

**MUNI**  
**LAW**

# **The Concept of Legal Persons**

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# I. What is a legal person?

- legal persons (juristic persons) is a (relatively) new one phenomenon in legal doctrine and legislation
- concept and system was mainly developed in continental Europe
- definition of a legal person?
- „*legal person is everything except the individual human being, which is recognized by the state as a subject of rights*“ (Heise 1807)

# I. What is a legal person?

- see also § 20 (1) czCG: *„A legal person is an organized body which the law provides has legal personality or whose legal personality is recognized by law. A legal person may, irrespective of the object of its activity, have rights and obligations which are compatible with its legal nature.”*
- „Právnícká osoba je organizovaný útvar, o kterém zákon stanoví, že má právní osobnost, nebo jehož právní osobnost zákon uzná. Právnícká osoba může bez zřetele na předmět své činnosti mít práva a povinnosti, které se slučují s její právní povahou.“

# I. What is a legal person?

- Basic elements
- a legal person is different from a human being
- however, like a human being it is considered to be a person in the legal sense (equipped with legal personality)
  - see § 118 czCC: „A legal person has legal personality from its creation until its dissolution.”
  - „Právní osoba má právní osobnost od svého vzniku do svého zániku.“
- contrary to a human being, a legal person does not acquire legal personality by its mere existence but by a approval by the law

# I. What is a legal person?

- see also § 15 czCC: „Legal personality is the capacity to have rights and obligations within the limits of the legal system.“
- „Právní osobnost je způsobilost mít v mezích právního řádu práva a povinnosti.“
- see § 19 (1) cz CC: „Every human being has innate natural rights [*acquired by birth*], which are known by reason alone, and is therefore considered a person. ...”
- „Každý člověk má vrozená, již samotným rozumem a citem poznatelná přirozená práva, a tudíž se považuje za osobu. ....“
- human beings do not have to justify their existence:
  - there are persons because they exist
- legal persons exist because they are justified by the state (legislation)

# II. Systems of legal persons

- Legal basis of establishment
- Legal persons established under public law
  - established as such by law or another legal acts of a public authority
  - in general, equipped with some powers of a public authority
  - e.g. provinces, municipalities, chambers
  - State (Czech Republic) see § 21 czCC: „The state is considered a legal person in private law. ...” „Stát se v oblasti soukromého práva považuje za právnickou osobu.“ – is a legal fiction that is a legal person.

# II. Systems of legal persons

## Legal persons established under private law

- established by a legal act which is governed by private autonomy
- articles of association, statutes, unilateral declaration
- f.e. joint stock company (*Akciová společnost*), company with limited liability (*Společnost s ručením omezeným*), association (*Spolek*), cooperative (*Družstvo*), foundation (*Nadace*)
- however: the state (and other legal persons established under public law) can establish private law legal persons
  - e.g. state might establish a company a joint stock company for the management of public highways
  - there is no restriction by private law
  - restrictions imposed



## II. Systems of legal persons

- Fundamental element of governance
- Corporations:
  - governed by their members (shareholders)
- Foundations (*fundace, nadace*)
  - governed by the will of the founder as laid down in the statutes
  - no members (no shareholders)!
- *Numerus clausus* of legal forms!
  - founders may only choose from the kinds of legal persons provided by law
  - no other kind of legal persons possible, private autonomy of founders restricted
  - reason: legal person as a legal entity may interact with others, any third person shall have access to information on basic elements such as representation, capital etc.

# III. Why and what for does a legal person exist?

- Historic doctrine (19th century)
- Theory of fiction (*Fiktionstheorie; Savigny*)
  - perhaps the oldest theory of legal persons
  - legal person as such does not really exist
  - its legal personality is fictitious
  - legal personality only because granted by the state
- Real entity theory (*Theorie der realen Verbandspersönlichkeit; v. Gierke*)
  - corporation is an existing organism
  - has legal personality – like a human being – just by its existence
  - personality has not to be granted by the state

# III. Why and what for does a legal person exist?

- Do these theories have any relevance for today's doctrine?
  - requirement of transparency (disclosure)
  - since a legal person has legal personality, but does not have physical presence like a human being, there is a need for transparency
  - legislation has to provide an instrument for transparency: public register
  
- restriction of state arbitrariness in deciding on whether or not a legal person should be approved
- right of all persons to pursue their interests by forming associations and corporation without being barred by the state
- overcoming the „concession system“ (to be discussed later)

# III. Why and what for does a legal person exist?

- Why do we recognize legal persons at all? What general purposes can they serve?
  - joint pursuit of interests shared by more than one person (corporations)
  - endowment of assets to (permanently) realize a specific purpose
  - limitation of liability for commercial activities (see single-member corporation)
  - performance of public tasks
- Legal persons always have to serve human interests in some way
  - there are no legal persons with a „purpose in itself“
  - relevant for foundations:
    - only foundations which have beneficiaries or serve the public can be recognized
    - no foundations the purpose of which is the management of their own assets

# III. Why and what for does a legal person exist?

## Recent discussion about e-persons?

should machines or software which act autonomously be recognized as a person?

see e.g. autonomous driving cars

should a third category besides from natural and legal persons be accepted?

can the decision-making process of a software be compared with autonomous decision of a human being?

decision-making process of a machine or software is driven by an algorithm

the real problem is the liability for damages caused by the software

recognition of an e-person would not help to solve this problem

product liability can be part of the solution

see EU law: proposal on adapting non-contractual civil liability rules to artificial intelligence (AI Liability Directive) (COM/2022/0496)

# III. Why and what for does a legal person exist?

- what about legal personality of artificial intelligence (AI)?
  - if, one day, AI would have something like self-consciousness and be able to make really autonomous decisions
  - then, perhaps, dualism of natural and legal persons must be reconsidered and extended to a third category
  - ChatGPT seems to be far from that

# IV. Establishment of a legal person

- Legal persons under public law are established by law or another legal act of a public authority
- Legal Persons under private law are established by a legal act governed by private autonomy
  - contract or unilateral act
- however: legal act by founders is just the first step in the process of establishment

# IV. Establishment of a legal person

## distinguish between founding act

- see § 123 czCC: „A legal person may be established by a constitutive act, by law, by a decision of a public authority, or in any other manner provided for by another legal regulation.”

- „Právníckou osobu lze ustavit zakladatelským právním jednáním, zákonem, rozhodnutím orgánu veřejné moci, popřípadě jiným způsobem, který stanoví jiný právní předpis.“

## and creation of legal person

- See § 126 czCC: „A legal entity is created on the date of registration in the public register.”

- „Právnícká osoba vzniká dnem zápisu do veřejného rejstříku.“



# IV. Establishment of a legal person

- what happens between the founding act (legal act by the founders) and the creation of the legal person (entry into public register)?
  - review by court (or competent authority)
- establishment of a legal person governed by private law is based on interaction between founders and state control

# IV. Establishment of a legal person

- models of involvement of state in the establishment of a legal person
- concession system
  - puts the state „in the driver seat“ (*Micheler*, Real Entity Theory)
  - from the historic perspective the oldest model (19th century and older)
  - state (government or competent authority) is free to approve or to deny the creation of the legal person (by discretionary power)
  - no enforceable right of founders to bring „their“ legal entity into existence
  - reason: legal persons (associations, foundations, corporations) were considered as kind of dangerous
  - absolute control of state considered to be necessary
  - strictly opposed by *v. Gierke* (real entity theory!)

# IV. Establishment of a legal person

- state (government or competent authority) found by experience that legal persons could be approved if they met certain requirements

- as a consequence:

- **normative system**

- legislation provides for certain requirements for the establishment of a legal person

  - e.g. name and seat of the legal person, minimum capital, appointment of representatives and other organs etc

- if those requirements are met the establishment of the legal person has to be approved

- state control is restricted to a review whether or not the legal requirements are met

- founders' right to bring their legal person to existence is granted

- normative system is most commonly applied in modern legislation

# IV. Establishment of a legal person

- see e.g. § 123 (1) czCC: „The founding legal act shall specify at least the name, the registered office of the legal entity, the subject of activity, the legal entity's statutory body and how it is formed, unless this is provided for directly by law. It shall also specify who are the first members of the statutory body.”
- „Zakladatelské právní jednání určí alespoň název, sídlo právnické osoby, předmět činnosti, jaký má právnická osoba statutární orgán a jak se vytváří, nestanoví-li to zákon přímo. Určí též, kdo jsou první členové statutárního orgánu.“
- depending on the form of legal person, there may be additional requirements
- system of registration (free creation of a legal person)**
  - after legal act by the founders, legal person has just to be registered
  - no state control
  - rarely applied
  - Liechtenstein foundation as an example

# V. Legal personality

- Legal person has legal personality
- range of legal personality?
- Basic principle:
  - equality of legal personality between natural persons and legal persons
    - legal persons, in general, have the same range of legal personality
  - protection not only of property, but as well personal rights (name, privacy etc)
  - legal persons entitled to fundamental rights
- Restrictions:
  - legal personality may be restricted by law
  - further restrictions by nature of legal person

# V. Legal personality

- see also § 20 (1) sentence 2 czCG: „... A legal person may, irrespective of the object of its activity, have rights and obligations *which are compatible with its legal nature.*”
  - „... . Právnická osoba může bez zřetele na předmět své činnosti mít práva a povinnosti, které se slučují s její právní povahou.“
  - restrictions especially in the field of family law and succession law
  - a legal person cannot marry or set up a will
  - restriction of legal personality by purpose or object of activity of legal person?
  - theory of *ultra vires*?
  - requirement of balancing the interest of the founder and other market participants

# V. Legal personality

- consequence of legal personality:
- principle of separation
  - legal sphere of legal person and legal sphere of members (shareholders) or founder are completely separated
  - members (shareholders) are not liable for the obligation of the legal person
  - legal person is not liable for the obligation of its members (shareholders)#
- in exceptional cases „piercing the corporate veil“
  - members (shareholders) are liable for obligations of the legal person
  - requirements and reasoning of such direct liability discussed in many jurisdictions
  - abuse of law? non-application of principle of separation based on its purpose?

# V. Legal personality

- see e.g. German Bundesgerichtshof II ZR 178/99:
- „If the sole shareholder induces a GmbH (company with limited liability) which is dependent on him to contribute its liquid funds to a liquidity network controlled by him, he is obliged, to take into account the GmbH's own interest in maintaining its ability to meet its liabilities and not to jeopardise its existence. If he does not comply with this obligation, he may be guilty of a breach of trust within the meaning of § 266 (1) German Criminal Code.”
- attribution of legal acts to legal persons:
  - legal person is represented by its organs or other representatives
  - see § 163 (1) czCC: The statutory body is vested with all powers that are not entrusted to another body of the legal entity by the act of incorporation, the law or a decision of a public authority.”
  - „Statutárnímu orgánu náleží veškerá působnost, kterou zakladatelské právní jednání, zákon nebo rozhodnutí orgánu veřejné moci nesvěří jinému orgánu právnické osoby.“



# V. Legal personality

- liability of a legal persons for non-contractual damages (torts)?
  - different solutions in various jurisdictions
  - see § 167 czCC: „ A legal person shall be bound by an unlawful act committed by a member of an elected body, an employee or other representative of the legal person in the performance of his or her duties towards a third party.”
  - „Právníckou osobu zavazuje protiprávní čin, kterého se při plnění svých úkolů dopustil člen voleného orgánu, zaměstnanec nebo jiný její zástupce vůči třetí osobě,“

Thank you for listening!