

MUNI  
LAW

# The Concept of Legal Persons

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# Survey of contents

- I. What is a legal person?
- II. Systems of legal persons
- III. Why and what for does a legal person exist?
- IV. Establishment of a legal person
- V. Legal personality
- VI. Principle of separation
- VII. Principle of equal treatment

# 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.*”
- „Právnická osoba je organizovaný útvar, o kterém zákon stanoví, že má právní osobnost, nebo jehož právní osobnost zákon uzná. Právnická 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.“
  - „Právnická 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 might be imposed by constitution or by public law

## 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.”
- „Právnickou 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.”
- „Právnická 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 approve or to deny the creation of the legal person (by discretionary power)
  - no enforceable right of founders to bring „their“ legal entity to 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.“
  - see sect 53 CH-ZGB: „Legal persons have all the rights and duties other than those which presuppose intrinsically human attributes, such as sex, age or kinship.“
- full legal personality in the field of property rights

# 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.”
  - „Právnickou osobu zavazuje protiprávní čin, kterého se při plnění svých úkolů dopustil člen voleného orgánu, zaměstnanec nebo jiný její zástupce vůči třetí osobě,“

# V. Legal personality

## criminal responsibility?

criminal responsibility as a consequence of personal fault

criminal responsibility of legal persons nevertheless adopted in some areas of law (competition law) and, on a general basis, in some European countries (Austria [Verbandsverantwortlichkeitsgesetz], Switzerland: „If a felony or misdemeanour is committed in an undertaking in the exercise of commercial activities in accordance with the objects of the undertaking and if it is not possible to attribute this act to any specific natural person due to the inadequate organisation of the undertaking, then the felony or misdemeanour is attributed to the undertaking. In such cases, the undertaking shall be liable to a fine not exceeding 5 million francs.“)

In same cases, *both* the natural person *and* the legal person are responsible

## protection of personality (name, reputation etc)

## protected by fundamental rights

## restrictions especially in the field of family law and succession law

## a legal person cannot marry or set up a will

# V. Legal personality

□ restriction of legal personality by purpose or object of activity of legal person?

□ theory of ultra vires?

□ dominant in Anglo-American law

See § 102 (a) (3) DGCL : "... the purpose of the corporation is to engage in any lawful act or activity for which corporations may be organized under the General Corporation Law of Delaware, and by such statement all lawful acts and activities shall be within the purposes of the corporation, except for express limitations, if any;  
..."

□ based on the idea that a legal entity can engage only in those kinds of activities which had been approved by the state(UK law)

□ can also be effected by a restriction of power of representation of organs  
has the same effect

□ restricts activities of a legal persons to the intention of the founders

# V. Legal personality

- restricts activities of a legal persons to the intention of the founders
- but is a major impediment for market participants who cannot rely on the validity of transactions performed with legal entity

## □ German speaking countries:

- idea of ultra vires rejected
- legal personality not restricted by purpose or object of activity of legal person
- improves efficiency of market transactions since validity cannot be avoided on grounds of ultra vires
- however: market transactions may be in contradiction to the intention of the founders (shareholders)

# V. Legal personality

- trend to convergence of both concepts?
  - theory of ultra vires losing power in some countries
  - see sect 39 UK Companies Act 2006: „(1) The validity of an act done by a company shall not be called into question on the ground of lack of capacity of anything in the company's constitution.“
  - unrestricted legal personality: legal act done by the company beyond purpose or object of activity could be invalid on grounds of abuse of power to represent the company

# V. Legal personality

- see also Art 9 European directive relating to certain aspects of company law (ex Art 9 1st dir company law):
  - (1) "Acts done by the organs of the company shall be binding upon it even if those acts are not within the objects of the company, unless such acts exceed the powers that the law confers or allows to be conferred on those organs. However, Member States may provide that the company shall not be bound where such acts are outside the objects of the company, if it proves that the third party knew that the act was outside those objects or could not in view of the circumstances have been unaware of it. Disclosure of the statutes shall not of itself be sufficient proof thereof.
  - 2nd sentence can be seen as a concession to ultra vires theory
  - (2) „The limits on the powers of the organs of the company, arising under the statutes or from a decision of the competent organs, may not be relied on as against third parties, even if they have been disclosed.”

# V. Legal personality

□ see also Art 13 Rome I regulation:

- In a contract concluded between persons who are in the same country, a natural person who would have capacity under the law of that country may invoke his incapacity resulting from the law of another country, only if the other party to the contract was aware of that incapacity at the time of the conclusion of the contract or was not aware thereof as a result of negligence.
- Art 13 Rome I regulation is an exception from the principle that legal personality and capacity to act is governed by the personal statute (law of citizenship or seat or registration)
- Art 13 Rome I regulation is to be applied on legal persons by analogy

# VI. Principle of separation

- 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?

# VI. Principle of separation

- 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.”  
 (“Existenzvernichtungshaftung”)
- See e.g. German Bundesgerichtshof II ZR 199/17:
- “The merger of a transferring legal entity that is ready for insolvency as a means of organising its liquidation without liquidation and thereby causing or deepening the insolvency of the acquiring legal entity may constitute an intervention that destroys its existence.”

# VI. Principle of separation

- other reasons for piercing the corporate veil (as discussed by doctrine)
  - Undercapitalisation (serious imbalance between the company's capitalisation and its economic activity)
  - Lack of clear differentiation between the assets of the company and the shareholders
  - de facto managing director: someone who is not a board member but acts as such
    - may be liable in the same way as a real board member
    - is not seen as a case of piercing the veil but as extension of the provisions on liability of board members

# VI. Principle of separation

- Liechtenstein law: reverse piercing („umgekehrter Haftungsdurchgriff“)
  - liability of a legal person for obligation addressed to a shareholder or founder (foundation)
  - “If the founder or beneficial owner of a legal entity has misused or used it to circumvent a law, cover fraudulent acts, deliberately breach contractual obligations or violate fundamental principles of company law, then the judge is permitted to take action against the legal entity as an extraordinary remedy.” (Liechtenstein Supreme Court 11 UR 2005.48-92).
  - considered as abuse of law

# VII. Principle of equal treatment?

- Legal persons established under private law are based on the private autonomy of founding members
- members of a corporation may have different legal positions
  - specific rights may be attached to a specific shareholder (e.g. being part of the board of directors, right to nominate a member of the supervisory board)
  - a shareholder may accept a weaker position than the other shareholders
    - e.g. child of founder accepts a smaller portion of the company's profits for the first years
- however: principle of equal treatment after the establishment of a legal person is widely accepted

# VII. Principle of equal treatment?

- See sect 1186 (2) ABGB: “Shareholders are to be treated equally under the same conditions”. (see also sect 47a Austrian AktG)
- See sect 53a German AktG: “Shareholders are to be treated equally under the same conditions.”
- see sect 706 Swiss OR: “... challenges may be brought against resolutions (of the shareholders’ assembly) which ... give rise to the unequal treatment or disadvantaging of the shareholders in a manner not justified by the company’s objects; ...”
- see sect 717 (2) Swiss OR: the members of the board of directors ... “must afford the shareholders equal treatment in like circumstances.”
- Principle of equal treatment applies “under the same conditions”

# VII. Principle of equal treatment?

## Practical relevance

- Exclusion of subscription rights for capital increases
- Consent to the transfer of shares in the event of transfer restrictions
- Introduction of maximum voting rights
- Information of shareholders by the board of directors?

Information to majority shareholder considered as not in violation of principle of equal treatment if it helps to establish and to execute efficient group management objective justification is required

## takeover law

Equal treatment of shareholders in case of a public tender offer

## Exceptions if provided by law

e.g. squeeze out of a minority of not more than 10% of capital

# VII. Principle of equal treatment?

- Decision of the Austrian Supreme Court (6 Ob 55/18h)

- Facts:

- Limited partnership founded in 1963
  - Two (male) partners with unlimited liability, (at least) another one with limited liability
  - Excerpt from the partnership agreement:

Art VII.1. „In the event of the death of a partner, his legal male heirs shall take over his rights and obligations and the company shall be continued with them. ...”

Art VII. 4. “In the event that any person other than a male descendant of the founding shareholders should be appointed by a testamentary disposition as heir or legatee to take over a Shareholder's interest or to join the Company, the other Shareholders shall have the right to consent to such joining or to pay out the share ... .”

- One of the partners with unlimited liability dies in 2017, leaving his wife and a daughter behind
  - appointed his daughter as legal successor to his share of the partnership

## VII. Principle of equal treatment?

- Succession of the daughter is refused by surviving shareholders
- Daughter claims that Art VII.1 and VII.4. are nul and void insofar as women do not have the same legal position as men
- Decision of the Supreme Court is based on two lines of argumentation
  - unclear how they relate to each other
  - first line of reason: based on a European directive there is a law on equal treatment in the field of labor
    - law also applies on activities as a freelancer
    - partner with unlimited liability has to represent the company and to manage the business
    - can be considered as a freelancing activity according to the law on equal treatment

# VII. Principle of equal treatment?

- Second line of argumentation: much more fundamental
- Right of equal treatment is a fundamental right protected by the constitution and the European Convention of Human Rights
- Fundamental rights in general are addressed to the state (legislation)
- but they may have some relevance in the relation between private individuals as well
- they may serve as instrument to substantiate general clauses such as public policy (good morals) (*indirect effect of fundamental rights*)
- until 1975 Austria family law was based on the principle that man is the „head of the family“
- today such a provision would be considered as null and void, based on the fundamental right of equal treatment and on the law of equal treatment in the field of labor
- can someone claim that a contractual provision is void if it conflicts with today's standards but could not have been contested when the contract was concluded?

# VII. Principle of equal treatment?

- in general, the standards at the time of the conclusion of the contract have to be applied
- but: when someone relies on the validity of a clause in a contract which was not against public policy (good morals) back then, but which is in contradiction to today's standards, he commits an act of abuse of law
- Result: Daughter of deceased shareholder may acquire his share without the consent of other shareholders
- Consequences of the decision unclear:
  - can the reasoning of the Supreme Court also be applied on other forms of discrimination? (such as non-marital birth, religion etc)
  - can the reasoning of the Supreme Court also be applied on other legal acts than partnership contracts? (such as corporation, testament, foundations etc)

# VII. Principle of equal treatment?

- Decision of the European Court of Human Rights 5.7.2022,  
70133/16, *Dimici*

## □ Facts

- „Mülhak“ is a Turkish foundation established in the 16th century
- managed by the descendants of the founder
- assets of 207 million Euro, annual profit approximately 3,7 million Euro
- purpose of the foundation
- profits go to charitable institutions at first hand
- surplus will be given to daughters of male descendants as minimum maintenance
- rest (which is most of the money) will be given to male descendants
- female descendants could not participate in the rest

# VII. Principle of equal treatment?

## Reasoning of the ECHR

- based on Art 14 European Convention of Human Rights: „The enjoyment of rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status“.
- Discrimination of (late) mother of claimants because
  - she had been excluded from profits and
  - could not pass on status of beneficiary to her descendants
- violation of Art 14
- Convention addressed to member states, not to individuals
- however, courts of member state failed to react to the discriminatory clause in the statutes of the foundation
- Violation of the state's duty to protect

# VII. Principle of equal treatment?

- ban on discrimination is part of European ordre public
- prevails against private autonomy, freedom of property, freedom of association
- no balancing with other legal interests
- could discrimination be justified by other fundamental rights? (e.g. freedom of religion?)