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The Theory and Ethics of the Person in Law:  
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## The Theory and Ethics of the Person in Law: The German Perspective

### 1 Introduction

Law has indeed become the great equalizer and diversity is legally provided within a framework of general equality, as Samuel Barbosa rightly claims. The factual social status is no longer the foundation of law and individual rights – or rather: privileges – the basis of legal dignity, but the other way around: dignity has become the foundation of human and fundamental rights that are the basis of personhood in law. Distinctions in this legal status, therefore, need justification. This becomes more complicated if we do not consider both individual and group rights because here not only the legal relationship of the group towards the state but also between the members of the groups and the group itself have to be regarded to decide about the diversity *of* the group and diversity *within* the group.<sup>1</sup> Since Georg Wilhelm Friedrich Hegel, we know that not all contradictions are paradoxical, but necessary for all existing entities as long as we can understand the dialectic of seemingly opposing elements of a relation.<sup>2</sup> In this sense, I should not call the legal relation of equality and diversity of persons paradoxical, but dialectical.

In his article, Samuel Barbosa describes the institute of legal personhood in Brazilian legal history and the entities to which this status is attributed. In the analytical part of his paper, he focusses on the institute of legal personhood. I have previously called such an analysis “The *Theory* of Legal Personhood”.<sup>3</sup> In the shorter final parts of his paper, Barbosa claims that equality calls for the attribution of legal personhood to all human beings alike. I should call this an argument in *legal ethics*. Whereas I mostly agree with the first part of the paper, I claim that it is not equality, but rather human dignity which is the reason for acknowledging all human beings as persons in the

1 KIRSTE (2016) 27 ff.

2 HEGEL (1992/1813) 50 ff.

3 KIRSTE (2015a) 345 ff.

law.<sup>4</sup> Since apart from the theory of jurisprudence, legal theory and legal ethics are the part-disciplines of legal philosophy,<sup>5</sup> my perspective on Samuel Barbosa's paper is philosophical.

## 2 The theory of the legal person: What is a legal person?

Firstly, I should like to distinguish between the concept of legal personhood and that of legal personality and focus on the former. Whereas legal personhood signifies the unity of rights attributed to a legal subject, personality is protected by a particular group of rights, namely those referring to reasonable persons on behalf of the development of their character and abilities<sup>6</sup> (in Germany Art. 2 in connection with Art. 1 Basic Law).<sup>7</sup> Both are founded on the capability of a human being to have rights and duties, which could be called legal subjectivity. Legal persons are legal subjects with respect to the rights attributed to these subjects.<sup>8</sup> Based on the Brazilian legal order, Barbosa may not need to make these distinctions; in the philosophical perspective taken here, they seem to be relevant to me.

Legal subjectivity and legal personality then relate to each other like the potentiality of rights and actually having rights. Distinguishing a legal subject as a subject being capable of having rights and the legal person as a unity of the rights attributed to a legal subject, it is possible to understand, why legal subjects can have different kinds of rights.

Citizenship could be defined as the public status of a legal person.<sup>9</sup> It encompasses the political rights attributed to a legal subject. At the core of citizenship are the rights to participation in political autonomy, namely the rights to vote and to be elected. However, in a broader sense, one could also

4 KIRSTE (2013a) 63 ff.

5 KIRSTE (2019) 25–37; KIRSTE (2020) 15–29.

6 Actually to claim “personality” would be necessary to have human rights, has often been a white supremacist attempt to avoid acknowledging these rights to human beings of other cultures, TIEDEMANN (2012) 12.

7 However, in the history of philosophy, sometimes the concept of person refers to rational capabilities, like in Locke's concept of person. Since the classical period in literature (Schiller) and the idealist philosophies, at least in Germany, these rational abilities are expressed in the term “personality”.

8 Kurki defines “that legal personhood is a bundle property and that one can hold legal rights without being a legal person”, KURKI (2020) 4.

9 For different conceptions of citizenship see EICHENHOFER (2020) 1.

consider the rights to political communication and association, which are limited to citizens. Given the limited category of rights, it is possible – though not sufficient for a fully respected human being – to be acknowledged as a legal subject and person, without being considered as a citizen, because he has no or not all political rights.<sup>10</sup>

To distinguish these different forms of legal personhood with respect to the rights attributed to legal subjects, it is helpful to refer to Georg Jellinek and his well-known status theory.<sup>11</sup> However, we must make three caveats:<sup>12</sup> Firstly, since Jellinek developed his theory of the four legal status in a constitutional monarchy, it is necessary to reinterpret it with respect to democracy under the rule of law. This especially applies to the status subjectionis and the status activus. Secondly, it can be presupposed that in such a legal system, the status is an expression of the rights attributed to a legal subject and not the rights of a subject as a result of his social status, as Barbosa correctly shows with respect to slaves and indigenous people in 19th-century Brazil.<sup>13</sup> Thirdly, Jellinek developed his theory for fundamental public rights. Since we are dealing with legal subjectivity in general here, it is necessary to enlarge this concept to all kinds of rights. For Jellinek, the first status encompasses all rights of an individual against other legal persons (namely the state). Privacy, freedom of speech or of opinion and, the right to property protect the freedom of the individual from other legal persons and the state as a legal person. This is the status *negativus*. Today, to be left alone should in many respects not suffice. Labour laws, consumer protection laws, claims to public aid especially public health is necessary for the individual to fill this free space. Jellinek called the unity of these claims to public subsidies and the fulfilment of duties of others the status *positivus*. A third status was described by him as a status of duties towards the state and called this status *activus* as securing freedom in the state.<sup>14</sup> In a democracy under the rule of law, however, this status is transformed into the freedom of the individual to participate in the enactment, interpretation and enforcement of his rights and duties and the common good. It now becomes clear that

10 KIRSTE (2015c) 28 f.

11 JELLINEK (1905) 86 f., 94 ff.; BRUGGER (2013) 237 ff.

12 KIRSTE (2014b) 177 ff.

13 See below under 2.

14 KIRSTE (2008) 187 ff.

citizens need to have all rights necessary for active status. Finally, Jellinek required a fourth state, which means the subjection of the individual under the state. Now, since the rule of law means that the state is founded on and limited by law, the state itself is to be conceptualized as a (public) legal person, a subject of his competencies and duties. The status *subjectionis* means the subjection of all persons – private or public – under the law. In this status, persons have legal relationships and are not merely subjected to the power of another person.

Accordingly, whoever is legally capable of having rights, is a legal subject. Legal persons, based on the status *subjectionis*, can have a negative status against other persons, a positive status of claim rights towards persons and, an active status in the participation of private and public autonomy in founding, interpreting and, enforcing rights and duties with other persons. Together these rights and forms of legal personhood form the legal relationships of persons in the law.

### 3 The ethics of the legal person: Who should be a legal person?

Now this analysis of the concepts of legal subjectivity, legal personhood, legal personality and, citizenship based on the distinction of the four status, the status *subjectionis*, *negativus*, *positivus* and, *activus*, does not tell us, *who* should be acknowledged as a legal person and what rights this person should have. Natural justifications from human capabilities like reason, empathy, ability to act, neediness are not sufficient normative grounds. In the introduction and the last section of his paper, Samuel Barbosa claims that this question could be answered based on the principle of equality. We would treat humans unequally if we did not acknowledge their personhood. Equality, however, is a principle that refers to an external criterion by which we should treat people equally or unequally. We have to ask: equality of whom, of what and what is the justification of treating human beings in some respects equally.

Instead of equality, one could argue that autonomy is the foundation of legal personhood: I may refuse to conclude a contract with someone if I am not legally obliged to do so. I am protected by my private autonomy to do so. However, if I want to be left alone by someone else, obtain something from him or undertake something together with him, in a way that is legally recognized, I cannot proceed without his voluntary commitment or legal

obligation to do so.<sup>15</sup> This is his freedom and his right. Concluding a contract, in which he and I mutually bind ourselves means however that we recognize each other as legal subjects, capable of having rights and duties. In private relationships, there are no rights and duties, if the parties do not recognize each other as legal persons. The master, who just uses a slave does not recognize him as a legal subject but treats him as an object. He has no rights against the slave and the slave does not have a duty towards his master. Their relationship is factual. Marx would speak of the ultimate alienation or objectification of a human being. This demonstrates that freedom may answer the question of equality of what – equality of autonomy – and also of who should be recognized as a legal person. But what about people who do not have legal autonomy such as slaves, or who cannot act autonomously, such as disabled people? Shouldn't they be acknowledged as persons also?

In order to answer this question, let us take a quick look at the history of legal theory in the 19th and early 20th centuries in German-speaking countries. It is noteworthy that the theory of the legal person in Germany, after philosophical and jurisprudential preliminary work, developed in the 19th century mainly under legal positivist auspices. The moral question of who should be a person – namely the human being – was taken for granted.<sup>16</sup> In light of National Socialism's disregard for the personality of the human being, this was too short a thought and challenges the legal-ethical question of the right to recognition as a legal entity.

The General Prussian Land Law of 1794 formulated in § 1 of part one "Of Persons and their Rights in General": "Man, as far as he enjoys certain rights in civil society, is called a person." While this provision correctly states that those people who have rights are persons it does not say which people should have rights. It answers the legal-theoretical question about the concept of personhood but does not provide any legal-ethical criteria for who should be a person. In the same sense the law does not grant equal rights to all men, but proceeds from differences of class: "§ 6 Persons, to whom, by virtue of their birth, destiny, or principal occupation, equal rights in civil society are attached, together constitute a state of the empire. Whoever, therefore, has equal rights belongs to a state." The General Prussian Land Law does, however, distinguish "general rights" from those acquired by

15 KIRSTE (2015b) 473 ff.

16 KIRSTE (2001) 319 ff.

virtue of belonging to a state: Under “Sources of law” it states in § 82 of the introduction, “The rights of man arise from his birth, from his status, and from actions or events with which the laws have a certain effect.” Of the “general rights” the Prussian Land Law assumes that they “are based on the natural freedom to seek and promote his own well-being without infringing on the rights of others” (§ 83, Introduction). After all, slavery was abolished.<sup>17</sup> Apart from this, it remains a matter for the legal system to determine the circle of those to whom it wishes to attribute rights. At most, there may be an extra-legal – natural legal obligation – to recognize all human beings as legal subjects. What is problematic about this construction is not that the legal system decides on rights, but that this can be done selectively. The positive, “civil” right to rights is still missing so that certain groups of persons could be excluded from the law.

This step is taken only by the Austrian Allgemeines Bürgerliches Gesetzbuch (ABGB) of 1811, § 16: “Every human being has innate rights which are obvious through reason, and is, therefore, to be regarded as a person. Slavery or serfdom, and the exercise of power referring to it is not permitted in these countries.” Now the right of a person to be recognized as a legal person is included in the law itself. Even today this provision still contains the protection of human dignity in the Austrian legal system. We cannot go deeper into this here. But it is sufficient to conclude that it needed natural, innate rights to guarantee all human beings the basic status as a person in law. In his commentary Franz Zeiller (1751–1828), the author of § 16 gave the reason for the rights-based personhood.<sup>18</sup> And his academic teacher Karl Anton von Martini (1726–1800) stated in § 137 of his “Positiones”: “The being and nature, which all humans have in common, contains the sufficient reason of the innate rights.”<sup>19</sup> It becomes clear for both that human dignity is the fundament of the innate rights, which are again the basis for the

- 17 General State Laws for the Prussian States II, 5 § 195: “Slavery shall not be tolerated in the Royal States.” § 197: “No royal subject can and may commit himself to slavery”; I, 4 § 13: “Nobody can be bound to slavery or private captivity by declarations of intent”; II, 7, § 148: “Therefore the former serfdom, as a kind of personal slavery, does not take place, even in consideration of the dependent inhabitants of the flat country.”
- 18 ZEILLER (1802) § 2, p. 2: “Reasonable beings, as far as they have the ability to set purposes for themselves, and to carry them forward in a freely effective way, and are therefore for their own sake present (end in itself), are called persons [...]. Man necessarily thinks of himself as a free being, as a person.”
- 19 MARTINI (1772) § 137, p. 29 cf. also § 164, p. 36.

personhood of all human beings qua being humans. The essence of man is his freedom. But the reason and goal of this freedom is his ability to be an end in himself, as Zeiller claims following Immanuel Kant.

“And since, for the distinction of irrational objects or things which are available to rational beings as means, rational beings, which are ends in themselves and possess rights, are called persons; so every man is to be regarded as a person; he must not, like a thing, be used as means for any ends of others. This highly fruitful legal original truth, to which, as the newer systems of natural private law show, all legal truths can be traced back. In the end, is here taken as a basis for the treatment of rights.”<sup>20</sup>

To be an end in oneself is the explanation Kant gives for the principle of human dignity. Dignity is, therefore, the principle that requires all human beings to be recognized as persons. Because only as persons do they have a status that permits them to be an end in themselves. Whereas von Zeiller was inspired by Immanuel Kant, his academic teacher, Karl Anton von Martini’s concept of the person was influenced by the older enlightened natural law tradition. On this theoretical foundation, however, he too had considered slaves as persons, because they also have innate rights for the fulfilment of the duty to perfect themselves.<sup>21</sup>

The debate on slavery and legal personhood was far from over though. Gustav Hugo (1764–1844), perhaps the most important precursor of the Historical School of Law, decidedly rejected the Kantian idea of the foundation of personhood in the dignity of the human being and even went so far as to consider slavery justifiable:

“In recent times one has often tried [...] to decide from mere terms a priori also about this. The slavery and serfdom of whatever kind it might be, was rejected because in it man would become a thing, a commodity, private property was approved [...] Now every child may decide whether it is more unreasonable to have a serf or to let a man be disgraced (although he will of course soon stop, to be a thing, a something, at least a living something) [...] This right to see a man, to have something carried, in short, to have some advantage from him, can now, like any other property, be acquired and sold, without prejudice to the personality of the bearer.”<sup>22</sup>

Although heavily criticized by many members of the Kantian, Hegelian, Krauseian and other philosophical schools for this rationalization of the

20 ZEILLER (1811) 103.

21 MARTINI (1772) § 763, p. 241: “The slave is also a man, therefore all the duties of mankind must be assigned to him. He has inherent perfect rights, therefore he has a moral state, and is a person in this respect.”

22 HUGO (1799) 145 f.

status of slavery, Hugo set the pace for the positivist understanding of persons in law in the 19th century. Most of the scholars participating in the discussion from Savigny to Zitelmann rejected the Kantian concept of an original right (“Urrecht”)<sup>23</sup> of all men to be acknowledged as legal persons but instead took it as moral self-evidence that all men and only men should be legal persons, as Friedrich Carl von Savigny (1779–1861) put it.<sup>24</sup> Legal personhood for Savigny was the basis for legal relationships.<sup>25</sup> Savigny emphasized the autonomy of law in deciding, who may become a legal person and who would not.<sup>26</sup> Georg Friedrich Puchta (1798–1846) brought it to the point that “man is person only by law”.<sup>27</sup> This autonomy of the legal concept of the person from its philosophical foundation allowed the technical differentiation of this legal institution the further course of the 19th century. Arndt thought that the legal person had “only an intellectual, not a natural existence”, whereas Unger meant, it was “a creation from nothing”. Ernst Zitelmann, with regards to the capacity of will, decidedly did not refer to the natural person, but to “whom the objective law confers such a status of the person”.<sup>28</sup> Legal personhood is considered a mere legal technicality. It would be based on the autonomous decision of the positive law to decide about it.

23 KIRSTE (2018a) 97–136.

24 “All right is existent for the sake of the moral freedom inherent in every individual human being [...] Therefore the original concept of a person or legal subject must coincide with the concept of man, and this original identity of both concepts can be expressed in the following formula: Every individual human being, and only the individual human being, has a legal capacity”, SAVIGNY (1840) 2.

25 SAVIGNY (1840) 1: “Every legal relationship consists of the association of one person with another. The first component of it, which requires closer examination, is the nature of persons whose mutual association is capable of forming this legal relationship. So here the question is to be answered: Who can be the bearer or subject of a legal relationship? This question concerns the possible having of rights or legal capacity [...]”

26 SAVIGNY (1840) 2: “However, this original concept of the person can be modified by the positive law in two ways [...], restrictive and expansive. Firstly, some individuals may be denied legal capacity, either wholly or in part. Secondly, it can transfer the legal capacity to anything but the individual human being, i. e. a legal person can be artificially formed.”

27 JOHN (1982/83) 949, points out that this would be the first step for the assumption that man as a being endowed with the power of will is a legal subject, because the individual right is power, and not that the individual right is a power of will, because it serves the realization of the human will.

28 For these quotes see COING (1989) 340 f.

Georg Jellinek viewed legal personhood in a positivist manner as a title granted by the state – which was itself understood as a legal person: “There is, therefore, no natural, but only a legal personality.”<sup>29</sup> The criterion of human being, for him, did not seem sufficient to recognize all human beings as persons.<sup>30</sup> It could well be, therefore, that some human beings had a mere factual relationship towards each other and the state. Although he rightly claimed that “all legal relationships are relationships between legal subjects”<sup>31</sup> and that “[t]he recognition of the individual as a person is the basis of all legal relationships”,<sup>32</sup> he did not provide a legal criterion for who should be recognized as a person in law. Hans Kelsen has brought this 19th-century development in the theory of the legal person to a provisional conclusion. He eliminated still existing contradictions of previous doctrines by reducing the legal entity to a consistently objective legal basis. His concern was to “bring physical and legal persons [...] to a common denominator, to the common denominator of law”. In this perspective, the natural person will also prove to be an artificial construction and thus appear in its truth as a “juridic person”.<sup>33</sup> Both, the “natural” as well as the “juridic person” are personifications of the rights and duties they have.<sup>34</sup>

29 JELLINEK (1905) 28.

30 JELLINEK (1905) 82: “The state, therefore, creates the personality. Before the state freed him or recognized him in a limited sense as having the power of disposal over his peculium, the slave was not a person, not even in the sense that he was attached to it as a quality that had not been recognized. He was naturally recognized as a human being. But this was only expressed in the fact that he was not a legal subject, but a subject of duties. From the nature of man, historically and logically, only duty but not rights against the State result as necessary.”

31 JELLINEK (1905) 10: “All law is the relationship of legal subjects [...] The state, too, can only have rights if it is confronted with legal entities. A de facto relationship of domination becomes a legal one only when both members: the ruler and the ruled recognize each other as bearers of mutual rights and duties.”

32 JELLINEK (1919) 419.

33 KELSEN (1960) 176 f. distinguishing “natural legal persons” and “juridical legal persons” like joint-stock companies: “If, in the case of the juristic person, rights and legal duties can be carried by something that is not a human being, then, in the case of the so-called natural person too, what ‘carries’ the rights and legal duties and what the natural person must have in common with the juristic one, since both, as ‘carriers’ of rights and legal duties, are persons, cannot be the man who is the carrier in question, but something that man has just as much as the communities addressed as legal persons.”

34 KELSEN (1960) 177.

Most of these legal theorists assumed morally that all human beings can be subjects of rights and therefore persons in the law. Precisely because this was a moral implicitness, there seemed to be no need for its legalization. Morality however can change silently and faster than law. When the enlightened morality that even legal positivists could accept was exchanged by the racial ideology of the National Socialists the moral presupposition that all men are natural legal subjects vanished as well. Through the positivist reduction of the concept of the legal person to a legal-technical institute of the ownership of individual rights, which the state could or could not assign, the ethical question was lost. Now groups of people could again be denied the status of legal persons. The party program of the National Socialist German Workers' Party (NSDAP) of February 24, 1920, already stated in point 4: "Citizens can only be those who are comrades of the people ["Volksgenosse", SK]. Comrade of the people can only be one who is of German blood, without regard to denomination. No Jew can, therefore, be a comrade of the people." Karl Larenz (1903–1993) willingly assisted that Jews, therefore, could not be persons in law either:

"Not as an individual, as a human being par excellence, or as the bearer of an abstract, general reason, I have rights and duties and the possibility of shaping legal relationships, but as a member of a community that gives itself its form of life in law, the national community. Only as a being living in community, as a national comrade is the individual a concrete personality. Only as a member of the national community does he or she have his or her honor and enjoy respect as a legal comrade."<sup>35</sup>

The unity of "legal comrades" in this sense formed a "legal state".<sup>36</sup> "Legal comrades" are united by their full devotion for their legal duties towards the people and only in a secondary way by rights. Their legal status rests in the "honor of the legal comrade", which is unequal.<sup>37</sup> "The individual has his true existence only as a comrade of the people: as a member of the narrower communities and of the highest, embracing all, the people", as Gerhard Dulckheit (1904–1954) put it.<sup>38</sup> It was ultimately the Führer, who personi-

35 LARENZ (1935) 21: "Thus, the foreigner is not a German citizen, even though he or she is under the protection of our law and participates to a large extent in legal transactions and their facilities and is considered a guest."

36 WOLF (1934/35) 358.

37 WOLF (1934/35) 348 f.

38 DULCKHEIT (1937) 43.

fied all legal relationships.<sup>39</sup> Legal Personhood again became a consequence of the membership in a social group, the group of the people which again were defined by race.

Having suffered from this ideology and its execution by the National Socialist State gave reason for Hannah Arendt to claim a “right to have rights”.<sup>40</sup> This would guarantee all human beings irrespective of their citizenship their dignity. This is also the reason, why after World War II human dignity<sup>41</sup> was transformed into an international human right and a national fundamental right in an increasing number of constitutions. The right to human dignity grants all human beings the right to be acknowledged as a legal subject. This is understood in the light of the four status of Georg Jellinek. It guarantees all human beings those rights necessary to be a full human person in law. Human dignity then is the criterion we were looking for and which had already been outlined in the enlightened Kantian legal theory which requires us to treat all human beings equally with respect to their legal personhood.<sup>42</sup> It must be a right and not only a principle because otherwise the individual could be made an object to the fulfilment of this principle. It is also necessary that this is a fundamental right because individual rights are general rights of all subjects even without mutual recognition of these subjects. The Brazilian Constitution from 1988 makes extensive use of the principle of human dignity.<sup>43</sup> This provides the grounds for recognizing all Brazilians as legal subjects.<sup>44</sup>

With respect to the above-mentioned status, this means that in Brazil no one may be objectified or instrumentalized. It also means that if these legal subjects have to live under humiliating conditions without decent nutrition or health supplies, they have a positive claim to social aid.<sup>45</sup> Furthermore, these rights may not be donated to them by a generous, perhaps paternalist state; they have to be the expression of their participation if they not be treated as objects of a right given to them as mere charity. Participatory rights

39 DULCKEIT (1937) 50, in a crude interpretation of Hegel’s philosophy of law.

40 ARENDT (1976) 296 f.

41 KIRSTE (2018b) 117–142.

42 KIRSTE (2014a) 274 ff.

43 SARLET (2009).

44 Cf. different articles in KIRSTE et al. (2018).

45 KIRSTE (2013b) 119 ff.; KIRSTE (2018c) 2 ff.

then are necessary for the acknowledgement of the legal person.<sup>46</sup> It would also violate their positive freedom as autonomous if they were subject to political power they cannot legitimate by participating in its constitution. This also means that citizenship in the sense of being acknowledged as a person with participatory rights stems from human dignity. Thus, persons living in quilombolas, indigenous people living in remote tribes and other minorities must have a right to decent participation. But most of all: Brazilians of all nations have to be acknowledged as legal subjects.

The person in law, again, is not the isolated individual.<sup>47</sup> One needs recognition in order to be a legal person. One also needs social recognition befitting a social person. Some aspects of one's social existence cannot be established by the individuals alone, but by the groups with which one is living. Language, identity-building through traditions and the environment are such structures that affect the individual as a member of groups. Group rights, therefore, also contribute to personhood. The individual has these rights qua belonging to certain groups – like an indigenous tribe. The group as such may also have collective rights, which should be acknowledged like their identity. Therefore, treaties should be reached between indigenous tribes with respect to their traditional territory.

#### 4 Conclusion

In his “Metaphysics of Morals” Immanuel Kant describes a merely empirical – one could also say: merely doctrinal – jurisprudence like the mask in Phaedrus’ fable, nice to watch, but hollow inside.<sup>48</sup> That the mask (πρόσωπον, persona) of human beings in law is not merely a nice theoretical construction but serves the interest of human beings, is guaranteed by the principle of human dignity both in the European and in the Brazilian legal systems. This principle provides the criterion for the equal status for human beings to be capable and in fact, have different human and fundamental rights.

46 KIRSTE (2015c) 11 ff. = KIRSTE (2017) 33 ff.

47 KIRSTE (2016) 27 ff.

48 KIRSTE (2001) 345.

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