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Structuring modern life running on software. Recognizing (some) computer programs as new “digital persons”

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ABSTRACT

Saudi Arabia grants nationality to an AI robot; the first “clash of robots” took place in Japan; and, Bill Gates suggests that robots start paying taxes. We believe that these developments justify new legal fiction interventions. Software has long now exceeded the intellectual property boundaries. It is no longer merely property; it has assumed life of its own. It does not matter that such life is imaginary today. Legal persons were brought to life through legal fiction intervention that was based on much less motivation – merely the human incentive for profit. Software is certainly connected today with profit, given that the world’s most valued corporations are software companies. However, it has moved much further than that, to assume in many ways artificial life of its own. We think that it is time that the dichotomy between natural and legal persons, that has served humanity so well over the past centuries, now be trisected: A new, digital person, ought to be added to it.

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1. Introduction: trisecting the natural/legal person dichotomy to allow recognition of the “digital person”

Yuval Noah Harari, in his popular book *Sapiens: A Brief History of Humankind*,¹ brings forward a new narrative of humanity’s creation and evolution. A central argument of his analysis focuses on the power of human beings to create fictions that later become real-life structuring elements of human societies. In order to draw a powerful, and elucidating, picture on legal fiction, he gives the example of Peugeot SA, the automobile industry company:

Modern business-people and lawyers are, in fact, powerful sorcerers. The principal difference between them and tribal shamans is that modern lawyers tell far stranger tales. [...] It all revolves around telling stories, and convincing people to believe them. [...] In the case of Peugeot SA the crucial story was the French legal code, as written by the French parliament. According to the French legislators, if a certified lawyer followed all the proper liturgy and rituals, wrote all the required spells and oaths on a wonderfully decorated piece of paper, and affixed his ornate signature to the bottom of the document, then hocus pocus – a new company was incorporated. When in 1896 Armand Peugeot wanted to create his company, he paid a lawyer to go through all these sacred procedures. Once the lawyer had performed all the right rituals and

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¹ Harper editions, 2015.

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*pronounced all the necessary spells and oaths, millions of upright French citizens behaved as if the Peugeot company really existed.*²

Harari continues to explain that “Peugeot is a figment of our collective imagination. Lawyers call this a “legal fiction”. It can’t be pointed at; it’s not a physical object. But it exists as a legal entity. Just like you or me, it is bound by the laws of the countries in which it operates. It can open a bank account and own property. It pays taxes, and it can be sued and even prosecuted separately from any of the people who own or work for it”.³ He considers “the idea behind such companies among humanity’s most ingenious inventions”, providing Sapiens’ with immense power, that ultimately was proven key to humanity’s contemporary success.⁴

Harari’s vivid illustration is basically correct. Modern life is indeed built upon the dichotomy between a natural and a legal person. In fact, any actor in a human society can be either one. Anybody that is permitted to execute an action, carry rights and obligations and incur liabilities may either be a natural person (meaning, a living human being) or a legal person (an organization recognized as such by law). Variations within the above two categories may well exist (for example, an individual may carry limited ability to enter into contracts or an organization may be anything from an international organization to a commercial enterprise), nevertheless the fact remains that anything different is, simply, inconceivable. This is the way the legal world, and thus human life, is structured today.

Obviously, as correctly noted by Harari, this is essentially an artificial construction.⁵ Only natural persons exist in the real world. Legal persons are a theoretical device. It was, however, conceived to better cope with reality.⁶ The background of legal persons, explaining their *raison d’être* and their historical evolution, is well catalogued by now. Their roots are traced as back as in Roman law or, at the latest, in church history and *persona ficta*. Their contemporary form has taken form almost a hundred years ago.⁷ It was at that same time when the last objections to legal persons, representing a group of humans in transactional life, were last expressed⁸ - and subsequently silenced forever.⁹ Since then corporate vehicles have been taken for granted by legal theory and philosophy.

² Pp.31ff.

³ P.32.

⁴ *Ibid.*

⁵ See also the, German, discussion on *Fiktions- and Realitätstheorie* in MüKo-BGB/Reuter, Vor § 21, Rn. 1 ff, 6. Auf., Bd. I, 2012, as well as, in Flume W, *Allgemeiner Teil des Bürgerlichen Rechts*, B. 1/2, Die juristische Person, 1983, S. 3 ff. (3–31).

⁶ While they may have been practiced at first as convenience, or even expedience, vehicles, contemporary theory attributes legal persons to efficiencies in costs and doing business (see Micklethwait J/Woolridge A, *The Company: A Short History of a Revolutionary Idea*, Orion, 2003).

⁷ Arbitrarily setting a milestone, the British Limited Liability Act was released in 1855.

⁸ For a brief description of criticisms against the, then, new idea of companies, see the Introduction in Micklethwait J/Woolridge A, *ibid.*

⁹ No serious criticism against legal persons has been expressed for the last 100 years. Critics at times only aim against corporations, but again not blaming the idea *per se*, but rather certain of its many parameters (for example, management accountability, management and shareholders’ relationships, minority rights).

Notwithstanding Harari’s enthusiastic analysis above, that is pursued in his sequel, *Homo Deus: A Brief History of Tomorrow*,¹⁰ where he claims that humanity is on its way to divinity, the truth is that humanity’s legal imagination stopped working ever since. Legal persons are among last pieces of legal fiction developed by humanity,¹¹ and this happened hundreds of years ago. We suggest in this paper that maybe, in order for Homo Sapiens to continue living successfully in the future and perhaps fulfil its destiny for becoming *Homo Deus*, we may now need to create one more piece of legal fiction, that of the digital person.

2. Legal personality: not much more than the right to transact and a unique number to do so

A natural and a legal person are not opposites. They are complementary, in the sense that together they encompass all of the lawful ways of existence. They are also distinct from each other. An actor today can have either one of these faculties, not both. Notwithstanding cases of single-member companies or “lifting the corporate veil”¹² attempts, modern life and the law converge to the same conclusion, that of mutual exclusiveness.

Few legal issues pertain to the natural person, it being the obvious actor in real life. Legal discussions today mostly evolve around the issue of the beginning (birth) and end (death) of human life.¹³ A series of legal, and ethical, questions are still being asked on when exactly an individual exists, and thus carries rights, and when it stops doing so, and thus loses them (or, at least, has them substantially reduced). We suppose that these issues will continue to surface for as long scientific findings make it ever more difficult to specify the start and end of human life. Other than that, contemporary legal systems are taking into account decreased (luckily, not increased) levels of human ability to act, in cases of entering into contracts or being put to prison. While here too biology may surprise us in the future, if it proves that human’s freedom to act is also legal fiction, and that each one of us is predetermined by her genes, legal science should be considered for most cases as settled in the case of natural persons.

This is much less the case on legal persons – without this meaning, however, that the main legal issues have not been settled here too. A legal person is, essentially, an association of people or an assembly of capital aimed at carrying out a common cause. Two are the basic characteristics of such legal persons, the one logically emanating from the other: First, that by law they have a separate right to act, independently from their members. In other words, they have the right to enter contracts in their own name, to create income and to incur liabilities. Second, whenever they choose to follow that

¹⁰ Harper editions, 2017.

¹¹ Together with intellectual property and human rights, but these do not belong to this analysis (and they too date hundreds of years back).

¹² See, for example, Meiners R E/Mofsky J S, *Piercing the Veil of Limited Liability*, 4 Del. J. Corp. L. 351 (1978).

¹³ See, for example, The Economist, *When death is not the end: The meaning of mortality*, 26 April 2018.

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