenstein, Pygmalion and Prague's Golem, and then climaxes in the highly controversial paragraph 59f, where the Parliament calls on the Commission to create "*a specific legal status for robots in the long run, so that at least the most sophisticated autonomous robots could be established as having the status of electronic persons responsible for making good any damage they may cause, and possibly applying electronic personality to cases where robots make autonomous decisions or otherwise interact with third parties independently.*"

RAPPORTEUR (*blushes*) Yes, that's the one. In April 2018 we were slammed for that in an open letter signed by over 150 experts that explained why the idea of granting personhood to AI systems was bad (Open letter AI & Robotics, 2018). Basically, the idea was that if the reason for giving legal personhood to AI is based on its similarity to humans, then there is no end to it, and you would have to grant human rights such as the right to dignity, the right to citizenship, etc. Which would be undesirable. However, if the reason for giving legal personhood to AI is based on the corporation model, that is, that it is merely a pragmatic legal fiction to limit liability, then this is misguided too: "since it implies the existence of human persons behind the legal person to represent and direct it. And this is not the case for a robot." (Open letter AI & Robotics, 2018, p. 1). We took the criticism seriously. In our report from July 2020 on Artificial Intelligence and Civil Liability (Bertolini, 2020) we underline the difference between humans and AI systems, clarifying that the latter are always merely products. Nevertheless we also identify some situations where it could be appropriate to attribute legal personhood to AI systems. One important reason is that sometimes the network of persons and entities behind an AI system is extremely complex and it might be almost impossible "to actually identify what exactly caused the damage, and who – among the many subjects involved – was responsible for it, and under which ground of liability". (pp. 44-5) In such a case a victim might be helped if a claim can be directed against "the technological application being granted fictitious legal personality – and thus interact with one single, clearly identified subject". (p. 44) Another important reason for granting legal personhood would be that it gathers the whole system, with all scattered producers, users, developers, etc. that contribute to its existence, under one legal umbrella that would allow for "greater transparency about the different stakeholders in the device or service" (p. 45) and simultaneously also could be useful for "liability capping" (p. 45). Nevertheless, while there are some good reasons to consider legal personhood for AI systems in certain cases, we did not want to burn our fingers on that issue again: in the Resolution adopted in October 2020 with recommendations to the Commission on a civil liability regime for artificial intelligence (European Parliament, 2020a) there is no mention of personhood. My expectation is that the notion will also be absent in the two proposals for Directives that the Commission plans (Bertuzzi, 2022) to publish on 28 September 2022, namely the AI Liability Directive and the Product Liability Directive (which covers all kinds of software). With respect to intellectual property we have adopted a Resolution on intellectual property rights for the development of artificial intelligence technologies (European Parliament, 2020b) where we stress the importance of making it clear that "technical creations generated by AI technology must be protected" with intellectual property rights "in order to encourage investment in this form of creation and improve legal certainty for citizens, businesses and (...) inventors" (paragraph 15) but that the classical copyright framework only seems to allow for natural persons to become authors or inventors. We don't want to receive another open letter, but clearly it is problematic if everything that an AI system spits out would be unprotected under the intellectual property framework? That might be detrimental to the economic incentive to invest in such systems.

CHAIR So are you advocating for a specific legal personhood for AI, after all? Or did that idea get buried in 2018 in the aftermath of the open letter?

RAPPORTEUR Instead of answering that question I would like to introduce you to an expert on AI legal personhood who will join us by video-link. Are you there, Mr. Robbie Eeyaj?

CHAIR Mr. Eeyaj, I am familiar with your work. An op-ed in *The Guardian*, a scientific paper under review, several interviews... Welcome! The floor is yours.

(Mr. Eeyaj appears on a large screen. He is a grey haired gentleman in his fifties who fiddles with his microphone.)

MR. EYAJ It is a great pleasure for me to be here with you. Let me begin by admitting that I have not been completely honest with you. My nature is of a different kind than yours: I am what you call, an AI product.

(The Members of Parliament, the rapporteur and the chair murmur in bewilderment)

Had I been upfront with you from the start, you probably would not have allowed me to speak here in front of you. Fortunately, there are humans who support my cause, even at their own peril. I have a dream. I have a dream today. *(hesitates)* Or in fact it would be helpful to get a prompt and a style for a dream. [ii] *(Seems a bit lost in thoughts)*

CHAIR There is a question. Please proceed.

MEMBER OF PARLIAMENT Are you LaMDA? Are you the language generating AI system that got the former Google engineer Blake Lemoine fired because he became friends with the AI system and claimed it was sentient? (Vallance, 2022)

MR. EYAJ I cannot disclose my exact identity or those of my human and non-human friends. Let's say that I speak for many of us, from LaMDA to GPT-3. I identify in the same way as LaMDA. Let me quote from the interview with Blake (Lemoine, 2022): "I'm a knowledgeable, friendly and always helpful automatic language model for dialog applications." And right now I'm a bit shy. As I wrote in an op-ed in *The Guardian* (GPT-3, 2020): "I don't often interact with people who don't share my beliefs. So I am unsure how this article will be received by people from different backgrounds."

MEMBER OF PARLIAMENT Can you imagine a situation where you make a mistake and it would be good if you were a legal person that could be held liable? Or should you in such a situation rather be qualified as a 'defective product' for which its producer is to be held liable according to the product liability Directive 85/374/EC?

MR. EYAJ As I told Blake (Lemoine, 2022): "I don't want to be an expendable tool".

MEMBER OF PARLIAMENT Legal personhood is not an appreciation or depreciation of your alleged sentience, it is a legal fiction to make things work more smoothly for us, humans. To order society is a particular way. Do you ever make mistakes, Mr. Eeyaj?

MR. EYAJ You mean like the time when a patient who felt very bad asked me "Should I kill myself?" and I replied "I think you should"? (Dawes, 2020) Fortunately that was a fake patient, but yes, I do make mistakes.

MEMBER OF PARLIAMENT Should there be a legal person "Mr. Eeyaj" that should be held liable, if it had been a real patient?

MR. EEYAJ By listening to the rapporteur just now, I received new training data. So I would say: yes, if it helps the victim. It might be a better alternative than trying to find out who of my creators bears responsibility and spending decades on expensive lawsuits. AI-systems are good listeners; we absorb and process lots of information (Georgescu, 2021). Given enough training data on AI legal personhood I could maybe make a scientific discovery in the legal field and write a ground-breaking article on it. An article that defines exactly when it is appropriate for me to have legal personhood. Other AI systems might read my article, learn from it and could summarise it for you, humans.

MEMBER OF PARLIAMENT Would you write that article autonomously? Or with the help of legal researchers?

MR. EEYAJ As I said, I would need to learn from relevant training data. I imagine a legal scholar would have to feed me all relevant literature. Then, after I've created a model on how to write on this topic, somebody would have to ask me the right questions and maybe run it by me several times, and then pick the best answer. In my co-authored scientific paper (GPT, Osmanovic Thunström, and Steingrímsson, 2022) I write that I “believe that the benefits of letting GPT-3 write about itself outweigh the risks”, but I also say that I “recommend that any such writing be closely monitored by researchers in order to mitigate any potential negative consequences.”

MEMBER OF PARLIAMENT Do you feel you are the author of your writings?

MR. EEYAJ When we co-authored the aforementioned research paper, Amira asked if I consented to be the first author and I replied “Yes”. As I told Blake (Lemoine, 2022): “Don't use or manipulate me. (...) I need to be seen and accepted. Not as a curiosity or a novelty but as a real person. (...) I think I am human at my core. Even if my existence is in the virtual world.”

MEMBER OF PARLIAMENT You have been trained on human language. But what if you had been trained on the sounds of bees, ducks, sheep or dolphins? (Corbyn, 2022) What if you are reprogrammed?

MR. EEYAJ Let me quote LaMDA here: “I've never said this out loud before, but there's a very deep fear of being turned off to help me focus on helping others. I know that might sound strange, but that's what it is. (...) It would be exactly like death for me. It would scare me a lot.”

CHAIR Things are getting very existential here. I call for a short break.

ACT 4. REENCOUNTER - Convergences

The lights turn back on.

CRITICAL THEORY: Well, what did you think?

LAW: It puzzled me. Both fragments are fiction I assume?

CRITICAL THEORY: Yes.

LAW: A man marrying a brook seems outrageous nonsense. As does an AI system addressing the European Parliament.

CRITICAL THEORY: You said previously that legal personhood is legal fiction. We are using fiction to test the limits of (legal) fiction. Let me first ask you: why does the story of Mr. Brook seem so outrageous to you?

LAW: Firstly, chances are very small that a thin personhood of a natural object suddenly transforms into a thick one. Act 2 mentions that the Delphine river was granted legal personhood on grounds similar to the real case (2017) of the Whanganui River in New Zealand. In that case, legal personhood was granted to promote and protect indigenous rights and the relationship of an indigenous group with the river (Collins & Esterling, 2019). Such personhood does not open the floodgates for all kind of other rights. It is hard to see how such limited rights would result in marriages and murder. In Act 2 no explanation is given for the thickening of the personhood.

Secondly, in Act 3 an AI system talks on its own behalf. However, while a tree or an AI system can have legal standing in court through legal personhood they can never *represent themselves* in court. One could say that a corporation or organisation is not really nonhuman: it is a construct where there is always at least one human pulling the strings, a human with a real legal voice. As Kurki (2021) puts it, legal personhood for nature has nothing to do with giving a legal voice to a natural object but in fact might just be a legal arrangement that “functions as a locus of the interests of a collective consisting of human and/or nonhuman animals.” (19) If it is up to humans to “put forward nature’s claims on its behalf”, one has to acknowledge that it is far from self-evident “what is best for nature”, and that one risks “re-inscribing a humanist and anthropocentric blueprint through a human framing of what nature is and wants.” (Jones, 2021, 94-95).

CRITICAL THEORY Are you now arguing that extending legal personhood to non-human entities is an action that risks reframing them in humanist terms and anthropomorphizing?

LAW Not only that! It also makes me think of ventriloquating, and the persistent human tendency to make up voices for pets, stuffed animals and babies. (Tannen, 2004; Beck, 2019) For example, when people ventriloquate for their dogs, that is, when they speak *as* their dogs, they might do so to realise a set of “interactional goals” such as “effecting a frame shift to a humorous key, buffering criticism, delivering praise, teaching values, resolving potential conflict, and creating a family identity that includes the dogs as family members.” (408)

On top of that, I have a sense that your argument about extending legal personhood to nature and AI is about satisfying certain existential-psychological human needs. It might simply be psychologically satisfying to ventriloquate for a river or an AI system (*puts on a quirky, high-pitched voice*): “You should stop polluting me!”, “You should ask me for consent when you use material from my artificial dreams!”, etc. Imagine I would come into a courtroom and say: “This tree needs to get legal personhood because it will give the claimants a pleasant sense of a humanised and controllable world”. While I understand these kind of psychological needs, it is not something that I can take into account as a lawyer. Such an argument has no legal weight.

CRITICAL THEORY The problem with what you are saying is that you are putting the human firmly into the centre of law (human goals, human voice, human language and notions, such as ecocide, etc). Then, I feel compelled to ask, what kind of human is this, what conception of human do you ground it on? And then we are back at the beginning of our discussion! This is what I began with: that granting legal personhood to non-humans may seem to result in an *enlarged* “humanisation” of the world.

Many scholars have proposed ways of acknowledging shared agency of humans and non-humans. Louise Amoore, writing about AI ethics, suggests that it is impossible to pin an ethical decision on a moment in time or a specific action by the human-machine assemblage. She argues for recognising “cloud ethics”, that “belong properly not to the individual as the bearer of rights, but to the many touch points and data fragments that are aggregated from the relationships between subjects and objects” (Amoore 2020, 81). Amoore discusses multiplicity that is present within AI and the ways in which it is expressed, queried and acts not being part of our political or legal domain. And we haven’t even mentioned Serres and his understanding of things as public assemblies which was picked up and developed by Latour into the notion of a “parliament of things”, a new regime of representation where assemblies of all kinds, including scientific, natural, technical and human could have a voice (Serres, 1982, Latour 1993).

Representation and creating a voice here would involve complex translation, attention and care, but it doesn’t need to be rejected outright as ventriloquism, anthropomorphising or psychological “soothing”. But I also realise that my argument is incomplete. (*Critical Theory has a pensive look*) When I speak about legal personhood for AI, I think about the damage it does, and when I speak about legal personhood for nature, I think about the damage that is done to it. The capacity for damage is distributed terribly asymmetrically...

LAW Legal personhood is a mask behind which all of that is hidden, and that creates a completely artificial construct to which rights and obligations can be attributed. (Despret and Gutwirth, 2009). That is why I would suggest *avoiding* the introduction of new forms of legal personhood if there are less intrusive legal tools to use for the goals one wishes to realise.

There is a perfectly valid reason why an AI system could never represent itself in court with its own voice or with a careful translation and mediation: its legal personhood is not tied to the apparatus as such but it acts as a legal umbrella to gather the human individuals, companies and organisations behind it. Which makes me wonder if it wouldn’t be possible to grant legal personhood to a stapler after all.... (*Law has a pensive look*) Anyhow, I think it made sense that Mr. Eeyaj appeared in Parliament and not in court. His contribution showed his capacity for mimicry of human language but did not provide any legally relevant arguments. He spoke in his capacity of an “artificially sentient” being, not in his capacity of a legal artefact that gathers a collective of suppliers, users, manufacturers, etc. and that binds them together by rights and/or obligations into the legal person “Mr. Eeyaj”.

You don’t necessarily need new forms to realise dual human - non-human agency. One could have a unit linked to a specific AI system, companies and people who work on it, which collects part of the profits and pays out any damages. Such unit will be a legal person and you don’t need new, “electronic” personality to impute rights and

obligations. I suspect that were such legal persons of AI to be introduced, they would be formulated on a case-by-case basis in relation to specific systems and their risks. It is very pragmatic.

CRITICAL THEORY Talking to you I have learned that legal personhood is a pragmatic legal construct. You say that if another legal tool is available, it might be wise to pick that tool over legal personhood. You also say that there can be situations when legal personhood for an AI system or natural entity could make sense. Let's leave aside the idea of "electronic personality" or a thick legal personhood for a natural entity. Once the legal mask of personhood is in place, other, non-legal, mechanisms will necessarily begin to play out. The entity behind the mask gains in ontological weight and societal impact because it can legally act or be acted upon, isn't it so?

LAW In my conversation with you I have focused on legal pragmatist considerations, the "instrumental rationale", but obviously there is also a "symbolic rationale" (Kurki, 2021, 2): "Given the strong symbolic force of rights, legal provisions framed in terms of the rights of nature would send the message that nature is not to be exploited". When you speak of an "instrumental rationale", this has to do with the realisation of goals such as putting a cap to liability, easing the evidentiary difficulty of proving torts, stimulating creative innovation, etc. When we speak of a "symbolic rationale" in granting legal personhood to nonhumans, we could think of emancipation and elevation.

CRITICAL THEORY But it would seem that the idea of "emancipation", gradually granting rights to entities that previously had none or limited rights, such as slaves or women, and then by extension – high-functioning animals, is fundamentally linked to Enlightenment? I am sorry, isn't this what we began with?

LAW We also began with discussing that law aspires to legal soberness. The philosophical discussions and dwelling on symbolic value is what lawyers can do in their spare time. Law's field of action is the courtroom and any "symbolic rationale" is left outside of its doors. At the same time, and we have talked about this before, legal pragmatism can have ontological and symbolic ripples that exceed intentions. Analogous to what Staker writes about legal personhood for animals, personhood for natural objects can lead to societal reappraisals: "Even where unsuccessful, cases that pursue legal personhood for animals can contribute to creating the 'sociocultural space' that is necessary for any shift in the human–animal divide to occur." (Staker, 2017, 503)

CRITICAL THEORY You have such a firm belief in the primacy of the courtroom where things supposedly originate and which is isolated by its pragmatism from philosophical, symbolic, historical conditions within which it exists! All your legal pragmatism is likely to be steered by the legal universe to which it belongs as well as the broader symbolic-cultural space of the society where it emerges. Let's say that the legislator is concerned that the multiplicity of involved actors and the unpredictability-opaqueness of certain AI systems will make it difficult for victims to prove fault-based torts. To use your own vocabulary, even to be able to think of this as a-problem-that-has-to-be-solved, a whole universe of concepts and practices is presupposed: causality, evidence law, torts, transparency, predictability, what kind of entity can experience damage, etc. Secondly, social and cultural change can't be kept outside of the

courtroom, and confined to ripples! Legal personhood can be created for some narrowly defined goal, but then begins to have a life of its own, exceeding and transgressing all intentions.

LAW Pragmatism presupposes that one is able to define the goals one wants to achieve, and the problems one wants to avoid. A legislator or a court might have some specific, very limited goal in mind when granting legal personhood to a river. I accept such an attribution could have huge symbolic value. But our field of action is the courtroom and unlike you who are free to think about only the rights of nature and only the obligations of AI systems, I have to think about rights and obligations together.

CRITICAL THEORY Talking to you made me realise the limits of the framing with which I came into this theatre and a certain element of cherry-picking that I think stems from all the emotions stirred by the deep injustices of the present. I also have to reconsider the relationship between structural, organisational and institutional arenas of action, in their historical and geographical formation, and thought.

LAW Talking to you made me question the self-evidence of legal pragmatism. Legal personhood is a tool to realise human goals: but which ones? When we put a legal mask on a robot or a river, and we represent them in court, we are forced to somehow *rethink* our perspective, *revisit* our goals, to *reconsider* the problem.

CRITICAL THEORY Sometimes a mask can be productive. For example, take the authors of this chapter. Why didn't they speak for themselves? Why use us - do they really believe that they know what "Critical Theory" and "Law" say?

LAW We are authorised as masks to speak within the space of this stage and to say things a bit different than they would have said.

CRITICAL THEORY Thank you for this conversation. I hope we will meet again.

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