

Trial on personhood for chimp "Hiasl"

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Summary

In 1982, the chimp "Hiasl" was abducted from the Western African jungle to be used in scientific experiments in Austria. Since his abduction was illegal, he was freed at the airport. After long legal battles with the company responsible for his abduction, he grew up in a human family and now lives at a Viennese animal shelter. In 2006, this shelter ran into financial difficulties and "Hiasl" was threatened with deportation. Therefore in 2007, his close friends started legal procedures to have him declared a person and to have a legal guardian appointed for him to represent him in court. Four renowned experts in anthropology, biology and law supported the case scientifically. According to Austrian civil law, all members of the genus "Homo" are persons. Sharing 99.4% of human genes, chimps also belong into this genus. Secondly, it is argued that in the context of civil law the definition of person biologically means possessing a "theory of mind", which chimps do. Only if "Hiasl" is accepted as a person, his interests will matter and he can be represented in a legal case against his deportation, so that justice could be done. Only as a person, he can collect money for himself. And only as a person, he could start legal procedures, claiming for damages against those responsible for his abduction, to secure his future.

Zusammenfassung: Gerichtsverfahren zur Erlangung des Personenrechts für den Schimpansen Hiasl

Der Schimpanse "Hiasl" wurde 1982 aus dem Dschungel Westafrikas nach Österreich entführt, um hier zu Tierversuchen verwendet zu werden. Da es sich um einen illegalen Transport handelte, wurde er am Flughafen von Zollbeamten befreit. Nach langem Rechtsstreit wuchs Hiasl in einer menschlichen Familie und dem Wiener Tierschutzhaus auf. Durch finanzielle Schwierigkeiten des Tierschutzhauses Ende 2006 war er plötzlich mit Abschiebung ins Ausland bedroht. Deshalb begannen seine Freunde einen Sachwaltschaftsprozess am Bezirksgericht Mödling für seine Anerkennung als Person. Vier anerkannte ExpertInnen in Anthropologie, Biologie und Rechtswissenschaften unterstützten diesen Antrag wissenschaftlich. Nach österreichischem Zivilrecht sind alle Mitglieder der Gattung Mensch („Homo“) Personen. Schimpansen, die 99,4% der Gene mit *Homo sapiens* teilen, gehören zu dieser Gattung. Zweitens kann aus dem Kontext des Zivilrechts herausgelesen werden, dass jene Wesen Personen sind, die eine „Theory of Mind“ haben. Auch dazu gehören Schimpansen. Nur wenn Hiasl als Person anerkannt ist, können seine Interessen vor einem Gericht repräsentiert werden, kann er in einem Verfahren seine Abschiebung bekämpfen oder einen Schadenersatzprozess gegen diejenigen führen, die für seine Situation verantwortlich sind.

Keywords: Animal rights, personhood, legal guardian for a chimp, Hiasl

1 Introduction – Hiasl's story

The chimpanzee Matthias "Hiasl" Pan, as he is now known, was born in 1981 in the jungle of Sierra Leone, Western Africa, into a tribe of *Troglodytes verus* chimps. In those days, research labs, zoos and circuses were very interested in chimps caught in the wild and were prepared to pay a large ransom for their capture. In Sierra Leone, a wild animal trader of Austrian origin named Dr. Sitter caught a number of baby chimps to send them over to Austria. For the price of 460,000 Austrian Schillings (corresponding to 33,500 Euro) Hiasl's fate was decided. His mother was shot; he was ripped from her dead body, aged only 10 months, and he was stuffed into a box

and boarded onto a plane. On 29th April 1982, together with 11 other baby chimps, he arrived at Vienna International Airport Schwechat. He and a young female chimp called Rosi, who, like Hiasl, was also approximately 10 months old, were destined to go to the company Immuno's laboratory in Orth on the Danube, 30 km East of Vienna, for medical experiments in the context of hepatitis and AIDS research. At that time, Immuno was trying to build a large chimp colony at their lab in order to breed these animals as experimental tools. By 1989, Immuno had 53 chimps, only 2 of which were not wild caught. For the chimps, being in the lab meant living in tiny cages. At the beginning, the cage dimensions were about 0.7 m x 1.2 m, later the

cage size increased to 1.5 m x 1.2 m, depending on the weight of the animals. When the new primate centre in Orth opened up on 23rd May 1992, it contained 56 single cages of 4.85 m² each (about 2.2 m x 2.2 m) in the windowless basement of the building. On 17th November 1999, the company Baxter, which took over Immuno, stopped the experiments on chimps and started a rehabilitation project with the surviving 44 chimps from the lab, almost 20 of whom had been infected with a hepatitis virus or HIV or both. (Balluch, 2003)

This scenario was meant to be Hiasl's and Rosi's fate when they arrived as little babies in their boxes at the airport. Another baby chimp, Henry, had been ordered by the Viennese zoo dealer Walter



Ullrich, and the remaining 9 of the 12 baby chimps from the shipment were to be taken over by the animal dealer H. Demmer in Vienna. However, on the day before their arrival, on 28th April 1982, Austria signed the Convention on International Trade of Endangered Species CITES, an international treaty originally drawn up in 1973 to protect wildlife against over-exploitation. As a result, the 12 chimps did not have the necessary CITES documents, so that their arrival in Austria was essentially illegal. Animal rights activists had received a tip-off and together with customs officers seized the 12 babies and freed them from their boxes. On 6th May 1982, Vienna magistrates ruled to confiscate Hiasl and the other chimps for being unlawful imports in contravention of Article 12 (2) of the CITES agreement. The 9 Demmer chimps were handed over to the Vienna zoo, where all of them died soon after. On 17th May 1982, Hiasl, Rosi and Henry were officially placed into the care of the Vienna animal shelter, where a care person took them home to raise them in a human family together with his own human children. Hiasl, hence, is socialized like a human and considers himself to be part of the human species. Until today, he reacts to other humans as being his social partners, his rivals or his sexual mates.

More than a year later, on 14th July 1983, Vienna magistrates found the company Immuno guilty of breaching the CITES agreement and ruled that, therefore, Immuno cannot be considered having legal possession of Hiasl and Rosi. Immuno appealed against this decision. On 10th October 1983, this appeal was refused. Hence, Immuno went to the High Court, which, on 10th April 1984 – almost 2 years after the arrival of the chimps ruled in favour of the company. On 18th September 1984, the High Court even ruled the penalty for breaching the CITES agreement unlawful and ordered the chimps to be handed back. On 20th November 1984, the mayor of Vienna issued an order to the human family and the Vienna animal shelter to hand over the chimps to Immuno. When Immuno representatives arrived on 29th November 1984 to take over the chimps who in the meantime had turned 3 years old, they were physically blocked by animal

rights activists and prevented from taking them. The activists, many of whom had befriended the chimps and loved them dearly, were not willing to allow these individuals to be delivered to their fate inside the research lab. An offer was made to buy the chimps, but Immuno declined.

Since Immuno was not able to get their hands on the two chimps, on 10th July 1985, they started legal procedures against the Republic of Austria to legally request removing the chimps from those caring humans by physical force. The charge was based on Article 137 of the Austrian constitution, which deals with property rights claims against the Republic. For the zoo dealer Walter Ullrich, such court proceedings were not to his liking. Therefore, on 16th December 1985, he agreed to sell “his” chimp Henry to the animal shelter for 48,000 Schillings (3,500 Euro). Since the shelter was not equipped to permanently house the chimp, one year later, on 10th December 1986, they handed Henry on to the zoo in Heidelberg, Germany, where the chimp died, just as the other chimps had died in the zoo in Vienna.

On 10th December 1986, the High Court decided upon Immuno’s case against the Republic of Austria in their favour. The judges ordered the government to enforce their ruling to hand over the remaining chimps, Hiasl and Rosi, to the research lab. On 23rd March 1987, the Republic of Austria gave the animal shelter 14 days to surrender the chimps voluntarily. The shelter refused. Instead of using police force, on 11th June 1987, the Republic of Austria once again went to court against the shelter. On 18th February 1988, the trial took place at the provincial court of civil law in Vienna. The shelter argued that it had a legal obligation to protect animals from pain and suffering, which would undoubtedly have been the consequence for Hiasl and Rosi if they were to go into the lab. The judges, however, responded by saying that animals are things and as such, have no interests for themselves. According to the court, the only interests existing in this case were the interests of the owner Immuno in its property rights, which had been infringed upon (Wiener Tierschutzverein, 1988).

The shelter appealed against this decision. At the beginning of 1989, independently from this case, the Austrian Parliament added a new paragraph to the Austrian civil law code dealing with the property status of animals. Article 285 of the civil law code states that any entity that is not a person is a thing, implicitly declaring all non-human animals as being things. To this Article, a new section, Article 285a, was added that explicitly states that animals are not things, but that they shall be treated as things unless specific laws exist ruling otherwise. Referring to this new piece of legislation at the High Court appeal, the animal shelter argued that animals, not being things, have a value in themselves, which goes beyond the value of property for the owners of the property. Additionally, they contended that in the case at hand this value should count higher than the property value of the utility of the chimps as experimental tools for Immuno’s research lab. However, on 27th September 1989, the High Court ruled that, Article 285a notwithstanding, non-human animals continue to be things and that they have no value in themselves. Therefore the property owner has the right to take possession of his property, even if this implies suffering and death for the chimps. The shelter, however, once more refused to comply; and the Immuno representatives did not dare to come back and to attempt obtaining their property.

By that time, Hiasl and Rosi were already 8½ years old. Eventually, the two lost contact to their human family and permanently moved into a specially built enclosure at the animal shelter in Vienna. In 1999, the company Baxter, which had taken over Immuno, stopped their experiments on chimps; and 3 years later they officially donated Hiasl and Rosi to the shelter. In 2005, the actions of those activists who, back in 1984, had prevented Immuno from removing the chimps, were officially recognized as justified, since the Austrian Parliament unanimously voted to ban all experiments on apes. From 1st January 2006 onwards, any experiments, not only on chimps, but also on bonobos, gorillas, orang-utans and gibbons, became illegal in Austria if they are not for the benefit of the individual concerned. To a large extent, this

breakthrough resembles the human rights declaration of Helsinki 1964, which protects humans from medical experiments against their own interests.

2 Initiation of a trial for personhood

In 2006, the Vienna animal shelter ran into financial difficulties. In the bankruptcy proceedings, a business manager was put in charge of the assets of the shelter, with the aim to secure as much money as possible for those people the shelter was indebted to. Usually, the shelter takes in homeless cats, dogs and other pet animals and seeks people willing to give these animals a new home. The Vienna City Council pays the shelter a fee for each animal found within the city boundaries. Hiasl and Rosi, not being pets, are a big liability for the shelter. Every month, they each cost approximately 5,000 Euro. If the shelter goes bankrupt, Hiasl and Rosi are likely to be one of the first creatures, who have to be given away. In addition, being 26 years old, they are still in the prime of their life, and might be very valuable for a zoo or a circus or, indeed, even a research lab doing experiments on chimps abroad, in countries, where this is still allowed.

Towards the end of 2006, a person donated a large sum of money to the President of the animal rights association VGT (Verein gegen Tierfabriken – Association Against Animal Factories) under the condition that he was only to take possession of it if Hiasl was appointed a legal guardian, who was allowed to receive this money at the same time, and who would be able to decide what the two together would want to spend the money on. With this contract, the President of the VGT was in a position to argue to have legal standing to begin court procedures in order to obtain a legal guardian for Hiasl, or rather, under his full name, for Matthias “Hiasl” Pan. This he did on 6th February 2007 at the district court in Mödling, Lower Austria.

The application was supported by four expert statements from Prof. Stefan Hammer, professor of civil rights and constitutional law at the University of Vienna, Prof. Eva-Maria Maier, professor

of philosophy of law at the University of Vienna, Prof. Volker Sommer, professor of anthropology at the University of London and Dr. Signe Preuschoft, biologist and chimp expert at the University of Zurich, who was the scientific head of the rehabilitation project of the ex-lab chimps in Austria. With the help of these expert statements, an argument was put forward that a chimp, and in particular the chimp Hiasl, is to be considered a person in accordance with the Austrian law.

3 Why chimps are persons in accordance with the Austrian civil law

The Austrian civil law code ABGB does not define what a person is. Article 16 of the civil law code declares all humans as being persons: “Every human is born [...] with rights and therefore has to be considered a person.” What, however, is meant with the term “human”? The definition of “human” in Article 16 ABGB has to be interpreted biologically. After all, beings acting like humans but not being humans genetically (possibly computers or robots) are not included. On the other hand, individuals that are human beings genetically, but who have mental defects or who might have been socialized in a tribe of monkeys, definitely do count as persons before the law.

Until today, there is no judicial literature on this subject, since everybody apparently assumed that they knew which creatures are human and which are not. This might have been a reasonable assumption to make in the pre-Darwinian days of 1811, when the law was written. However, since the onset of taking evolution seriously, a number of different species or sub-species of humans have been identified. Take, for example, Neanderthals. Would they count as humans in accordance with Article 16 ABGB, if, say, they suddenly appeared alive in a remote Himalayan valley? Or *Homo habilis*, or *Homo erectus*, or the recently discovered *Homo floresiensis*, who apparently still lived only 12,000 years ago?

In human rights charters (Heidelmeyer, 1997), basic rights are recognized for “members of the human family”. To pro-

vide this phrase with a scientific meaning, it must be interpreted as the term “family” of the Linnean classification. The biological family that today’s *Homo sapiens* belongs to is the family of Great Apes, which includes chimps. If the term “human” has to be considered in its more narrow sense, then it must refer to the genus “*Homo*”, which, after all, is Latin for human. Now, while the question, which species belong to the genus *Homo*, might be decided upon controversially, a well based scientific argument can be made that chimps (and bonobos) must be part of it as “*Homo pan*”. The primary reason for this classification is the very close genetic relationship between *Homo sapiens* and chimps, who share about 99.4% of their genes (Hecht, 2003; Wildman et al., 2003). A study looking at amino acid chains, the building blocks of proteins, found that of 1271 positions only 0.4% differed between chimps and *Homo sapiens* (Bekoff, 2001). Other pairs of species like brown bear and ice bear, lion and tiger, horse and donkey, who are similarly closely related, do belong to the same genus (Balluch, 2005, page 151).

Furthermore, at least theoretically if not already experimentally, *Homo sapiens* and chimps, especially male chimps and female *Homo sapiens*, can produce fertile offspring (Balluch, 2005, page 151). *Homo sapiens* have one chromosome less than chimps, since the chimp chromosomes 2p and 2q have fused into a large chromosome in *Homo sapiens*. Having different numbers of chromosomes is not an absolute barrier to hybridization, though. Similar mismatches are relatively common in existing species, a phenomenon known as chromosomal polymorphism. (<http://en.wikipedia.org/wiki/Humanzee>)

The genetic structure of all the great apes, including *Homo sapiens*, is similar. Chromosomes 6, 13, 19, 21, 22, and X are structurally the same in all great apes. 3, 11, 14, 15, 18, and 20 match between gorillas, chimpanzees and *Homo sapiens*. Chimps and *Homo sapiens* match on 1, 2p, 2q, 5, 7-10, 12, 16, and Y as well; and they have recently been found to share a large transposition from chromosome 1 to Y that is not found in any other ape. This level of chromosomal similarity is

roughly equivalent to that found in equines. Interfertility of horses and donkeys is common, although sterility of the offspring (mules) is nearly universal. Similar complexities and prevalent sterility pertain to horse-zebra hybrids, or horses, whose chromosomal disparity is very wide, with horses typically having 32 chromosomes and zebras possessing between 44 and 62 depending upon the species. In direct analogy to the chimpanzee case, the Przewalski horse (*Equus przewalskii*) with 33 chromosome pairs, and the domestic horse (*E. caballus*) with 32 chromosome pairs, have been found to be interfertile, and produce semi-fertile offspring, where male hybrids can breed with female domestic horses. (<http://en.wikipedia.org/wiki/Humanzee>). (Fig 1: Examples of species that are included in the genus *Homo*, i.e. that are humans)

To summarize, a reasonable argument can be made that the definition of the term “human” in Article 16 ABGB must include chimps, i.e. also the chimp Hiasl. On the other hand, Article 16 ABGB also makes it clear that not only humans are persons. If the terms “human” and “person” were interchangeable, the statement that all humans are persons would not make any sense. Indeed, judicially speaking, companies or associations, for instance, also can be persons before the law. The reason for this is that companies and associations might have interests for themselves, which differ from the interests of the people working within those

companies and associations. Only if the companies and associations are recognized as persons before the law, can their interests be represented in court. That clearly shows that “having interests” must be one defining aspect of being a person.

However, since there is no judicial literature on the question of what constitutes a person according to the Austrian civil law code, we have to take into account the philosophical background of this law. The Austrian civil law code was prepared by a specific ABGB commission, in which Franz von Zeiller was the most important member. It was primarily influenced by the ideas of the enlightenment area, and, more specifically, by the ideas of Immanuel Kant, who had published his thoughts only a few years before. Within this context, it is the ability to reason, which must be addressed as the defining factor for personhood (Kant, 1786; Schönecker and Wood, 2002; Grondin, 1994, page 117 et seqq; Lehnert, 2005, page 22-30 with further references). Zeiller himself speaks of the “dignity of a reasonable, free acting creature” (italics by author) when commenting on Article 16 ABGB (Zeiller, 1819 page 65). The ability to reason should include the ability for abstract thought, thinking in terms of cause and effect and being able to put yourself into the position of another being, i.e. being able to predict what another being might feel or do next. A person who engages in abstract thought and thinking in terms of

cause and effect might be said to have interests. By being able to put him- or herself into the position of other persons, the person can appreciate the interests of other persons as well, thereby recognizing personhood in others. This ability can be translated into biological terminology: A person is biologically defined as a being capable of recognizing the interests of other beings, i.e. a person is a being who has what is called a “theory of mind”.

This conclusion is backed up by the detailed wording of Article 16 ABGB. This Article states that it can be recognized through reason that all humans are born with rights and therefore are persons. Reason in this context is hence used to describe the ability to recognize a rights-holder, i.e. a person. This statement supports the conclusion derived earlier, that a person is a being that recognizes personhood in other persons, i.e. a being with a theory of mind.

Indeed, chimps in general, and Hiasl in particular, have been shown to possess a theory of mind (Taylor-Parker et al., 1994; Sommer, 2000, page 131; Taylor-Parker and McKinney, 1999, page 145; Savage-Rumbaugh and Lewin, 1994, page 274). Within a behavioural enrichment program, Hiasl passed a mirror self-recognition test, he showed tool use and understanding, played with human caretakers, watched TV and drew pictures. Hiasl can understand if caretakers want to lure him into doing something, and then decide whether this is in his interests or not. He can pretend to feel or do this or that, and actually willfully deceive others by intending something completely different, but hiding his actual intentions. Those humans close to him, who know him best, clearly support the proposition that he has a theory of mind and does understand intentional states in other persons.

This is supported by scientific findings on the cognitive abilities of chimpanzees in general. There is practically no quality or ability traditionally considered typically human that chimpanzees do not possess, too. They do not only use but also produce tools, which they might reuse regularly. Chimps create brushlike ends out of sticks to fish for termites, stone tools to break nuts and spears to go hunt-

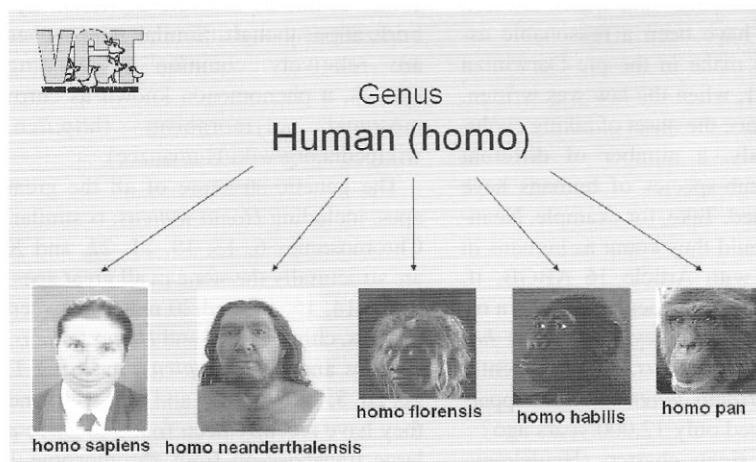


Fig. 1: Examples of species that are included in the genus *Homo*, i.e. that are humans.

ing (Hooper, 2007). Their tools are so sophisticated, that it is hard for paleontologists to decide whether certain stone tools were made by *Homo sapiens* or chimpanzee ancestors (Holmes, 2007). Chimpanzees show medical use of plants – a medical knowledge that can only have been accumulated by trial and error and by passing it on over generations, i.e. culture. And chimps do pass on knowledge from one generation to another as has been verified both in observations in the wild and in tests on captive chimps (Holmes, 2006). Therefore, they possess culture, which is illustrated by the fact that different chimpanzee populations have different methods of tool making or using, of greeting and different rituals – very much like different populations within the *Homo sapiens* species do have different cultural traditions. Chimpanzees can learn to use sophisticated sign language and to understand spoken English. Chimpanzees possess all aspects of rational thought including the ability of thinking in causal relations and of drawing analogies (Matsuzawa, 2006; Stanford, 2002; Savage-Rumbaugh and Lewin, 1994). Moreover, as they are able to adapt their behaviour to the knowledge, feelings and needs of others, they have a theory of mind, being able to act Machiavellian or altruistically by using others for their purposes or helping them in need (Gomez, 1998).

To summarize, Hiasl is, as a chimp, a human according to the definition of the term as it is used in Article 16 ABGB. However he is also a person according to the definition of this term within the philosophical tradition of the enlightenment, which is the basis for the Austrian civil law code altogether. He therefore is a person according to today's Austrian civil law. (Fig. 2: Change in paradigm! A modern understanding of personhood includes all great apes.)

4 The trial for personhood

On 6th February 2007, the application for a legal guardian for the chimp Hiasl was put to the Mödling district court in Lower Austria. The judge called two hearings. In the first, she bemoaned the fact that Hiasl had no documents proving his identity. The applicants could remedy this shortcoming, by providing witnesses of his arrival as an abducted child in Austria, as well as proof of his continued identity over the years in Austria since. After the second hearing, the court issued a decision not to continue the proceedings, arguing that Hiasl is not mentally handicapped and that he faces no imminent threat. According to Austrian law, both of these factors are pre-conditions for obtaining a legal guardian.

Regarding mental handicaps, the applicants conceded that Hiasl has no men-

tal defect. Nevertheless he was abducted as a child, taken from his family and his native environment, and thus is seriously traumatized. He had to grow up in an alien environment, where he is not capable of an autonomous life, in contrast to the situation if he had been left in the jungle, where he would not need a legal guardian. Hiasl has been locked up for most of his life, which obviously does not put him in the position to look after himself within the society he is living in. He therefore needs a legal guardian to make sure his interests are being recognized and respected, and that he does not lose out.

However these interests are seriously threatened due to the imminent bankruptcy of the animal shelter he is living at. He is threatened with deportation into an unknown future, possibly abroad where many laws protecting him in Austria might not be existent. Also, as a person with a legal guardian, he could receive donations for himself instead of only as an asset of the animal shelter. If the shelter goes bankrupt, such donations are lost to him. If he would receive money personally, he would be able to keep it and make good use of it for himself. Furthermore, he would also lose the donation that has jointly been given to him and the President of the VGT, if he is not represented by a legal guardian. All these aspects clearly show an imminent threat, but also a clear disadvantage for him personally, should he not receive a legal guardian.

The applicants appealed against the court's decision. On 9th May 2007, the judge eventually turned down the appeal, arguing that the applicant had no legal standing to appeal. By doing that, she left the question unanswered whether Hiasl is a person or not. Indeed, in all her decisions and in her correspondence, she continuously wrote as if Hiasl was a person. On 22nd May 2007, the applicants appealed against this decision to the provincial court in Wiener Neustadt. On 5th September 2007, the provincial court turned down the appeal. The judges argued that according to Austrian law, only the legal guardian or the being him- or herself, for whom the application was seeking a legal guardian, could appeal against a court decision on legal guardianship.

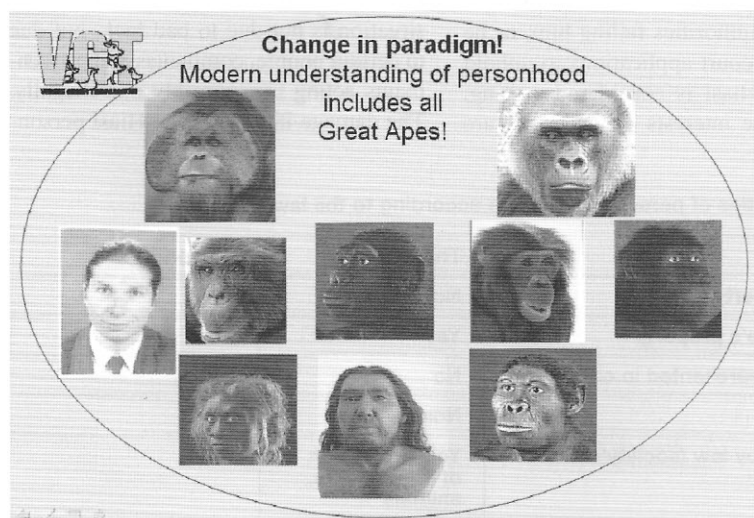


Fig. 2: Change in paradigm! A modern understanding of personhood includes all great apes.



On 26th September 2007, the applicants made an appeal to the Austrian Supreme Court for Civil and Criminal Matters (Oberster Gerichtshof). In this appeal, the applicants argue that the law cited by the judges only applies when a legal guardian has already been appointed. Otherwise it would make no sense to say only the legal guardian can appeal. This law obviously pertains only to cases where an appointed legal guardian does not actually want to be the legal guardian or where the person having a legal guardian appointed wants to appeal against this decision. Usually, in cases of mentally handicapped humans, there will only be appeals if a legal guardian has been appointed, because that reduces the rights of the person receiving a legal guardian. In Hiasl's case, to the contrary, however, the refusal to appoint a legal guardian by the court means that he is deprived of his rights. Therefore the provisions of appeals cited by the provincial court do not apply.

Secondly, in other cases the Supreme Court has already ruled that, if necessary, close relatives of a person can appeal in his or her name, if he or she is not capable to do so him- or herself. In the case of Hiasl, the latter undoubtedly applies. However since his close relatives were killed during his abduction, or, in any event, are neither present nor capable of making such an appeal themselves, in extension of the meaning of this ruling, Hiasl's close friends should be able to appeal in his name.

And thirdly it is argued, that the applicants have to have legal standing, because their interests are at stake as well. After all, they have received the before-mentioned donation of a large sum, which they can only use if Hiasl is appointed a legal guardian. In the appeal to the Supreme Court, the applicants stress that this point has been missed altogether by the Provincial Court in its judgment.

By the time of writing of this article, the Supreme Court has not yet reached a verdict, but it has publicly stated that it does take the case very seriously. The applicants have vowed to bring the case to the European Court of Human Rights, should the Supreme Court fail them.

5 Person versus thing

Legislation distinguishes between a person and a thing on a very fundamental level. While a person cannot be someone's property, but can own property him- or herself, a thing can be someone's property and cannot own property itself. A person has interests, which can be protected by rights, i.e. a person is a rights-holder, while a thing has no interests, which are represented or recognized by legislation in court, and, in principle, cannot have rights. Things, however, can be protected by laws, but not in their own interest. Monuments, for example, can be protected by specific laws, because it is in the interest of society to protect them. It is not in the interest of a monument itself to be protected. The case is similar with non-human animals. According to the law they are things (in practice), hence have no interests and hence can only be protected by laws in the interest of society. The animal protection ombudsman, for example, who has legal standing in cases of animal abuse, has the legal duty to represent the interests of society in animal protection, and not the interests of animals themselves. Things, in contrast to persons, have no legal standing. (Table 1: Qualities of persons and things according to the law)

If Hiasl is seen as a thing and not as a person, neither he, nor anyone else, can ensure that the laws protecting him are being enforced. As a person, in such a situation, he could either file charges against the authorities failing him, or he could make court applications to uphold the law. If Hiasl is considered a thing, then only the interests of his owner are

infringed if somebody else does him harm. His best protection would then be the law against criminal damage and the property rights of his owner.

If, however, it is his owner, who does him harm, then only his owner's interests will be represented in court. That means, for example, he could be sold, evicted or deported any time his owner sees a personal advantage in doing so. His own interests would play no role whatsoever in such proceedings. As a person, in contrast, he could legally fight his eviction or deportation. Only if he is recognized as a person, the judges would have the option of weighing his interests against those of the person trying to evict or deport him. It is only then that it would be possible to do justice to him.

As a thing, he can be owned, but he cannot own anything himself. That means that nobody can donate money to Hiasl to secure his future or to buy his own land and to build his own enclosure. As a thing, Hiasl will always be dependent not only on the good will of his owners, but also on their ability not to go bankrupt. If they do, no good will can protect him from being taken, evicted, sold or deported. As a person, Hiasl could not be owned by anybody. In contrast, through his legal guardian, he could raise his own money and secure his own future, independently of any misfortunes of others.

And last but not least, as a thing Hiasl has no legal standing by himself in any cases he might wish to bring to court. His situation is not due to bad luck, but due to certain people, companies and governments acting irresponsibly and illegally. The damage inflicted upon Hiasl person-

Tab. 1: Qualities of persons and things according to the law

	Thing	Person
Owns property	No	Yes
Is someone's property	Yes	No
Interests represented in court	No	Yes
Rights	None	Some
Protected by law (society's interest)	Yes: protection of monuments, animals	Yes
Legal standing	No	Yes

ally by those people, companies and governments is very high. They have destroyed his life. Was it not for sympathetic, caring people, he would long be dead by now. Why should it be the responsibility of good hearted people, to fund his future, if there are culprits, who would have the money to pay for what they have done? As a thing, his owner, the animal shelter, could only claim money for the damages the shelter has incurred. Damages to Hiasl himself would not count. And since the animal shelter is not legally obliged to care for Hiasl, the shelter cannot sue for the costs for caring for him. If, however, Hiasl was recognized as a person, the damage done to his life would count and he himself could start legal procedures against those responsible for it. He could sue the animal dealers, who abducted him and killed his mother. He could sue the company, who paid for his abduction in order to do experiments on him. And he could sue the governments of those countries, who gave permits for his abduction or for those experiments. All of these are responsible for his situation, and all of these should therefore be held liable to undo the damage as best they can.

6 Discussion

This trial, in many respects, touches on the core beliefs in our society. Historically and culturally, many of our traditions are based on Christian values, for whom oftentimes the most important aspect seems to be to separate humans from other animals. Humans are supposedly made in God's image, chimps – very much resembling humans – apparently are not. This tradition can be traced from early church elders like Augustinus via influential catholic writers like Thomas von Aquin up until today, when the Salzburger auxiliary bishop (Weihbischof) Laun declared: „Having a soul distinguishes humans from the world of animals. [...] No commonality and no similarity in the realm of the body can cover up this deep gulf. The most humanlike ape has, if you look at it, more in common with tadpoles or amoebas than humans.“ (<http://www.kirchen.net/bischof/laun/texte>). Unfortunately, it is

unscientific, dogmatic attitudes such as these, which, until today, are very influential in many of society's actions, and which are used to justify them. What should actually have long been discarded as religious fundamentalism, still permeates laws and regulations. We are reminded of debates between creationism or intelligent design *versus* science, which seem to occur increasingly more frequently these days. However, the rules of society about how we are to live together, cannot depend on anybody's religion. Should those, who do not believe in the same religion, be coerced with the threat of violence into succumbing to the collective delusions of religious fundamentalists?

There is only one plausible option to be taken here, and that is to base any decision concerning the whole of society on rational argumentation and scientific facts. This is exactly what this trial attempts to achieve with the term “person” and with the status of non-human great apes in society. Actually, there has been a long tradition of such transitions from religious dogma to secular wisdom regarding who should be considered a person or human since the beginning of the enlightenment era. It was a secular argument winning against the Christian tradition that widened the terms to include “barbarians”, women, people of colour, children and mentally handicapped people. The time has now come to start the debate whether to cross the Rubicon and include, for the first time in history, beings outside the biological species *Homo sapiens* (maybe keeping in mind that the category of species is also an arbitrary convention, as Darwin already wrote in his seminal work “The origin of species” (Darwin, 1859). This trial on personhood of the chimp Hiasl has triggered more international media attention worldwide than any other topic regarding animals, or even most other topics concerning Austria altogether. That alone proves that the time has come to question speciesism as the fundamental ideology of today.

However the personhood trial does not go as far as the Great Ape Project (Cavaliere and Singer, 1993), which demands basic equal rights for all great apes to life, liberty and freedom of harm. To ex-

plicitly recognize basic rights for all great apes is a political decision Parliament has to take. And indeed, parliamentary debates on this issue such as those being held in New Zealand and Spain have already begun. Nevertheless, in this particular trial, the applicants only argue that Hiasl is a person and not a thing according to today's Austrian civil law. This is not a political decision. There is no change of law necessary for Hiasl to be appointed a legal guardian.

In spite of this, if Hiasl was appointed a legal guardian and hence recognized as a person, such a step would not give him equal basic rights. It would only recognize him as a rights-holder instead of him being a thing. Which rights he thus would have would still be an open question. For example, his rights could be solely to have the laws protecting him executed, i.e. to make him become a legal player via his legal guardian, to give him legal standing. This would be the consequence, if he were accepted as a person. Furthermore, a political decision could be made to extend basic rights to life, liberty and freedom from harm to him. Nobody, however, speaks of extending Hiasl's rights further to include voting rights etc. In contrast to the basic rights, he could not benefit from those extended rights. Hence they are not in his interest and they do not need to be debated.

It has also been argued, that basic rights for great apes would diminish the idea of human rights altogether. On the contrary. Legal rights for great apes can be seen as a logical step forward in the development of human rights. Rather than being a revolutionary change of traditional human rights concepts, they are the next step evolutionarily (in both, the general as well as the biological meaning of the word). A modern understanding of human rights therefore necessarily must include at least the most basic rights for great apes. This would not take away anything from the rights that the species *Homo sapiens* possesses, but, on the contrary, would strengthen its position: In a world, where legal rights for all great apes are accepted, no-one could question the existence of rights for certain ethnicities, minority groups, or genders of *Homo sapiens*.

Clear rational arguments based on scientific facts have been put forward to argue for the inclusion of chimps into the realm of beings considered persons according to today's Austrian civil law code. It remains to be seen whether these arguments will be heard and evaluated, or whether the old religious doctrine of humans being metaphysically different from all other animals will prevail.

References

- Balluch, Martin (2003). Jetzt sind sie endlich wieder Schimpansen. *Tierschutz Konsequent* 23, 18.
- Balluch, Martin (2005). *Die Kontinuität von Bewusstsein. Das naturwissenschaftliche Argument für Tierrechte*. Wien: Guthmann-Peterson Verlag.
- Bekoff, Marc (2001). *Das unnötige Leiden der Tiere*. Freiburg im Breisgau: Verlag Herder.
- Cavalieri, Paola and Singer, Peter (1993). *The Great Ape Project. Equality beyond Humanity*. London: Fourth Estate.
- Darwin, Charles (1859). *On the origin of species by means of natural selection*. London.
- Gomez, Juan Carlos (1998). *Are Apes Persons? The Case of Primate Inter-subjectivity*. Etica & Animali 1998.
- Grondin, Jean (1994). *Kant zur Einführung*. Hamburg: Junius Verlag.
- Hecht, Jeff (2003). Chimps are Human, gene study implies. *New Scientist* from 19th May 2003.
- Heidelmeyer, Wolfgang (1997). *Die Menschenrechte*. Paderborn: Ferdinand Schöningh.
- Holmes, Bob (2006). Cultured chimpanzees pass on their skills. *New Scientist* from 14th September 2006, 11.
- Holmes, Bob (2007). Stone Age Chimps were handy with a hammer. *New Scientist* from 17th February 2007, 15.
- Hooper, Rowan (2007). Savannah chimps get armed and dangerous. *New Scientist* from 3rd March 2007, 16.
- Kant, Immanuel (1786). *Grundlegung zur Metaphysik der Sitten*. Hamburg: Meiner Verlag 1999, 63-69, Akademie Ausgabe Bd. IV 436-440.
- Lehner, Michaela (2005). *Recht und Ethik*. Diss. Universität Wien.
- Matsuzawa, Tetsuro (2006). *Cognitive Development in Chimpanzees*. Heidelberg, Berlin New York: Springer Verlag.
- Schönecker, Dieter and Wood, Allen W. (2002). Kants „Grundlegung zur Metaphysik der Sitten“. Kommentar, 142-144. Paderborn: Ferdinand Schöningh.
- Savage-Rumbaugh, Sue and Levin, Roger (1994). *Kanzi. The Ape at the Brink of the Human Mind*. New York: Wiley.
- Sommer, Volker 2000. *Von Menschen und anderen Tieren. Essays zur Evolutionsbiologie*. Stuttgart: Hirzel.
- Stanford, Craig (2002). *Significant Others: The ape-human continuum and the quest for human nature*. New York: Basic Books Inc.
- Taylor-Parker, Sue, Mitchell, Robert W. and Boccia, Maria L. (1994). *Self-Awareness in Animals and Humans. Developmental Perspectives*. Cambridge University Press.
- Taylor-Parker, Sue and McKinney, Michael L. (1999). *Origins of Intelligence. The Evolution of Cognitive Intelligence in Monkeys, Apes and Humans*. Baltimore: Johns Hopkins University Press.
- Wiener Tierschutzverein (1988). Stellungnahme des Wiener Tierschutzvereins zur Aufforderung der Republik Österreich, die beiden Schimpansen Rosi und Hiasl der Immuno AG zu übergeben. *Der Tierfreund* 2, 4.
- Wildman, Derek E., Uddin, Monica, Liu Guozhen et al. (2003). Implications of Natural Selection in Shaping 99.4% Nonsynonymous DNA Identity Between Humans and Chimpanzees: Enlarging Genus Homo. *Proceedings of the National Academy of Sciences* 100, 7181-7188.
- Zeiller, Franz von (1819). *Natürliches Privatrecht*, cited in Posch and Schwimann 2005, ABGB Bd. 1 §16 Rz 2. Wien: Orac Verlag.

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