

## THE PERSON AND THE PERSONHOOD FROM THE PERSPECTIVE OF THE U. S. AMERICAN LEGAL DOCTRINE

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**Abstract:** *The mode of solving legal issues within the Anglo-American legal culture has been usually based upon human experience and pragmatic reasoning. This is also the way for the U. S. American legal doctrine to approach the concept of person in law as the basic legal institution. I tend to argue that such approach should be seen as incorrect since fundamental legal concepts – such as a person in law – should not be constructed upon practical human experience. I would claim that this intentionally “anti-theoretical” attitude is the reason why the Anglo-American legal terminology applicable to the concept of person appears unclear. It is difficult to identify differences between “legal entity” and “legal person” as well as the relation and/or difference between terms “person” and “personhood*

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### INTRODUCTION

The Anglo-American legal culture is known for its reluctance to abstractly theorize, which has been presented sometimes as its advantage. Unlike continental legal culture where legal issues have been traditionally solved in a hypothetical and abstract manner usually before any legal problem may occur, the Anglo-American legal culture seems to engage in resolving legal issues at the moment of their emergence, i.e., practically and within a concrete context. The mode of solving is then based upon human experience and pragmatic thinking. Such approach is applied not only within situations identifiable by senses, but also regarding fundamental legal categories (basic concepts) such as the concept of person in law. An example of such approach may be that of Margaret Jane Radin in one of the most frequently cited paper in the USA<sup>2</sup> entitled “Property and Personhood”.<sup>3</sup> However, her argument that intuitively shared consensus would be the reason why particular property, such as a house, should belong to a personhood, was subject to substantial criticism by Stephen J. Schnably.<sup>4</sup> Although Radin and Schnably significantly diverge in their response to the question of how the personhood of an individual should be approached and what property should be considered personal, they in fact share the common starting point, namely that it is an individual as a real human whose actual existence gives rise to normative conclusions with respect to his or her position within the law as a person.

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<sup>2</sup> See SHAPIRO, F. R. The Most-Cited Law Review Articles Revisited. *Chicago-Kent Law Review*. 1996, Vol. 71, No. 3, p. 751.

<sup>3</sup> See RADIN, M. J. Property and Personhood. *Stanford Law Review*. 1982, Vol. 34, p. 957.

<sup>4</sup> See SCHNABLY, S. J. Property and Pragmatism: A Critique of Radin’s Theory of Property and Personhood. *Stanford Law Review*. 1992–1993, Vol. 45, p. 347.

I believe that such approach is wrong: basic legal concepts, such as a person in law, should not be constructed upon practical human experience. Legal concepts are abstract theoretical constructions which are not detectable by senses.<sup>5</sup> A weak point within the Anglo-American legal system appears to be the absence of any general legal definition of a person. This is not to say that the concept of a person is unknown to the Anglo-American system of law.<sup>6</sup> However, the issue is that the concept begins to be treated at the moment when a problem arises and the concept of a person is defined in relation to that particular issue and not in general terms.<sup>7</sup> I would argue that this may be the reason for the relevant terminology to be so diverse within the Anglo-American law. No clear distinction appears to exist between the term “legal entity”<sup>8</sup> and “legal person”. It is not clear what the distinction is between “person” and “personhood” and what they mean respectively.<sup>9</sup> I believe that a mere analysis of an individual as a real human is insufficient in order to identify and understand all these concepts and terms. Therefore, the objective of this paper is to answer the question what it means to be a person in law, based upon an analysis of the law as a system of rules where only a person exists, not a human.

This is why Part II attempts to identify consequences of deriving normative conclusions from the personhood of a human. The construction of personal property as introduced by Margaret J. Radin is explained: upon intuitive consensus, the property constitutes the personhood of a human and, as a result, should be the reason why a human is to be considered a person. Then arguments by Stephen Schnably are presented: he claims that no such fairly established consensus exists. Should we go beneath the surface of such ostensibly existing consensus we would always find deep discrepancies and conflicts. The conflicts in particular should be focused on when considering the property and the personhood. However, both scholars rely on a human who shares certain values in Radin’s theory, and casts doubts on, and becomes resistant to, certain values for Schnably.

Part III brings in my arguments why I believe that the starting point for analysing a person should not be the real world where real people from flesh and bones exist, but the law as a system of legal norms. The difference between a human and a person is that the for-

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<sup>5</sup> The fact that someone is a slave and the other a slaver (i.e., “non-person” and “person” respectively) is not identifiable by itself according to the physical appearance of the respective individual as both are human beings.

<sup>6</sup> See NIMAN, J. In Support of Creating a Legal Definition of Personhood. *Journal of Law and Social Deviance*. 2012, Vol. 3, p. 142.

<sup>7</sup> See REIMANN, M. *Einführung in das U S-amerikanische Privatrecht*. München: Verlag C. H. Beck, 2004, p. 13. “Das amerikanische Recht kennt auch kein eigenes Gebiet des Personenrechts. Es gibt kein Restatement oder Lehrbuch über persons, über Rechts- oder Geschäftsfähigkeit. Diese Fragen werden eben nicht allgemein und gemeinsam vorab, sondern im jeweiligen Zusammenhang behandelt, etwa im Vertragsrecht. Diese Behandlung ist deshalb auch nicht ganz einheitlich.”

<sup>8</sup> Civil law usually employs the term “legal person” (“Rechtssubjekt” in German) instead of a “legal entity”; thus I would consider the two terms to denote the same concept.

<sup>9</sup> In civil law there are traditionally distinguished between “Legal Person” and her Legal Personality. For the concept of Legal Personality does exist in civil law only this one term. But in the Anglo-American legal terminology is possible to find two terms: “Personality” and “Personhood”. It is not clear, whether there is any difference between these two terms. In this article I consider the term “personhood” as equivalent to “personality”.

mer exists in the real world (being – sein in German) whilst the latter applies to the normative world of what should be (sollen in German). As a result, a person should not be perceived as a human. If we intend to identify legal order which is valid we cannot identify an individual existing in reality at the same time.

## I. AN INDIVIDUAL AND PERSONHOOD

What does it mean to be a person in law? The law was created by people and its main objective is to regulate the relations between them; as a result, one may assume that only a human being may be a person in law. The answer to the question what position at law is assigned to a human being is closely linked to the answer to question what personhood it possesses. The personhood of an individual determines the right and duties of the individual. All these questions and answers are closely interlinked.

This is the substance of the article “Property and Personhood” by Margaret Jane Radin.<sup>10</sup> Her contemplations regarding the concept of person have attracted much attention due to its innovative and far from traditional approach. Radin does not consider the manner in which we individuals relate to others, i.e., what type of person we play in relation to other people;<sup>11</sup> she builds her premises upon the relationship established between an individual and things belonging to them, i.e., their ownership, which constitutes their personhood.<sup>12</sup> Radin relies on intuitive experience potentially acquired by everyone: there are things we are bound up with by a strong tie.<sup>13</sup> The existence of such bond becomes strongly perceived at the moment we lose the thing. We may experience pain as if we have lost part of ourselves. An example may be a wedding ring or a family house.<sup>14</sup> At the same time, there are things we are not bound up to although they form our property, namely fungibles.<sup>15</sup> As a result, Radin distinguishes property relevant for the personhood as such

<sup>10</sup> RADIN, M. J. Property and Personhood. *Stanford Law Review*. 1982, Vol. 34, p. 957.

<sup>11</sup> Whether legal relations, relations between a creditor and the debtor, social relations such as father, lover or enemy.

<sup>12</sup> RADIN, M. J. *Property and Personhood*, p. 961 (“It intuitively appears that there is such a thing as property for personhood because people become bound up with “things”. But this intuitive view does not compel the conclusion that property for personhood deserves moral recognition or legal protection, because arguably there is bad as well as good in being bound up with external objects. If there is a traditional understanding that a well-developed person must invest herself to some extent in external objects, there is no less a traditional understanding that one should not invest oneself *in the wrong way or to too great an extent* in external objects. Property is damnation as well as salvation, object-fetishism as well as moral groundwork.”).

<sup>13</sup> RADIN, M. J. *Property and Personhood*, p. 959 (“Most people possess certain objects they feel are almost part of themselves. These objects are closely bound up with personhood because they are part of the way we constitute ourselves as continuing personal entities in the world. They may be as different as people are different, but some common examples might be a wedding ring, a portrait, an heirloom, or a house.”).

<sup>14</sup> RADIN, M. J. *Property and Personhood*, p. 959 (“One may gauge the strength or significance of someone’s relationship with an object by the kind of pain that would be occasioned by its loss. On this view, an object is closely related to one’s personhood if its loss causes pain that cannot be relieved by the object’s replacement. If so, that particular object is bound up with the holder. For instance, if a wedding ring is stolen from a jeweler, insurance proceeds can reimburse the jeweler, but if a wedding ring is stolen from a loving wearer, the price of a replacement will not restore the status quo—perhaps no amount of money can do so.”).

<sup>15</sup> Money can be such example: it is irrelevant what form the money acquires. Exchanging banknotes for other banknotes can hardly give rise to mental anguish.

– personal property, and generic things – fungible property, which – if lost – can rarely cause mental suffering of their (reasonable) holder.<sup>16</sup>

Should personal property constitute the grounds for the recognition of personhood there is a question of how to determine when the property is personal and when it is not. The issue is that individuals may identify with different objects respectively. Reasons for establishing a strong tie with a particular piece of property differ – one may feel as mentally destructive the loss of the family house, another would be emotionally disrupted by the loss of the father's watch. Personal preferences and objects of personal ties would be quite arbitrary.<sup>17</sup>

Radin thus poses a question of parameters of good or bad identification with objects and what is, and is not, personal property. She claims that objective criteria may be found either within heteronomous morality, psychology and the concept of person as such.<sup>18</sup> Radin tries to find the criteria within the theory of person compatible with her conception that personhood is constituted (apparently not only) by personal property.

The conception of personal property is based upon the idea that every individual can have unique personal preferences and interests reflected in his/her individual personal property which forms his/her personhood. Such conception is incompatible with person understood as an abstract holder of rights. The abstract perception of person as the holder of rights (particularly in Kant's theory treating person as a rational self)<sup>19</sup> excludes the understanding of an individual as a person having own individual preferences. That is why Radin avoids this theory.<sup>20</sup>

Her philosophical basis is rather built upon John Locke and his idea that the property of an individual subsists primarily in his or her own body. Locke says that “every Man has a *Property* in his own *Person*,” from which it immediately follows that “[t]he *Labour* of his Body, and the *Work* of his hands . . . are properly his.”<sup>21</sup> It follows that the relation of a person to his or her own body is the relation to his/her own personal property. At the same time, Locke defines a person as “a thinking intelligent being that has reason and reflection, and

<sup>16</sup> RADIN, M. J. *Property and Personhood*, p. 960 (“I shall call these theoretical opposites— property that is bound up with a person and property that is held purely instrumentally—personal property and fungible property respectively.”).

<sup>17</sup> RADIN, M. J. *Property and Personhood*, p. 961 (“The intuitive view of property for personhood just stated is wholly subjective: self-identification through objects varies from person to person. But if property for personhood cannot be viewed as other than arbitrary and subjective, then personal objects merely represent strong preferences, and to argue for their recognition by the legal system might collapse to a simple utilitarian preference summing.”).

<sup>18</sup> RADIN, M. J. *Property and Personhood*, p. 962 (“The necessary objective criteria might be sought by appeal to extrinsic moral reality, to scientific truths of psychology, or to the concept of person itself.”).

<sup>19</sup> RADIN, M. J. *Property and Personhood*, p. 962 (“Perhaps closest to the *persona* of Roman law, the first conception is of the person as rights-holder. For Kant, the person is a free and rational agent whose existence is an end in itself. I shall call Kantian the view of person focusing on universal abstract rationality. In this view, personhood has no component of individual human differences, but rather by definition excludes the tastes, talents, and individual histories that differentiate one from another”).

<sup>20</sup> RADIN, M. J. *Property and Personhood*, p. 967 (“If persons are bare abstract rational agents, there is no necessary connection between persons and property. Therefore, Kantian rationality cannot yield an objective theory of personal property”).

<sup>21</sup> LOCKE, J. *The Second Treatise of Government*. 6<sup>th</sup> ed. New York: Liberal Arts Press, 1952. ch. V, § 27.

can consider itself as itself, the same thinking thing in different times and places.”<sup>22</sup> These statements are not internally conflicting: a person is capable of its own self-consciousness only if the person is endowed with memory. Locke considers memory to signify this continuous self-consciousness. However, if one should have memory then he or she should have brains and body; in other words, the body appears to be necessary for a person but not sufficient by itself.<sup>23</sup> A similar philosophical background can be traced in the last (principal) theory of person presented by Radin. A person is not one capable of recalling what has happened (archetype of Epimetheus), but one capable of planning and projecting the plans into the future (archetype of Prometheus). This “bodily” conception of person is compatible with the ideas that memory is determining for a person<sup>24</sup> as well as the ability to plan one’s own destiny. An emotional relation to things may follow from the purpose of our personal property in the past as well as their intended purpose in the future.<sup>25</sup> One can hardly be generous without means allowing the generosity to be proven.<sup>26</sup>

However, Radin is aware of the fact that mere existence of objects to which certain people attach intensive emotional affection cannot be an automatic reason for considering these objects to be part of personhood as personal property. She claims:

*“A key to distinguishing these cases is “healthy.” We can tell the difference between personal property and fetishism the same way we can tell the difference between a healthy person and a sick person, or between a sane person and an insane person. In fact, the concepts of sanity and personhood are intertwined: At some point we question whether the insane person is a person at all. Using the word “we” here, however, implies that a consensus exists and can be discerned. Because I seek a source of objective judgments about property for personhood, but do not wish to rely on natural law or simple moral realism, consensus must be a sufficient source of objective moral criteria— and I believe it can be, sometimes, without destroying the meaning of objectivity.”<sup>27</sup>*

Radin infers the concept of personhood from our relations to objects surrounding us. A distinguishing criterion is whether the relation to property is “healthy”. Determining

<sup>22</sup> LOCKE, J. *An Essay Concerning Human Understanding*. Oxford: Clarendon Press, 1894. Bk. II, ch. XXVII, § 9.

<sup>23</sup> Radin provides a conception which identifies the person with its body as the third main theory of person. Her main argument apparently is that if there is no body there cannot be any individual. If there is no individual there cannot be any person. A more sophisticated alternative of such theory, as Radin argues, is the necessity of bodily continuation. See RADIN, *Property and Personhood*, p. 963 (“The sophisticated version is that continuous embodiment is a necessary but not sufficient condition of personhood. To recognize something as a person is, among other things, to attribute bodily continuity to it.”).

<sup>24</sup> In order to know that something is mine I should be able recall it. In other words, Radin tackles reasons why we consider certain objects to be “of our person/personal”: one reason may be the view to the past, i.e., the view connecting our memories with particular objects.

<sup>25</sup> RADIN, M. J. *Property and Personhood*, p. 968 (“If an object you now control is bound up in your future plans or in your anticipation of your future self, and it is partly these plans for your own continuity that make you a person, then your personhood depends on the realization of these expectations.”).

<sup>26</sup> RADIN, M. J. *Property and Personhood*, p. 968 (“But, for example, if you express your generosity by giving away fruits that grow in your orchard, then if the orchard ceases to be your property, you are no longer able to express your character.”).

<sup>27</sup> RADIN, M. J. *Property and Personhood*, p. 969.

whether the relation is, or is not, healthy relies on the existence of consensus identifying a particular person as objectively sound or unsound, as healthy or unhealthy. This perspective suggests that there is a general consensus with respect to the unhealthy relation of a fetishist to his shoes, whilst the relation of a “normal” person to his or her house or car is healthy. In summary, what is personal property and the personhood may be determined by consensus which is not understood as objectively existing within the valid legal rules, but rather as consensus subconsciously perceived.

This perception of consensus gave rise to substantial criticism of the whole theory introduced by Radin. The author of the criticism was Stephen J. Schnably.<sup>28</sup> He claims that Radin has attempted to identify deeply rooted consensual values which justify the application of legal norms. If Radin’s attempt should be successful, Schnably argues, she would have to rely on two assumptions regarding the social consensus: (i) such fairly created consensus exists, and (ii) the application of a consensual norm relating to the personhood differs from its inception.<sup>29</sup>

Schnably regards both assumptions as incorrect. He claims there is never a consensus we would be able to simply follow. Analyzing particular aspects of any consensus always reveals its deep controversies.<sup>30</sup> At the same time, should we assert that we only follow the given consensual norm we in fact help constitute the personhood in a sense which strengthens the consensual norm.<sup>31</sup>

Schnably claims that no consensus exists, or that such ostensible consensus rather reflects unjustifiable inequality of power. He demonstrates his ideas on ostensibly non-contradictory and consensually (according to Radin) accepted value – the relation of an individual to his/her house, or the link with the house. Schnably asks what the house as an ideal means.

He argues that a house is usually understood as a seat possessed and occupied by one family. Even for people who cannot afford their own house it may be their aspirational ideal.<sup>32</sup> Therefore, a house represents a set of assumptions and individual living experience. Schnably shows that a house is almost indivisibly linked to the family in its under-

<sup>28</sup> See SCHNABLY, S. J. *Property and Pragmatism: A Critique of Radin’s Theory of Property and Personhood*. *Stanford Law Review*. 1992–1993, Vol. 45, p. 347.

<sup>29</sup> See SCHNABLY, S. J. *Property and Pragmatism: A Critique of Radin’s Theory of Property and Personhood*, p. 363 (“Hence she attempts to identify at least some deeply embedded consensual values that justify the application of legal rules. For the attempt to succeed, Radin must make two assumptions about any given consensual social judgment: first, that such a consensus, fairly-formed, exists; and, second, that application of the consensual norms of personhood is somehow distinct from their constitution.”).

<sup>30</sup> See SCHNABLY, S. J. *Property and Pragmatism: A Critique of Radin’s Theory of Property and Personhood*, p. 363 (“Both assumptions are wrong. I will argue that there is never any true consensus to follow. If we examine any particular area of “consensus” closely, we will find deep disputes as well.”).

<sup>31</sup> See SCHNABLY, S. J. *Property and Pragmatism: A Critique of Radin’s Theory of Property and Personhood*, p. 363 (“Each time we purport merely to follow a given consensual norm, we help constitute personhood in a way that reinforces that norm. Consequently, because the process of drawing on consensus simultaneously fosters and creates consensus, it is circular to try to draw on a given “consensus” to guide the resolution of legal issues.”).

<sup>32</sup> See SCHNABLY, S. J. *Property and Pragmatism: A Critique of Radin’s Theory of Property and Personhood*, p. 365 (“The ‘home’—usually conceived of as an owner-occupied single-family residence—seems to be a paradigm case of personal property in our social context.” Even for the many people who cannot in fact afford a private home, it remains an aspirational ideal.”)



standing and its history. The ideal of a house also includes the division of roles in the household. The idea of family as a refuge, a private world detached from power – obviously the most essential element of a house – has been subject to the attack of feminists who have clearly established that this ideal has substantially contributed to the subordination of women.<sup>33</sup> Schnably argues that “the home is as much a place of domination and resistance, conflict and discord, as it is the center of a healthy life”.<sup>34</sup> He concludes: “In short, a focus on consensus simply cannot deliver what it promises: a relatively uncontroversial basis for legal rules and decision making.”<sup>35</sup>

Schnably emphasizes that a consensual norm cannot be separated and distinguished from its application. He apparently maintains an idea that every application of a norm means – to a certain extent – its repeated inception and, as a result, its strengthening. His argument of “the impossibility of bracketing consensus” is exemplified with the relation to a house or to any other thing. This relation is not created in a vacuum, or, as Schnably notes, irrespective of contexts. One may create a personal relation to a thing only if the respective thing is his or hers, if the individual owns the thing and the others recognize his or her right to it. Only if the individual may be certain that others respect and recognize the right he or she may establish a mental link to the thing, i.e. to create a relation between the object and the individual. Schnably notes:

Because my embodiment thus depends in part on others’ acquiescence, their approval or disapproval will influence my desires and goals. In short, what we as a society choose to recognize and protect as personal inevitably affects subsequent choices by individuals of how and where to embody themselves.

This evaluation of Radin’s theory of self-embodiment suggests that even in its most prototypically private guise—one person “involving herself” in her home—the process must be profoundly social. By showing that individual embodiment is supported by powerful structural factors, a sociological critique of Radin’s approach to the home indicates that we could never simply apply any given ideal. Yet for all her invocation of consensual values, Radin says remarkably little about the social and political issues that might clarify how and why people invest their personhood in property.<sup>36</sup>

The ideal of a house – as one of particular manifestations of the vision of “human bloom” we should intuitively consent according to Radin – is not in fact constructed by individuals, but it is actively supported by the state and other private agents with significant social power.<sup>37</sup>

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<sup>33</sup> See SCHNABLY, S. J. *Property and Pragmatism: A Critique of Radin’s Theory of Property and Personhood*, p. 366 (“Indeed, the idea of the family as a haven, a private world separate from power—perhaps the most defining aspect of the home—has come under attack by feminists, who have shown that it has contributed greatly to the subordination of women.”).

<sup>34</sup> See SCHNABLY, S. J. *Property and Pragmatism: A Critique of Radin’s Theory of Property and Personhood*, p. 367.

<sup>35</sup> See SCHNABLY, S. J. *Property and Pragmatism: A Critique of Radin’s Theory of Property and Personhood*, p. 371.

<sup>36</sup> See SCHNABLY, S. J. *Property and Pragmatism: A Critique of Radin’s Theory of Property and Personhood*, pp. 371–372.

<sup>37</sup> See SCHNABLY, S. J. *Property and Pragmatism: A Critique of Radin’s Theory of Property and Personhood*, p. 373 (“The ideal of the home is not one simply constructed by individuals, but is one that has been actively fostered by the state and other “private” actors wielding significant social power.”).

Each decision to protect a personal interest necessarily reinforces the ideal. Thus, those decisions can never be justified on the ground that we all agree that the personal interests at issue should be protected; the question always remains, should we further bolster the ideal by protecting it, or should we think about fostering alternatives?

Thus, consensus cannot provide a guide to resolution of legal issues because there is no consensus in any meaningful sense. The moment we attempt to identify a value as consensual, we engage in a practice that makes it all too easy for exercises of power to remain hidden. Moreover, since the law itself often shapes consensus, purporting to rely on consensus to shape the law is a dangerous exercise in circularity. In attempting merely to apply a given consensus, we necessarily strengthen it as well.<sup>38</sup>

Schnably, in order to substantiate strong tensions “beneath the surface” of an ostensible consensus without controversies, introduces his heuristics – homelessness. He asks what Radin’s conception can indicate about people not having any home; how this theory may help resolve this problem, i.e., what implications can be inferred and how concretely the vision of a person embodied in its house can help.

He raises a question whether the homeless should have the right to a house; not only a potential right to acquire a house (by purchase), but an actual right to have a house at their disposal and occupy it.<sup>39</sup> Should we pose a question whether we really wish to provide housing to the homeless and enable them to occupy the suburbs then the solution directly resulting from Radin’s consensually shared value appears to be totally inadequate.<sup>40</sup>

Schnably’s arguments are to show that if we focus on the ideal of a house, or the relation of a person to the house the person owns, we in fact recognize and acknowledge the existing relations of power. And, on the other hand, we are absolutely unable to solve social problems, such as homelessness. This is clearly shown when Schnably asks how the personhood of the homeless, or interests of their personhood, should be protected. In this case one can resort to the protection of relations of a nature similar to the relation to a house. For example, what legal consequences may arise if the homeless develops her relation to a particular library where he or she spends time, or to an abandoned house reconstructed and occupied by squatters. Should we apply the rules developed by Margaret Radin we would have to protect the homeless in their right to establish their home in li-

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<sup>38</sup> See SCHNABLY, S. J. *Property and Pragmatism: A Critique of Radin’s Theory of Property and Personhood*, p. 374.

<sup>39</sup> See SCHNABLY, S. J. *Property and Pragmatism: A Critique of Radin’s Theory of Property and Personhood*, p. 375 (“The second and more sweeping assertion that might be derived from Radin’s approach is that people should have homes — or at least, should not be deprived of the opportunity to have them due to circumstances beyond their control. Perhaps, then, we should recognize a personal stake in access to vacant residential buildings under some circumstances, or create “safe zones” in which those lacking homes can carry on the daily activities of life without fear of arrest.”).

<sup>40</sup> See SCHNABLY, S. J. *Property and Pragmatism: A Critique of Radin’s Theory of Property and Personhood*, p. 376 (“To put it as bluntly as possible, do we really want homeless people to have “homes?” ... we ought to think critically about the traditional idea of the home as a private enclave, grounded in racial and economic exclusion and in the degradation of public space. Precisely because the ideal is a deeply contested one, it would be strange to think that the long-term solution to homelessness should be the opportunity for everyone to buy into the suburbs”).



barriers, or squatters in their right to occupy abandoned buildings.<sup>41</sup> Although admitted as simplification Schnably claims that the ideal of the house on the one hand, and homelessness on the other, are just two sides of the same coin.<sup>42</sup>

This is why Schnably claims:

*“...the law can never simply implement some consensus regarding property and personhood. The social constitution of personhood is always at stake when issues of property and commodification are decided. A theory that brackets moral issues from legal ones overlooks the manner in which exercises of power help shape the consensual norm that is supposedly being taken as a guide. To avoid that circularity, legal theorists must focus on the conflict that can always be found beneath the surface of apparent consensus.”*<sup>43</sup>

## II. THE INDIVIDUAL AND THE PERSON

I believe that the view of homelessness as introduced by Schnably may reveal the issue of person and the relation between a person and the individual. It is not just whether the homeless has the right to a house, but also whether the homeless has personhood and is therefore the person. Undoubtedly, the homeless is a human being. Does the fact that the homeless has no house suggest he or she has no personhood? Being the homeless does not definitely mean not being an individual, not being a person and, as a result, not having personhood. Even the homeless can acquire a house as well as an individual owning a house can be deprived of it and can become homeless. I would argue that this leads to one important practical conclusion analyzed repeatedly by Schnably in his article, namely an actually existing fact – ostensible consensus on personhood – cannot give rise by itself to normative determination. Should we deduce such normative conclusions we in fact create norms from ostensibly consensually shared values and determine who the person in law is.

One strange thing should be noted in this context. The mode of our answering the question “what does it mean to be a person in law?” differs from that used when explaining other issues such as “what does a creditor mean?”, “what does a loan agreement mean”, or “what does a power of attorney mean?”. Answering the three latter questions is always based upon the existing legal order – valid legal regulation; we assume that “creditor”,

<sup>41</sup> See SCHNABLY, S. J. *Property and Pragmatism: A Critique of Radin's Theory of Property and Personhood*, p. 376 (“How might the law come to protect personhood interests on the part of the homeless? It might grant protection to people who develop a homelike relationship to a particular piece of property. A homeless person, for example, might develop an attachment to a particular library where she passes her time. Or perhaps several homeless people would develop a stake in an abandoned apartment building they took over and repaired. By upholding the right of the homeless person to use the library even when others object to her hygiene, and by permitting squatters to occupy the building they have taken over, the law would be protecting personhood interests.”).

<sup>42</sup> See SCHNABLY, S. J. *Property and Pragmatism: A Critique of Radin's Theory of Property and Personhood*, p. 376 (“It is a simplification, but a revealing one, to say that the ideal of the home and homelessness are two sides of the same coin.”).

<sup>43</sup> See SCHNABLY, S. J. *Property and Pragmatism: A Critique of Radin's Theory of Property and Personhood*, p. 353.

“loan agreement” or “power of attorney” mean what they are defined by the respective legal system. When we are looking for an answer to the question “what is a person” we become quite reluctant to rely on what is stipulated in the law and to find the answer only within the respective legal order. The reason may probably be that we voluntarily (or maybe subconsciously) substitute “a human being” for “person” and become somehow unwilling to state that a person – a human being – is only what is stipulated by the law. Should we do that we would indicate that human beings – individuals – are essentially “slaves” of the legal order; we would have to say that the *legal* existence of a human being is stipulated by the legal order, which could also mean that a human being need not exist. At the same time, it would mean that a human being actually does not exist in law since its “legal existence” in fact denotes “validity”. No creditor, no contract, no power of attorney may exist unless there is an applicable legal norm stipulating that something like creditor, contract or power of attorney exist, i.e., are legally valid.

Saying that a man does not exist but “is valid or applies” should sound intuitively incorrect to all of us. The reason is that we all are human beings living our day-to-day lives. We all have experienced our own existence, but not our “validity”. This is why the requirement that we should not exist, but “be valid”, sounds us as absurd, incorrect and nonsense. This is also the reason why we usually resort to the world of reality rather than to the realm of the law when looking for an answer to the question “what does it mean to be a person in law?”; the external world, recognizable by our senses, is the place where real human beings from flesh and bones live.

This mental pattern forms the basis of one of the oldest civil codes within continental law, namely the General Civil Code (Allgemeine bürgerliche Gesetzbuch - ABGB) adopted in 1811 and applicable in the Austrian-Hungarian Empire and in Austria until today. Section 16 ABGB reads:

*“Every man has inborn rights, which are already apparent from reason, and is therefore to be considered as a person. Slavery or bondage and the exercise of a power having reference to it, is not permitted in these countries.”*

However, if rights belong to a “man”<sup>44</sup> there may be a temptation to recognize a person as a real being from flesh and bones even within the legal order. This might be the reason why the real life recognizable by our senses, not the legal order, serves as the source for the answer to “what does it mean to be a person”. This is the way of thinking of Jessica Berg who claims that “an entity labelled a natural person is genetically human”. She adds that unlike a juristic person which may be genetically a human being, “there are no non-human natural persons.”<sup>45</sup> I tend to argue that such intuitive statement is incorrect. “Person”, as

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<sup>44</sup> This also applies to similarly justified human rights listed in their national and international catalogues. Today, many justifications are based on the notion of human dignity – see also ONDŘEJEK, P. The Many Faces of Human Dignity in Law. In: N. L.X. Baey – E. Karska – A. P. Cobos Campos (eds.). *Human Dignity and Human Rights Serious Violations*. Joaçaba: Editora UNOESC, 2016, p. 39.

<sup>45</sup> See BERG, J. Of Elephants and Embryos: A Proposed Framework for Legal Personhood. *Hastings Law Journal*. 2007–2008, Vol. 59, p. 374.

well as “contract”, “creditor” or “power of attorney” cannot exist, unless there is an applicable legal norm stipulating the existence (legal validity) of something like person, contract, creditor or the power of attorney. This leads to a premise that an individual as the person exists within the legal order not as a matter of fact, but only normatively, i.e. that it “is valid”.

This is why Kelsen<sup>46</sup> claims that a natural person does not represent reality, but a legal construction.<sup>47</sup> If we intend to recognize a person from the perspective of the law as a valid legal order we should analyze the person from the perspective of legal rules which normatively exist, i.e., they are valid. Recognizing a man as a realistic being is the objective of biology, psychology<sup>48</sup> or sociology, but it is impossible to analyze it from the perspective of its “validity” or “applicability”. Such analysis would undoubtedly be absurd. However, this assumption does not apply the other way round. The manner in which Radin, Schnably and Berg approach the issue of a person suggests that they use an individual as a realistic being and infer conclusions for its position within the legal order – as a person in law. As a result, the object of an analysis is not person, but a human being. Czech legal scholar František Weyr<sup>49</sup> points at the questionable nature of such approach to both the human being and the state:

*“The relation between the state as understood within sociology (natural sciences) or history and politics and the state in the normative meaning corresponds to that between a human being in terms of natural sciences (biology) and person in the normative sense as the obliged. The practical legislature identifies one to the other, namely it attaches its normative constructions to the natural fact; this means that it declares the biological unit “human being” to be the holder of legal duties (the obliged). However, theoretically, they do not become one and the same object of analysis. For example, the practical legislature cannot establish when an individual in the biological sense originates, i.e., to normatively (through the rules) cause its inception. But it may stipulate when the legal personality of that human being is created, for example by setting the principle that it is created at the moment when the fetus is naturally separated from the mother’s body. However, this principle does not create a human being for the purposes of natural sciences (medicine or biology). Similarly, a legal norm cannot give rise to the state in the sociological sense.”*<sup>50</sup>

<sup>46</sup> KELSEN, H. *General Theory of Law and State*. New Brunswick (U.S.A.): Transaction Publishers, 2007; KELSEN, H. *Pure theory of law*. California (U.S.A.): University of California Press, 1967.

<sup>47</sup> See KELSEN, H. *General Theory of Law and State*, p. 96: “The physical (natural) person is, thus, no natural reality but a construction of juristic thinking. It is an auxiliary concept that may but need not necessarily be used in representing certain — not all — phenomena of law. Any representation of law will always ultimately refer to the actions and forbearances of the human beings whose behavior is regulated by the legal norms.”

<sup>48</sup> See KELSEN, H. *General Theory of Law and State*, p. 94: “To define the physical (natural) person as a human being is incorrect, because man and person are not only two different concepts but also the results of two entirely different kinds of consideration. Man is a concept of biology and physiology, in short, of the natural sciences. Person is a concept of jurisprudence, of the analysis of legal norms.”

<sup>49</sup> WEYR, F. (1879–1951) was an outstanding legal scholar and along with Hans Kelsen one of the co-founders of the pure legal science and its Czech branch, so called Brno Legal School. Weyr spent most of his academic career at the Law Faculty of Masaryk University in Brno, Czechoslovakia. WWII, and later the communist regime in Czechoslovakia in 1948, prevented his ideas contained primarily in his excellent work “*Teorie práva*” (1936) from spreading freely and being widely reflected. One of the goals of this paper is to introduce Weyr’s ideas to a wider community of legal scholars.

<sup>50</sup> WEYR, F. *Teorie práva*. [Theory of Law]. Brno – Praha, 1936, p. 94.

If we are recognizing the legal order existing normatively, i.e., the legal order which is valid, we cannot at the same time analyze an individual existing in reality. This is why pure theory of law relies on that the object of its analysis may be only the law – legal order and legal norms. The mode of recognizing of what exists within the realm of legal norms – what is valid – should be totally different from the mode employed in recognizing the reality, i.e., what exists in fact. Therefore “person” should not be swapped with “human being”;<sup>51</sup> this is why a human being is considered as “person” existing only normatively, and not factually, within the legal order.

## CONCLUSION

From the above mentioned reasons, I believe that we should return to the analysis of person as it is applicable within positive law. If we choose positive law as the source of our analysis there is no need to decide what values or purpose might be the grounds for the existence of a particular right. If we consider the legal order to be given *a priori* such question may be left for politicians; but we should ask what the normative existence of a person means from the perspective of the legal order where the person as a point of imputation applies: such analyses can surprisingly reveal a lot. They may show that every person may be the holder of power to a certain extent (it may use the power, but also become resistant against such power). They may indicate what meaning is assigned to consensus that is necessary for the formation of every contract.

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<sup>51</sup> See KELSEN, H. *General Theory of Law and State*, p. 95: “That the statement the physical (natural) person is a human being is incorrect is obvious also from the fact that what is true of the human being who is said to be a “person” is by no means always true of the person.”