LEGAL MONOGRAPHS

Artificial Legal Entities: Essays on Legal Agency and Liability

Karel Beran, Petr Čech, Bohumil Dvořák
David Elischer, Jiří Hrádek, Václav Janeček
Zdeněk Kühn, Pavel Ondřejek

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AUTOBIOGRAPHIES OF THE AUTHORS

Doc. JUDr. Karel Beran, Ph.D. (born 1975 in Prague) graduated from the Faculty of Law at Charles University in Prague (2000) and received the degrees of JUDr. in 2001 and Ph.D. in 2005. His dissertation titled "Právnické osoby veřejného práva" (Legal Entities of Public Law) was published by Linde, Prague, in 2006. In 2011, he successfully defended his habilitation thesis titled "Pojem osoby v právním smyslu" (The Concept of Person in Law) published by Leges in 2012 and was appointed associate professor in the field of Theory, Philosophy and Sociology of Law. Since 2003, he is a member of the Department of Legal Theory and Legal Doctrines at the Faculty of Law, Charles University, where he teaches Legal Theory, Theory of Juristic Persons and Legal Information Systems. Between 2014 and 2018, he served as a vice-dean for graduate studies (Master's) in the Faculty of Law. From 2006 to 2009, he also practiced law as an attorney in Prague.

As a visiting researcher, Karel Beran worked and studied at universities in Europe, USA, and Australia. He completed a long-term study visit at the University of Michigan Law School, Ann Arbor (USA), supported by Fulbright-Masaryk scholarship programme in the academic year 2016/2017, a two-semester scholarship stay at the Law Faculty of the University of Salzburg (Austria) within doctoral studies in 2002/2003, and medium-term study visits at Freie Universität Berlin, Fachbereich Rechtswissenschaft (Germany) in 2011, at Griffith Law School in Brisbane (Australia) in 2007 and at Cardiff Law School (UK) in 2006. He also completed many short-term study visits, e.g. at Trinity College Dublin (Ireland), Universität Salzburg Rechtswissenschaftliche Fakultät (Austria), and Ludwig-Maxmilians-Universität München, Juristische Fakultät (Germany).

Karel Beran has published voluminously on issues relating to law of persons and its theoretical foundations. He has long been interested in the status of persons in law, especially that of legal entities. In this regard, his work focuses on issues related to legal personality, legal capacity, theory of legal persons, theory of legal acts, and on corporate liability. In the area of legal philosophy, Karel Beran's research addresses legal norms (e.g. in terms of their mandatory or non-mandatory nature) and the issues of temporal effects of legal norms, including the problem of retroactivity. He has authored or co-authored seven monographs and over 55 scholarly articles and papers published in the Czech Republic and abroad. He has also co-authored university textbooks for legal theory, substantive civil law, and criminal law.

JUDr. Petr Čech, LL.M., Ph.D. (born 1975 in Prague) graduated from the Faculty of Law at Charles University in Prague, where he received the academic degrees of Mgr. (1998), JUDr. (2004) and Ph.D. (2012) and completed a post-graduate course of

German law at the University of Cologne by gaining the academic degree of LL.M. in 2003.

Since 2002, he has served as lecturer at the Department of Business Law of the Faculty of Law, Charles University, and he has simultaneously served as counsel in Glatzová & Co., s.r.o. law firm since 2011. From 1999 to 2002, he was the Director of the Legislative and Legal Department of the Czech Securities Commission. From 2002 to 2010, he was also a member or chairman of a chamber of the appellate committee of the Czech National Bank. Between 2004 and 2006, he was the chairman of the supervisory board of an OTC market organiser—RM-SYSTÉM, a.s. From 2006 to 2010, he worked as an assistant to the presiding judge of Chamber No. 29 of the Supreme Court of the Czech Republic. In 2014 and 2015, he served as an adviser to the first deputy Minister of Justice and from 2015 to 2018, he advised directly the Minister of Justice.

He publishes and gives lectures especially on the legal regulation of limited companies, securities and business obligations. He has authored or co-authored 11 scholarly monographs in the area of commercial law and over 180 papers on commercial law published in numerous specialised scholarly journals.

JUDr. Bohumil Dvořák, Ph.D., LL.M. (born 1976 in Prague) completed his studies of law and legal science at the Faculty of Law, Charles University in Prague, in 2001. In 2002 and 2003, he completed the post-graduate Master's programme at the Eberhard Karls University of Tübingen (Germany), where he obtained the academic degree of Magister Legum (LL.M). He finished his doctoral studies in the field of "Private Law I" at the Faculty of Law in Prague in 2008 and received the academic degree of Ph.D. He has worked at the Faculty of Law, Charles University, from 2008, firstly as external lecturer and, since 2010, as a research fellow at the Centre for Comparative Legal Studies. He is currently a lecturer at the Department of Civil Law. He is the founding member of the Czech Civil Procedure Society and an international member of the Wissenschaftliche Vereinigung für internationales Verfahrensrecht. He was appointed as judge in 2005 and since 2016, he has served as a judge at the Supreme Court of the Czech Republic.

Bohumil Dvořák completed a long-term study visit to Albert-Ludwig University in Freiburg (Germany) focusing on civil procedure as part of the Humboldt Foundation scholarship in 2011–2012, and short-term study and research stays at the University of Vienna (Institut für Zivilverfahrensrecht), the Regensburg University (Department of prof. Dr. Peter Gottwald) and the Max Planck Institute for Comparative and International Private Law (Hamburg).

He is the author of the monograph titled Právní moc civilních soudních rozhodnutí (Legal Force of Civil Court Decisions) (C. H. Beck 2008) and has co-authored multiple (incl. international) monographs, commentaries and dozens of scholarly articles. He publishes papers and articles on the relationship between procedural and substantive law, as well as on the classical legal concepts (legal force of a decision, plea of set-off, cession agreement, aleatory agreements, etc.). He is a member of the working group on recodification of civil procedure at the Ministry of Justice.

Doc. JUDr. PhDr. David Elischer, Ph.D. (born 1980 in Ústí nad Labem) graduated from the Faculty of Law at Charles University in Prague in 2005 and received the degrees of JUDr. in 2006 and Ph.D. in 2009. His dissertation is titled "Odpovědnost za škodu: protiprávnost a škoda ve světle moderních deliktních trendů." (Liability for Damage: Unlawfulness and Damage in Light of Modern Trends in Torts). In 2015, he successfully defended his habilitation thesis titled "Darování a jeho podoby v novém soukromém právu" (Gift and its Forms in New Private Law) (Wolters Kluwer 2016) at the Faculty of Law, Charles University, and was appointed associate professor in the field of civil law. Since 2005, he has worked at the Department of Civil Law of the Faculty of Law, Charles University, where he teaches Substantive Civil Law, Obligations Arising from Legal Acts, and Contracts and Torts.

David Elischer has completed a number of short-term study visits at European and US universities (Sorbonna in 2008; Santiago de Compostella as an invited speaker in 2008; University of Fort Lauderdale, Florida, where he taught the course "Tort Law in Europe and in the Czech Republic" in 2012).

At the Department of Civil Law, David Elischer teaches substantive civil law and studies certain issues of civil tort law, contractual law and family law. In the past, he has participated in working groups of the Legislative Council of the Czech Government on drafting the Civil Code in the areas of rights in rem and tort law. He has co-authored commentaries to the Civil Code, textbooks of civil law and a several monographs (including international). He is a member of the international academic group Common Core of European Private Law and contributes to Centre d'accès aux droits étrangers (Juriscope). He is also a member of editorial boards of a number of scholarly journals (Jurisprudence, AUC Iuridica, Právní rádce).

JUDr. Jiří Hrádek, Ph. D., LL. M. (born 1978 in Domažlice) graduated from the Faculty of Law at Charles University in Prague in 2002 and then continued his studies at the Hamburg University between 2000 and 2001. He also completed the LL.M. degree programme at Eberhard Karls University of Tübingen (2002–2003) and his post-graduate research degree at Charles University (2002–2009). From 2002 to 2015, he worked as a trainee attorney and an associate at the PRK, Gleiss Lutz and Schönherr law firms based in Prague. He is currently a research fellow at the Centre for Comparative Legal Studies at the Faculty of Law, Charles University, and a company lawyer in Zeppelin CZ s.r.o.

In 2002 and 2003, he completed research visits at the European Centre of Tort and Insurance Law (ECTIL) in Vienna. Furthermore, in 2007, he completed a traineeship at the European Commission's Directorate-General for Health and Consumer Protection.

Jiří Hrádek is a member of the editorial board of Jurisprudence, member of the European Centre of Tort and Insurance Law (ECTIL) and a member of the European Law Institute (ELI). He specialises in civil law, especially tort law. He is the author of Předsmluvní odpovědnost – culpa in contrahendo (Pre-contractual Liability—Culpa in Contrahendo) (Auditorium 2009) and has co-authored commentaries to the Czech

Civil Code (Wolters Kluwer 2014, C. H. Beck 2016), the Code of Civil Procedure (Wolters Kluwer 2016) and the publication titled Deliktní právo (Tort law) (C. H. Beck, 2017). He regularly publishes articles in Czech and international law journals (Jurisprudence, Journal of European Tort Law, and European Review of Private Law).

JUDr. Bc. Václav Janeček, Ph.D., M.St. (Oxon) (born 1987) is a researcher at the Department of Legal Theory and Legal Doctrines of the Faculty of Law, Charles University in Prague, and a doctoral candidate at the Faculty of Law, University of Oxford, where he also works as an editor of the Oxford Business Law Blog. Václav comes from the town of Rožnov pod Radhoštěm. Since 2007, he had studied law and philosophy at Charles University, and then spent a study year at the University of Sussex in Brighton before commencing his first doctoral degree in Prague in 2013. In 2017, he obtained a doctorate in Theory, Philosophy and Sociology of Law for his thesis on civil law liability (Faculty of Law, Charles University), and a master's in legal research degree (M.St.) for his thesis on non-compensatory damages (Faculty of Law, University of Oxford).

Václav has gained research experience at several institutions. He worked as a post-doctoral researcher at the Oxford Internet Institute in the Digital Ethics Lab. He pursued his research also in Hamburg (Max Planck Institute for Comparative and International Private Law), Vienna (Institute for European Tort Law) and Florence (European University Institute). Václav Janeček taught theory of law and a course dedicated to legal information systems in Prague, and legal philosophy in Oxford.

In his work, Václav studies issues overlapping law, philosophy and information technologies. His recent publications include Kritika právní odpovědnosti (Critique of Legal Responsibility) (Wolters Kluwer 2017) and "Ownership of personal data in the Internet of Things" (2018) 34 Computer Law & Security Review. Václav Janeček regularly publishes in the Czech Republic and abroad. For more details on author's work, see http://www.vaclav-janecek.cz.

Prof. JUDr. Zdeněk Kühn, Ph.D., LL.M., S.J.D. (born 1973 in Nymburk) graduated from the Faculty of Law at Charles University in Prague (1997) and received the degrees of JUDr. in 2000 and Ph.D. in 2001. In 2006, he became an assistant professor of the theory, philosophy and sociology of law, and has gained a full professorship in 2018. He also completed studies at the University of Michigan Law School, obtaining the degrees of LL.M. in 2002 and S.J.D. in 2006. Since 2008, he has served as a judge of the Supreme Administrative Court in Brno.

Zdeněk Kühn also lectures at multiple US law schools (Cornell University, University of South Carolina, University of San Francisco, Nova Southeastern University in Ft. Lauderdale etc.) and in Croatia. He hosts educational courses for judges in Slovakia, Croatia, Bulgaria, Romania, Poland, and other countries. As a scholar, he specializes in the area of interpretation of law and comparative public law. He has authored or co-authored a number of monographs and commentaries, and over 100 scholarly articles and papers published in the Czech Republic. Zdeněk Kühn has

also published an English monograph entitled The Judiciary in Central and Eastern Europe: Mechanical Jurisprudence in Transformation? (Martinus Nijhoff, Brill 2011) and dozens of scholarly papers in English, Chinese, Arabic, and Russian.

JUDr. Pavel Ondřejek, Ph.D. (born 1982 in Ostrava) completed his studies of law and jurisprudence at the Faculty of Law, Charles University in Prague, in 2007. In 2012, he completed his doctorate at the same faculty in the field of theory, philosophy and sociology of law. Since 2008, he has been teaching courses on theory of law and legal philosophy as well as several elective courses on theoretical aspects of human rights. He has been a research fellow at the Human Rights Research Centre of Charles University since 2012. Between 2007 and 2014, he also worked at the Department of International Co-operation and the European Union of the Ministry of the Interior of the Czech Republic.

Pavel Ondřejek has completed a long-term study stay at the Faculty of Law of the University of Antwerp (International and European Legal Studies Programme) and short-term study and research stays at the European University Institute (Florence), Central European University (Budapest), and Max Planck Institute for Comparative Public Law and International Law (Heidelberg).

He is the author of the monograph entitled Princip proporcionality a jeho role při interpretaci základních práv a svobod (The Proportionality Principle and its Role in Interpreting Fundamental Rights and Freedoms) (Prague 2012) and has further authored and co-authored over 40 scholarly articles and chapters in collective monographs and conference proceedings focusing mainly on the theory of fundamental rights, transformation of public law, and the application of the proportionality principle. His work was featured in premiere law journals home and abroad, including European Constitutional Law Review, European Public Law, and Espaço Jurídico Journal of Law.

LIST OF ABBREVIATIONS

ABGB
Allgemeines bürgerliches Gesetzbuch (Austrian Civil Code)

BGB
Bürgerliches Gesetzbuch (German Civil Code)

BGHZ
Entscheidungen des Bundesgerichtshofes in Zivilsachen (Decisions of the Federal Court in civil matters)

Civil Code
Act No. 89/2012 Coll., the Civil Code also as New Civil Code (zákon č. 89/2012 Sb., občanský zákoník) (Czech law)

Code Civil
Code civil (French Civil Code)

Commercial Code
Act No. 90/2012 Coll., on companies and cooperatives (Corporations Act) [zákon č. 90/2012 Sb., o obchodních společnostech a družstvech (zákon o obchodních korporacích)] (Czech law)

Convention
Convention for the Protection of Human Rights and Fundamental Freedoms (Statement by the Federal Ministry of Foreign Affairs No. 209/1992 Coll.)

Criminal Code
Act No. 40/2009 Coll., the Criminal Code (zákon č. 40/2009 Sb., trestní zákoník) (Czech law)

Labour Code
Act No. 262/2006 Coll., the Labour Code (zákon č. 262/2006 Sb., zákoník práce) (Czech law)

PETL
Principles of European Tort Law

1964 Civil Code
Act No. 40/1964 Coll., the Civil Code (zákon č. 40/1964 Sb., občanský zákoník) (Czech law)

1991 Commercial Code
Act No. 513/1991 Coll., the former Commercial Code (zákon č. 513/1991 Sb., obchodní zákoník) (Czech law)

FOREWORD

Both juristic and natural persons can have rights and duties and be held liable for their actions. In this regard, there is practically no difference between them. But while we can easily identify natural persons (humans) and immediately recognise their actions, our concept of a juristic person does not stem from our natural experience and is rooted in a purely legal construction. No one has ever seen a juristic person or has tangibly experienced how that person expresses its will. It is the law that must provide answers to the following questions in order to establish a particular juristic person's legal rights and duties: How does a juristic person act? What are the characteristics of a juristic person's legal responsibility? What is unlawful conduct by a juristic person and on what basis does legal responsibility of such a person arise? This monograph seeks to answer those questions.

In this respect, it is very important to note that in the current theoretical debates there is almost no specialisation, in "the law of persons" as such. Various theorists specialise in questions regarding legal conduct across the domains of private and public law, especially in connection with private law of contracts and public-law decision-making, or in relation to private law of torts and public-law wrongs. Why is there no specialisation in "law of persons" as such? The answer to this question can be sought in the premise that a person, as a rights holder, can never be severed from the given right and from the manner in which the latter arose. This is also why there is no such thing as a "law of juristic persons" in general.[1] Juristic persons are therefore analysed mostly in connection with the rights and obligations that arise for them, whether based on contracts or because of wrongs (offences) that they commit.

It also follows that the search for an answer to the question of how juristic persons can legally act and be legally responsible and liable (not only for their acts) requires collaboration amongst lawyers with a wide range of expertise. The team working on this book comprised not only those whose primary focus is the law of juristic persons and its theoretical background, but also lawyers who specialise in legal acts (also called "legal transactions") and legal responsibility (liability) in a number of legal sub-disciplines such as tort law, contract law, corporate law, civil procedure, comparative law, administrative law, and human rights law. This collaborative approach to issues regarding juristic persons from the viewpoints of various legal fields is then reflected in the structure of the monograph and aligns with the expert profiles of the authors of individual chapters.

[1] Where one refers to a "law of juristic persons" of some kind, this always relates only to a certain type of juristic persons, such as (business) corporations, associations or foundations; in those cases, we speak about corporate law, law of associations and foundation law, respectively.

The lead author, **Doc. JUDr. Karel Beran, Ph.D.,** has long been researching into theoretical aspects of juristic persons from the perspective of general legal theory. This is why, in the initial chapters, he explains the concept of "a person" in law from an analytical viewpoint. He further examines the notions of legal personality (personhood) and legal capacity, followed by explication of how a juristic person can perform legal acts and be held liable for those acts. **JUDr. Pavel Ondřejek, Ph.D.** specialises in theoretical issues related to public law, such as the principle of proportionality and fundamental rights. Accordingly, he wrote a chapter of this monograph that approaches juristic persons as holders of fundamental rights that are guaranteed on the constitutional level. Another chapter explores the law applicable to legal acts which are performed by juristic persons through their governing bodies. That chapter was authored by **JUDr. Petr Čech, Ph.D., LL.M.,** who is an expert in commercial and corporate law. Since juristic persons' acts can be viewed from both substantive and procedural viewpoints, **JUDr. Bohumil Dvořák, Ph.D., LL.M.**, who is a judge of the Czech Supreme Court and also an academic, addressed this issue in a chapter dealing with procedural acts performed by (not only) juristic persons.

The work on the monograph also involved experts in private-law liability. **Doc. JUDr. PhDr. David Elischer, Ph.D.** wrote a chapter dealing with no-fault liability of juristic persons. Various aspects of civil liability have also long been the domain of **JUDr. Jiří Hrádek, Ph. D., LL.M,** who, as well as being a research fellow at the Centre for Comparative Legal Studies at the Faculty of Law, Charles University, is a lawyer practising in business. He wrote a chapter analysing fault-based liability of juristic persons. **JUDr. Bc. Václav Janeček, Ph.D., M.St. (Oxon),** is still at the beginning of his academic career. In a chapter dealing with vicarious liability, he presented some results of his doctoral research which he had conducted at the Faculty of Law, Charles University. The part of book dealing with liability is concluded with a chapter on liability of juristic persons for a wrong (offence) under public law. That chapter was written by **Prof. JUDr. Zdeněk Kühn, Ph.D., LL.M., S.J.D.,** a Professor of theory of law and also a judge of the Czech Supreme Administrative Court.

This monograph seeks not only to answer the questions mentioned above, but also to contribute to a wider international debate on this topic. This is why the book was written in English and published both in the Czech Republic and abroad. The concept of a juristic person inevitably is present (at least as a theoretical construct) in every legal system, regardless of whether the valid legislation defines such a concept (which is usual in the continental legal systems) or not (as is the case in common law). Every legal order thus needs to specify the way in which a juristic person shall act and be held liable. Such rules, however, should be sought primarily in positive law, rather than in legal theory. Accordingly, positive laws (most notably the legislation) should—rather than any *a priori* theory of juristic persons, or perhaps an *a priori* theory of legal acts and liability of juristic persons—serve as the starting point for explaining legal acts and liability of juristic persons. That is also the starting point for this monograph. In particular, we explore those issues from the perspective of Czech law. In the light of this legislative background, the monograph aims to describe the

theoretical construct which is present in Czech law to point out issues that could be encountered by other legal systems, especially in the neighbouring countries, i.e. Slovakia, Poland, and Hungary. Indeed, these countries share a common history (both recent and distant) with the Czech Republic. Consequently, certain problems and questions dealt with by Czech lawyers might also be of interest in those countries.

This monograph is one of the main outputs of the grant research project entitled "Legal Transactions and Legal Responsibility of Juristic Persons". Nonetheless, this is not the only result. Alongside this English monograph, the project also yielded a research monograph in Czech entitled "Legal Transactions and Legal Responsibility of Juristic Persons after Recodification of Czech Private Law". While the Czech monograph deals with a similar topic, it does so from a different perspective, namely from the viewpoint of re-codified Czech law and the problems brought about by the recodification. The Czech law in force thus served as a background for these monographs; in this respect, both publications include several similar research findings. However, they have different purposes. The present monograph is intended for foreign readers, while the Czech book aims to reach Czech lawyers and deals primarily with issues related to recodification of Czech law.

As has already been mentioned, this monograph came into existence within the project "Legal Transactions and Legal Responsibility of Juristic Persons", which was funded by the Czech Science Foundation. This was a three-year-long project which involved ten researchers who are active at the Faculty of Law of Charles University in Prague, and more than ten other contributors—undergraduate and postgraduate students. In the context of the Czech Republic, this was a large project and has resulted in several research books, dozens of research articles published in the Czech Republic and abroad, and also the present monograph. None of the above would have been possible without the funding provided by the Czech Science Foundation, for which the Foundation deserves our gratitude. I would also like to thank the Faculty of Law of Charles University, in particular its Dean, Prof. JUDr. Jan Kuklík, DrSc., and Vice-Dean for Science, Prof. PhDr. JUDr. Michal Tomášek, DrSc., and also Prof. JUDr. Aleš Gerloch, CSc., head of the Department of Legal Theory and Legal Doctrines, for their co-operation and continuing support for our project.

I am also grateful to all members of our research team, who dealt vigorously with various aspects of legal acts and liability of juristic persons for three years; all this in an effort to create this joint work. In this regard, I want to highlight the efforts undertaken by the project's secretary, JUDr. Pavel Ondřejek, Ph.D., and the administrative support provided by the staff of the Research Office, namely by Ing. Eva Aljanabi and by Mgr. Kamila Stloukalová. Both of them deserve gratitude for their proactive and helpful approach. Special thanks are also addressed to Ms Zuzana Peřinová, the secretary of the Department of Legal Theory and Legal Doctrines, for her perfect administrative support and communication with the team members. Thanks also belong to other employees of the Economic and HR Department, in particular to Ing. Iva Schmidtová, Vladimíra Marešová, JUDr. Květa Molnárová, and Ms Iveta Zichová, as well as the entire staff of the Library at the Faculty of Law of Charles University.

This book was produced during the final stages of our research project. It took us more than a year to draft the individual chapters several times, then to restructure, review, edit, again redraft and supplement them to agree on this final version. It was much easier to manage this process thanks to the excellent, professional and virtually everyday support by Mgr. Iva Rolečková, the Editor-in-Chief of the Wolters Kluwer Czech Republic (a publishing house), who deserves our special appreciation. Both the international reach of the Wolters Kluwer publishing and the director of the Wolters Kluwer Czech Republic, Ing. Petr Král, have made it possible to publish our monograph not only in the Czech Republic, but also in the other countries of the Visegrad Four—Slovakia, Hungary, and Poland. We are very thankful for that.

A number of master's law students (Faculty of Law, Charles University) also assisted us with preparing the manuscript of this book. In particular, they researched some of the literature, edited and supplemented the footnotes, and finalised the list of references. In this respect, I want to highlight the work by Ms Veronika Zmeková and Ms Silvie Grulichová. Thanks are also due to the students whom I have not named, but who also contributed—in one way or another—to the completion of this monograph.

For us to be able to present the results of our research for international debate, it was necessary to publish the book in English. Much appreciation and gratitude must be conveyed in this regard to the Orange Tree translation company, and namely to Mgr. Martin Štulík and Mgr. Alžběta Soperová, who showed their expertise and understanding of the specificities of legal language (they both are not only translators, but also graduate lawyers), and undertook the uneasy task of transferring to English the abstract terminology of continental law, which is often very difficult to translate. I believe that they succeeded in this task and deserve not only my gratitude, but also my respect, for doing so.

Our special thanks also belong to our reviewers, Prof. dr hab. Ewa Bagińska (Faculty of Law and Administration, University of Gdansk) and Doc. JUDr. Martin Škop, Ph.D. (Faculty of Law, Masaryk University). They both managed to read the manuscript of our book swiftly and provided us with many valuable comments and suggestions.

Last but not least, let me express my sincerest gratitude to those who dedicate their time and effort to study this book, reflect on it and make use of its arguments and ideas in one way or another.

On behalf of everyone who has contributed to this book of ours, I wish this monograph will find as many readers as possible.

Prague, December 2018

Karel Beran
(lead author)

CHAPTER ONE
INTRODUCTION

(WHAT ARE THE COMMON FEATURES AND EFFECTS OF LEGAL ACTS AND OF RESPONSIBILITY, OR LIABILITY, OF JURISTIC PERSONS?)

The terms "legal conduct" (or "legal transaction")[1], "legal responsibility" (or "liability")[2] and "juristic person"[3] are construed and interpreted as mutually isolated

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[1] ZAMFIR, P. B., NEAGU, E. The Legal Conduct's Place in the Present Configuration of the Legal State. *Annals of Constantin Brancusi University*. 2007, pp. 81–86; MONAHAN, J. H. *Method of Law: An Essay on Stattement and Arrangement of Legal Standard of Conduct.* London: Macmilan and co., 1878; KOCOUREK, A., WIGMORE, J. H. *Evolution of law: select readings on the origin and development of legal institution. Volume III.* Boston: Litle, Brown, and company, 1918, p. 533; FRÖDE, Ch. *Willenserklärung, Rechtsgeschäft und Rechtsgeschäftfähigkeit*. Tübingen: Mohr Siebeck, 2012; BORK, R. *Allgemeiner teil des Bürgerliches Gesetzbuch.* Tübingen: Mohr Siebeck, 2006, pp. 155–211; LARENTZ, K., WOLF, M. *Allgemeiner Teil des Bürgerlichen Rechts*. München: C. H. Beck, 2004, pp. 393–507; MEDICUS, D. *Allgemeiner teil des BGB*. Heidelberg: C. F. Müler, 2006, pp. 73–98; WEBER, A. D. *Systematische entwicklung der Lehre von der natürlichen Verbindlichkeit*. Schwerin: Bödner, 1800; SCHLOSSMAN, S. *Willenerklärung und rechtsgeschaft*. Kiel: Lipsius und Tischer, 1907; MUGDAN, B. *Die gesammten materialen zum Bürgerlichen gesetsbuch für das Deutsche reich. Band I.* Berlin: R. v. Decker, 1899, p. 421; FLUME, W. *Allgemeiner Teil des Bürgerlichen Rechts. Band II: Das Rechtsgeschäft*. Berlin, Heidelberg: Springer Verlag, 2012.

[2] HONORÉ, T. *Responsibility and Fault*. Oxford: Hart Publishing, 1999; JANSEN, N. The Idea of Legal Responsibility. *Oxford Journal of Legal Studies*. 2014, vol. 34, no. 2, pp. 221–252; KUTZ, C. Responsibility. In: COLEMAN, J., SHAPIRO, S. (eds.) *The Oxford Handbook of Jurisprudence and Philosophy of Law*. Oxford: Oxford University Press, 2002, pp. 548–587; LUCAS, J. R. *Responsibility*. Oxford: Clarendon Press, 1993; RADKO, T. N. Legal Liability: Basic Approaches to Its Concept in Modern Jurisprudence. In: CHERNIAVSKY, A. G. (ed.) *Legal liability: The Main Approaches in Modern Science*. Moscow: Rusciense, 2017, pp. 4–8.

[3] WOLGAST, E. *Ethics of an Artificial Person: Lost Responsibility in Professions and Organizations*. Stanford, Calif.: Stanford University Press, 1992; TEUBNER, G. Enterprise Corporatism: New Industrial Policy and the "Essence" of the Legal Person. *The American Journal of Comparative Law*. 1988, pp. 130–155; HALLIS, F. *Corporate Personality: A Study in Jurisprudence.* Aalen: Scientia Verlag, 1978 (reprint); OTT, C. *Recht und Realität der Unternehmenskorporation*. Tübingen: Mohr Siebeck, 1977; EISENBERG, M. *The Structure of the Corporation: a Legal Analysis*. Boston: Little, Brown & Co, 1976; JOHN, U. *Die organisierte Rechtsperson: System und Probleme der*

concepts, seemingly having no common features. Indeed, which common features could they have if they each belong systemically to a different area? After all, legal conduct is classified as one of the types of legal facts establishing, modifying or terminating a (subjective) right, while legal responsibility is understood to be an obligation to compensate any damage arising out of legal facts (unlawful conduct and unlawful state of affairs) and, finally, the concept of juristic person is also interpreted entirely autonomously, in particular in terms of whether or not an entity is a person, whether it has legal personality *(personhood)* and whether it enjoys or is deemed to have legal capacity.

On rare occasions, the concepts of legal conduct, legal responsibility and juristic person are considered in mutual conjunction, in searching for an answer to the following questions: "What is legal conduct of a juristic person?" and "What is legal responsibility of a juristic person?" Ergo, this monograph aims to show that, in order to determine the preconditions for the capacity of a juristic person to engage in legal conduct and to bear legal responsibility, the terms "legal conduct", "legal responsibility" and "juristic person" need to be analysed in their mutual context.

When looking for an answer to the aforementioned questions we must take into account that the legal basis for the creation of a person's right or obligation consists either in a legal regulation alone, or in a legal regulation in conjunction with a certain **legal fact**. The capacity to engage in legal acts is often considered a prerequisite for the creation of rights and obligations. However, this is not entirely accurate. Indeed, a person can incur rights and obligations not only on the basis of a certain legal act (also referred to in this text as legal conduct), but also as a consequence of an unlawful act (wrong, or delict), unlawful state of affairs *(quasi delict)*, or legal event (i.e. for example birth, death or running of time). Nonetheless, it is equally true that a person's capacity to incur rights and obligations through legal acts (legal conduct) is intrinsically associated with his personality (personhood). A person vested with legal personality, as a mere capacity to have rights and obligations, but unable to engage in legal conduct, whether himself or through the acts of his representative, would be a "legally-crippled" individual, rather that a person.[4]

However, the Czech notion of *"právní jednání"* (legal act, or legal conduct) in fact covers two concepts, at least under the applicable Czech law. Legal act in the sense of a legal title means the result of legal conduct, rather than legal conduct as

Personifikation im Zivilrecht. Berlin: Duncker & Humblot, 1977; RITTNER, F. *Die werdende juristische Person: Untersuchungen zum Gesellschafts- und Unternehmensrecht*. Tübingen: Mohr Siebeck, 1973; NÉKÁM, A. *The Personality Conception of the Legal Entity*. Cambridge, Mass: Harvard University Press, 1938; WORMSER, A. *Disregard of the Corporate Fiction and Allied Corporation Problems*. New York: Baker, Voorhis & Co, 1927; CARTER, J. *The Nature of the Corporation as a Legal Entity*. Baltimore: M. Curlander, 1919.

[4] Nonetheless, the same conclusion cannot be reached in respect of other legal facts. To illustrate this, we can refer to Section 1481 of the Civil Code, which excludes certain persons from inheritance as a consequence of their previous unlawful conduct. Such persons are prevented from inheriting upon occurrence of a legal event—the testator's death. However, this incapacity in no way affects the operation of the concept of person under the law.

such, which is a mere precondition for the establishment of a legal title. This can be best illustrated on a typical example of a legal title, an agreement (contract). An agreement is a bilateral legal act arising from the consensus of the parties. It is thus a result of two unilateral legal acts that are, upon reaching a consensus, transformed into an agreement as a bilateral legal act—legal title. It follows from the above that the notion of legal act is used, first, to denote a **prerequisite** (legal conduct aimed e.g. to establish an agreement) and, second, as a notion referring to the **result** of such conduct (the agreement). This is also the reason why the Civil Code uses the concept of **legal act** in two different places. First, "legal act" is defined as a **type of legal fact**, giving rise to the creation, amendment or termination of a certain person's rights and obligations; second, legal acts are mentioned in connection with legal capacity, i.e. the capacity of a person to incur rights and obligations **through his own legal acts (or, in other words, conduct)**. Nonetheless, the said two meanings of the notion of legal act need to be distinguished from one another. In terms of **legal acts** performed by **persons**, this notion does not refer to the resulting act, but rather to legal conduct as a prerequisite for the establishment of a legal title.

Such a legal construct, based on the concept of prerequisite and consequence, applies not only to legal acts, but rather to all legal facts. The difference is that legal facts, independent of human will (i.e. an unlawful state of affairs, a legal event), give rise to a person's right or obligation irrespective of the person's acts, whether legal or unlawful. This means that the imputability of rights and obligations arising as a consequence of an unlawful state of affairs or a legal event depends on the provisions which govern the legal fact in question. We can refer as an example to the concept of no-fault liability, where obligations are imputed to a specific person based on an unlawful state of affairs, as an unlawful result of the events beyond the person's control. This fact is important, in particular, because the question of imputability of no-fault liability does not necessarily depend on the person's general (legal) capacity, but can rather be subject to *ad hoc* provisions pertaining to a specific right or obligation.

The above calls for an explanation of the mutual relation between legal acts (conduct) and liability of juristic persons. Indeed, where a legal act is understood in the sense of a legal title, i.e. the result, which can take form of an agreement (for example), this legal title serves merely as a means for the given person to acquire—not only potentially, but actually—certain rights and obligations. Nonetheless, the establishment of a legal title (an agreement) requires a previous legally relevant act (conduct) imputable to the person concerned, which represents a (mere) precondition for the creation of the title, as its consequence. The same must also apply to legal liability. Assuming that legal liability arises from an unlawful act or unlawful state of affairs, which—in the light of the above—can be understood as a consequence, we must ask a question: what preceded the creation of the legal title from the viewpoint of the person concerned? In this sense, we are confronted with the existence of an unlawful act or illegal result of events beyond the person's control as a prerequisite for the establishment of a legal title, similar to a person's legal conduct as a precondition for the creation of an agreement.

Consequently, legal acts and legal liability of juristic persons alike must follow a similar concept as the creation of such person's rights and obligations. Both an obligation established by a contract and an obligation ensuing from legal liability call for a question as to what preceded the inception of that obligation. It is nonetheless true in both these examples that the law must stipulate the manner in which the legal titles are imputable to a specific person as grounds for the establishment of that person's rights and obligations. However, the manner of imputing the above differs for juristic persons and natural persons. Accordingly, the individual chapters of this monograph deal with the question of how rights and obligations are imputed to persons in connection with legal acts (conduct), unlawful acts and unlawful state of affairs, respectively.

Chapter Two, titled "What entity could engage in legal conduct?" shows why every entity (for it to be considered a legal person) must be vested with "legal personality" and simultaneously the capacity to "engage in legal conduct" (i.e. perform legal acts). There are two essential prerequisites for a person to be able to engage in any legal conduct: reason and will. Nonetheless, law commonly operates with the concept of "persons lacking legal capacity", i.e. entities that have no or insufficiently developed reason and will. This logically calls for a question how such persons could enter into legal relations and thus incur rights and obligations. To understand how a person lacking reason and will could engage in legal conduct, we first need to explain the meaning of the notion of "conduct" and how it differs from "legal conduct". The first difference lies in the purpose of "conduct" and "legal conduct", respectively. The second then lies in the question as to who can engage in "conduct", on the one hand, and in "legal conduct", on the other hand. Once those questions are answered, it then becomes clear how law permits even a person without reason and will, i.e. lacking legal competence, to engage in legal conduct.

Chapter Three builds on the theoretical fundaments laid in Chapter Two and explains how a **juristic person can "engage in legal conduct"**, primarily providing an answer to the question of what is, or what can be considered, reason and will of a juristic person. A feature common to both natural and juristic persons is the requirement that they must be vested with legal personality. The way a legal personality is discerned nonetheless differs for natural and juristic persons. Indeed, in the case of natural persons, our senses allow us to determine who a natural person is and what legal conduct can be attributed to him (or her). Such an approach cannot be used in the case of juristic persons. Accordingly, for juristic persons, answers to both aforesaid questions need to be derived from the applicable law. However, even the applicable law cannot explain why an entity other than a human being is considered a person or why only specific conduct that is described by the applicable law can be considered **legal conduct of a juristic person**. Therefore, we must analyse the conclusions which follow from theories of legal persons as concerns their legal acts (conduct). It then has to be shown, in particular, how such theories explain the substance and creation of juristic persons' reason and will, and how it is at all possible for a juristic person to possess its own reason and will and, accordingly, to be deemed to enjoy legal capacity in a sense similar to natural persons.

Even though a juristic person, as a legal entity, can be the holder of rights, it is quite controversial to assume that a juristic person should also enjoy fundamental rights guaranteed by national constitutions or international treaties. This is probably so because a juristic person is a mere legal concept, whereas fundamental rights represent human rights stemming from the human nature and enshrined in the law. Unlike juristic persons, a human being enjoys freedom and human dignity, but is also vulnerable and often requires special protection provided by the state—this, in aggregate, forms the fundament of that person's human rights. This brings us to the following question: Do juristic persons need protection on the constitutional level and, if so, why? Would it not rather be sufficient and efficient to protect fundamental human rights only where exercised by a human being individually or collectively? **Chapter Four** describes in more detail the current situation where case law, not only in the Czech Republic, attributes to juristic persons certain fundamental rights, specifically those that correspond to the substance of a juristic person. The chapter further deals with related questions of justification of fundamental rights of juristic persons, and also with differences among the approaches used in the Czech Republic, the Federal Republic of Germany and the Strasbourg system of protection based on the European Convention for the Protection of Human Rights and Fundamental Freedoms. Special focus is placed on the question of existence of fundamental rights of juristic persons of public law, which is one of the most controversial issues in this area and the subject of ongoing theoretical discussions and also disputes arising in specific cases before the Czech Constitutional Court.

A juristic person can engage in legal conduct only in that certain acts of an individual, i.e. a natural person, are imputed to it. It is irrelevant in this respect whether the individual concerned is designated as "director", i.e. a member of the juristic person's governing body (or representative of a director where the office of director is discharged by another juristic person), or as a representative of the juristic person. In all the aforementioned cases, someone else's reason and will are imputed to the juristic person. The difference lies in the fact that law can attribute different effects to acts of a natural person discharging the office of director and to acts of a natural person acting as another ("common") representative, respectively. Indeed, the fact that the manners of representation vary is well illustrated by the traditional differentiation—not only in the Czech Civil Code—between contractual representation and statutory representation. The author therefore asks the question of whether the acts of a juristic person's director are to be considered contractual or statutory representation, or even specific *("sui generis")* representation belonging to neither of the aforementioned categories. The solution to this issue is not a mere theoretical exercise, but rather a key to answering the question of whether and to what extent such acts are to be governed by rules governing contractual representation or by those applicable to statutory representation. Consequently, **Chapter Five** primarily clarifies **the nature of directors' acts made on behalf of a juristic person under substantive law**. The solution is decisive in terms of application of the rules governing representation, for example with respect to the following questions: Under what

circumstances is a director deemed to act on his own behalf and not on behalf of the juristic person? In which cases are acts performed by a director of a juristic persons (or by other persons) imputable to the juristic person? When does, and when does not, the ban on representation in case of a conflict of interests under Section 437 of the Civil code apply to acts taken by a member of the governing body? Similarly, we need to answer the question why a director of a juristic person may grant a power of attorney, on behalf of the juristic person, to further representatives, irrespective of Sections 438 and 439 of the Civil Code, and whether or not it is possible to ratify retroactively acts made by a director who, in doing so, failed to comply with the prescribed manner of representation as he acted on his own although he was obliged to act jointly with another director. Finally, given that the Czech Civil Code designates directors of juristic persons as mere "representatives", it is once again necessary to resolve the question of joint representation by such a director and a corporate agent.

Juristic persons engage in legal conduct not only in substantive, but also in procedural relations. **Chapter Six** deals with the requirements on such procedural acts within civil court proceedings. It shows that there are substantial differences between "procedural acts" and "legal acts (conduct)" in terms of the requirements for effectiveness, as well as from the viewpoint of their interpretation, consequences of defects and the possibility to subject them to certain conditions. In all the aforementioned respects, the theory of procedural law emphasises the principle of legal certainty—court proceedings should serve to protect an infringed or jeopardised right of a person, rather than give rise to disputes as to whether a certain procedural act is or is not effective. Such an approach adopted in procedural law enables the judge and the parties to concentrate on the merits of the legal case, and accordingly, to hear and resolve the case within a reasonable period of time. Legal acts performed in civil proceedings form another important legislative aspect discussed in this chapter. Under what conditions do substantive legal acts performed during civil proceedings give rise to consequences? Does a plea of set-off invoked by a defendant before the court result automatically in termination of the relevant debt? And what about acknowledgement of debt by the defendant? Does this have any consequences in pending proceedings? This part of the monograph further addresses the area of procedural agreements, which are only scarcely regulated by the Czech legislation. The reason behind this fact is revealed in this chapter. In conclusion, it provides an answer to the question of why procedural law follows a different concept of acts taken by of juristic persons than substantive law. Can the provisions of the Czech Code of Civil Procedure (see Sections 21 and 21b of the Code of Civil Procedure) which unequivocally stipulate that a juristic person has its own will and define who specifically may express its will be considered a mistake or do they rather indicate the legislator's intent to adopt a different approach to acts of juristic persons than the one applied in substantive law?

To a certain degree, "legal personality" is associated with the person's "mental capacity" in terms of his capacity to **bear legal responsibility (liability)**. Assuming that a juristic person is vested with legal personality and is, accordingly, competent to engage in legal conduct, one must inquire about its possible mental capacity, i.e.

capacity to be a subject of responsibility (liability). Nonetheless, is the capacity to perform **own unlawful acts** even required for juristic persons to have the capacity to be liable under the law? To answer this question, we first need to explain what provisions of law are required for a legal person to be deemed the perpetrator of an offence, wrong or infraction, and how a specific obligation is imputable to a juristic person based on its legal liability. However, answers to this question will differ depending on whether such liability is based on private or public law; moreover, private-law liability can be broken down to liability based on fault and no-fault liability. **Chapter Seven** therefore explains the general prerequisites for a juristic person to be liable under the law. This then serves as the starting point for subsequent chapters, which deal specifically with liability of juristic persons under private law in the forms of fault-based, no-fault and vicarious liability; the following chapter then analyses public-law, or administrative liability of juristic persons.

There can be no reasonable doubt that juristic persons have the capacity to be legally liable within the regime of **no-fault liability**. Indeed, such liability arises irrespective of whether the juristic person in question has the capacity to perform its own or someone else's unlawful acts; the only relevant precondition for the inception of such liability is that its elements described by the law are present—they usually link possible liability with the existence a (loss) event defined by the law. The above could suggest that there are no substantial differences between juristic and natural persons in terms of no-fault liability. Is this conclusion really accurate? Is there not any difference in the manner of imputing the obligation to compensate damage to natural and juristic persons, respectively? How are harmful consequences caused by operation imputed to juristic persons? What are the limits of no-fault liability? Who shall or must benefit from the grounds for exoneration stipulated by law? How can juristic persons prove that they exercised all the care that can be reasonably required? Is there any difference between **contractual** and **non-contractual** liability of a juristic person, as both said types of legal liability are considered no-fault liability? **Chapter Eight** aims to provide answers to the questions asked above, although there is no general solution and the individual questions need to be assessed on a case-by-case basis, depending on the specific description of the conduct or event concerned. Indeed, the specific elements described by the law determine what can be imputed to juristic persons on the grounds of no-fault liability.

Liability based on fault is arguably the most complex case of legal obligation arising from liability. The reason is that, unlike in the case of no-fault liability, the juristic person in question not only must have the capacity to incur legal obligations directly imputable to it as a consequence of the relevant conduct or events described by the law, but the same person must also have committed an **unlawful act** and this act must be considered **culpable**. However, the answer to this question asked in **Chapter Nine,** is opened, rather than closed by this statement. Indeed, the relevant considerations must follow from the premise that a juristic person can never act itself and is always dependent on acts of natural persons whose acts are imputed to—and therefore considered acts of—the relevant juristic person. This applies both to lawful

and unlawful acts. However, it follows from the Czech Civil Code that conduct imputed to a juristic person as its legal act (Section 151 of the Civil Code) is not the same as that imputed to a juristic person as its unlawful act (Section 167 of the Civil Code, in conjunction with Section 2914, where applicable). Accordingly, the following fundamental question needs to be resolved: **what does the law consider unlawful conduct giving rise to legal liability of juristic persons?** Moreover, a mere existence of unlawful conduct does not suffice for liability based on fault to arise. Even in the case of juristic persons, it holds that the given unlawful conduct must be culpable. **What is considered culpable conduct of a juristic person, and does a juristic person have the capacity to be liable for a wrong?** Since culpability is presumed in private law—in the least severe form of negligence—, it is also necessary to clarify the notion of negligent conduct of a juristic person and the extent to which the capacity of a juristic person to be liable for a wrong can be inferred. Nonetheless, in order to come up with an answer to this question, we first need to analyse the notion of negligence in general, i.e. not only with respect to juristic persons, but also in relation to natural persons.

Chapter Ten examines whether a juristic person can bear liability under private law in a form other than **vicarious liability**. The question is phrased in theoretical terms, in particular from the viewpoint of jurisprudence as it developed in Czechoslovakia at the beginning of the 20th century. The introductory part of this chapter summarises the genealogy of the term liability (in Czech: *"ručení"*) and the notion of vicarious liability in Czech legal doctrine. Attention is then turned to the concept of delegated binding effect in the context of juristic persons and their capacity to be liable for a wrong. The key question is whether juristic persons can be liable individually or directly, or whether they can only bear vicarious liability, i.e. be liable for someone else's wrong. The aim of the chapter is, among others, to present and develop the viewpoint of the Normative theory (pure theory of law) of vicarious liability. Chapter Ten builds primarily on historical and theoretical analysis of the Czech law, the Czech and German legal terminology and the ground-breaking work by a Czech representative of the Normative Legal Theory, František Weyr, whose publications are mostly unknown in English-speaking countries. English literature generally associates the Normative Legal Theory with an equally innovative jurist, Hans Kelsen, who nonetheless did not devise any detailed theory of vicarious liability. The discourse comprised in Chapter Ten not only presents Weyr's ideas and the genealogy of the concept of liability, but also places them into the context of contemporary Czech law and legal liability of juristic persons, and further develops them in terms of both theory and jurisprudence.

Chapter Eleven first describes the development of administrative legal liability of juristic person in the Czech Republic, or Czechoslovakia, which can be traced back to the legislation of the First Czechoslovak Republic. This is necessary to understand why Act No. 250/2016 Coll., on liability for infractions and proceedings concerning infractions, effective from 1 July 2017, represented such a fundamental change and breakthrough for the Czech Republic. The reason is that said law offered a solution to

the general issues of administrative punishment, where however juristic persons show some important specificities. The main difference compared to infractions committed by natural persons must necessarily be inferred from the answer to the question of what is considered an administrative offence committed by a juristic person. The law must necessarily lay down how unlawful conduct of natural persons (or consequences of such conduct) can be imputed to a juristic person. In this context, it is necessary to analyse when infractions are committed in the framework of activities of a juristic person and in which cases liability for an infraction is borne only by the natural person concerned or by the juristic person, or by both these persons simultaneously. The following questions need to be answered, in particular: Can a juristic person bear liability if it is a mere "shell company", where no natural persons can be identified to whom an administrative infraction could be imputed? Under what conditions is a juristic person deemed to have exerted all reasonable efforts and thus exonerated from liability? Is it possible to take account of the financial standing of a juristic person in imposing sanctions? An absolutely crucial aspect from the viewpoint of administrative punishment of juristic persons is the prohibition of double punishment for the same act. Such a situation could indeed easily occur in the case of juristic persons since one act can correspond to the merits of several infractions laid down in various sectoral laws. In the light of the case law of the European Court of Human Rights, it is further necessary to analyse in what cases parallel and administrative liability of juristic persons is permissible and when it is not.

CHAPTER TWO
WHAT ENTITY CAN ENGAGE IN LEGAL CONDUCT?

2.1 Introduction

The difference between a person enjoying legal capacity and a person lacking such capacity lies in the fact that the former has the capacity to engage in "its own legal conduct". This leads to the question as to whether a juristic person can really engage in "its own legal conduct". Assuming that there exists "someone's own" legal conduct, the opposite must also exist, i.e. "someone else's" conduct. Hence, it is necessary to discuss the term legal conduct *(which term includes legal transactions, legal acts as well as legal actions—trans.)* as such and to explain the difference between the conduct of a human being, on the one hand, and the legal conduct of "persons", on the other hand. From the systemic point of view, this monograph therefore first addresses the essence of legal conduct and its differences compared to general human conduct. The subsequent part poses the question of who "enjoys the capacity" to engage in legal conduct and what the notion of "legal capacity" actually means. The answers to the aforementioned questions allow explanation of the essence of the legal conduct of a juristic person and, therefore, also whether or not a juristic person really enjoys legal capacity and to what extent a juristic person bears legal responsibility and hence is the subject of responsibility.

2.2 What is the meaning of conduct?

In order to grasp the meaning of legal conduct, it is necessary to first explain the notion of "conduct" as such. In this respect, I follow from the assumption that not all expressions of a human being *vis-à-vis* third persons constitute its conduct. I consider that factual "behaviour" of a human being, on the one hand, needs to be distinguished from his "conduct", on the other hand.[5] **Nonetheless, any considera-**

[5] In this respect, see Boguszak: *"Nevertheless, depending on circumstances, an unlawful state of affairs can even be caused by the behaviour of an individual who is incapable of controlling or assessing the consequences of his acts. On the contrary, unlawful conduct, even accidental, is a volitional and*

tions in this sense require distinguishing between the conduct of an individual and mere "behaviour" not constituting his conduct. In perceive the difference between human conduct and behaviour in that conduct is a qualified, conscious behaviour controlled by reason, while behaviour as such is merely unwitting expression manifested in one or another way *vis-à-vis* third persons. Where an individual consciously performs a certain act, he knows what he is doing and accordingly, he necessarily aims to achieve a goal, or purpose, which represents his interest. Determining one's interest is indeed conditional on his rational considerations, and pursuing such interest is thus cognitive conduct, while following one's instincts is conative behaviour.

Admittedly, human conduct may sometimes be irrational and may appear, from an external point of view, to jeopardise the very interests of the individual concerned. How, then, is it possible that acts of a human being that are often driven by the unconscious mind (the conative part of his brain) are mostly considered his conduct? The answer to this question is linked to the differences and similarities between a human being and an animal.[6] Both human beings and animals have instincts and it would be manifestly incorrect to claim that individuals (never) follow their instincts. Reason is what distinguishes (or at least is deemed to distinguish) a human being from an animal and can thus potentially serve as a corrective to his unwitting, or conative behaviour. Accordingly, law assumes that each human being is endowed with reason, which is manifested *vis-à-vis* third persons through his conduct, rather than mere unconscious behaviour. On the same grounds, in principle law is based on the assumption that human behaviour is considered conduct unless the individual concerned has lost the capacity of reasoning and is thus incapable of comprehending his acts. By the same token, the behaviour of an individual who is endowed with reason but, at the time of his action, is incapable of reasoning because he cannot control his action (i.e. acts in the heat of passion) is not considered to be his conduct.[7] Such acts represent mere behaviour, analogous to that of animals. An individual who merely "behaves" without engaging in any conduct is considered to lack mental capacity and, consequently, law in principle attributes no legal consequences to his acts. Nonetheless, there is an exception to every rule.[8]

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conscious behaviour." BOGUSZAK, J., ČAPEK, J., GERLOCH, A. *Teorie práva [Theory of Law]*. Prague: ASPI Publishing, 2004, p. 134.

6 In this respect, see ŠKOP, M. *Právo v portmoderní situaci [Law in Postmodern World]*. Brno: Masaryk University, 2008, p. 103 et seq.

7 In this respect, I follow from the wording of Section 24 of the Civil Code, which stipulates that conduct which an individual is *"capable of assessing and controlling"*, rather than mere "behaviour", is a precondition for arising of responsibility. *A contrario,* this leads me to the conclusion that, where an individual is *"incapable of assessing or controlling"* his behaviour, he does not engage in any conduct.

8 In this respect, see Section 2920 (2) of the Civil Code, which reads as follows: *"If a minor who has not yet acquired full legal capacity or an individual who suffers from a mental disorder was incapable of controlling his behaviour and assessing its consequences, the victim is entitled to compensation for damage if this is fair with regard to the financial standing of the wrongdoer and victim."*

Having regard to the above, we can conclude that conduct means purposeful behaviour characterised by the following two components:

(i.) **external manifestation of will**, consisting in behaviour (either in the form of an act or an omission); and

(ii.) a **purpose determined by application of reason** which is pursued by such behaviour.

The existence of an individual endowed with reason and will is hence a factual precondition of each and every conduct.

2.3 What are the specific aspects of legal conduct?

Having regard to the above, the difference between conduct in general and conduct in legal terms (i.e. legal conduct) lies either in the **purpose** pursued by the given individual or in the **entity** that engages in the legal conduct. I am of the opinion that the purpose of legal conduct always (in an analytical sense) consists in the creation or termination of a (subjective) right. However, can legal conduct be considered a mere subset of conduct in general, as defined above? An affirmative answer necessarily means that any legal conduct also requires reason and will as a *conditio sine qua non*. This leads to a question what prerequisites must be fulfilled for an individual's conduct to give rise to a new right (and a corresponding obligation).

In this respect, I follow the legal positivism school of thought, which presupposes that subjective right can only arise where permitted by (objective) law. Concordantly with Kelsen, law can be perceived as an enforcement system of norms intended to command human behaviour.[9] Ostheim correctly argues in this context that, while enforcement can only apply to external human behaviour, *"from the viewpoint of the incentive behind such behaviour, law can be described as a system of norms intended to satisfy individual interests and equipped with enforcement powers"*. Consequently, **the legal system implicitly involves evaluation of the assumed interests of its individual subjects.**[10] Law thus may consider certain interests as desirable and necessary, and thus commanded. On the other hand, certain interests will be considered undesirable, and thus prohibited.[11] However, along with the aforementioned two distinct polarities, the legal system also recognises interests that are irrelevant from the legal viewpoint and the parties involved are therefore at liberty to decide whether or not they wish to pursue them. Any conduct in pursuit of such interests is permitted, in the sense that it is neither commanded nor prohibited.[12]

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9 KELSEN, H. *Reine Rechtslehre*. 2. Auflage. Wien: Deuticke, 1960, p. 31.

10 OSTHEIM, R. *Zur Rechtsfähigkeit von Verbänden im österreichischen bürgerlichen Recht*. Wien: Manz, 1967, p. 4.

11 In such cases, individuals are not allowed to determine their own interests. Such elimination of one's own deliberation exists, for example, in respect of the prohibition of drug abuse or prohibition of incest, on the one hand, and conscription as a commanded conduct, on the other hand.

12 OSTHEIM, R.. *Zur Rechtsfähigkeit von Verbänden im österreichischen bürgerlichen Recht*. Wien: Manz, 1967, p. 5.

It follows from the above that conscious mind must always (at least *ex hypothesi*) be involved in establishment of a right, in order to evaluate whether or not the creation of such a right is beneficial for the subject of the right and worth pursuing, or whether it expresses the subject's "interest". The role of the volitional component is indispensable, especially to account for the fact that any permission also includes the possibility to refrain from exercising such permission, or authorisation.[13] Contrary to fulfilling a duty, the individual's will is not "forced" to avail itself of an entitlement granted by law.[14] Establishing a right therefore requires a stronger will than fulfilling a statutory duty or complying with law.[15] In view of the above, Ostheim argues that every individual, as a personified unit of human interests, evinces two attributes: **legal capacity** and **capacity to engage in legal conduct**. *"**Legal capacity** (Rechtsfähigkeit) then means at least the potential capacity to enjoy rights and bear obligations. This potential is manifested in the ability to independently pursue and establish legal relations with the aim to achieve interests approbated by law. **Capacity to engage in legal conduct**, conversely, builds on completely different fundaments. The capacity to engage in (legal) conduct is not founded on a unity of protected interests, but rather stems from the capacity of such a unit to exert its own deliberation, and hence to have its own will and apply its volition to enter into legal relations. Accordingly, the capacity to engage in (legal) conduct is closely linked to legal capacity as such, since a mere capacity to be a subject of rights would be devoid of a purpose without the capability of performing any acts and thus establishing legal relations."*[16]

To summarise the above, legal conduct is a type of conduct in general that aims to establish, modify or terminate a right. Human reason and will are a *conditio sine*

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[13] The concept of rights followed by the author is in fact neither the concept of will nor the concept of interest, but rather a combination of the two, requiring both an interest and a will to create a right. Related to the above is the right bearer, being an individual capable both of determining his own interest and of engaging his will to pursue that interest. For differences between the interest theory and the will theory of rights, cf.: https://plato.stanford.edu/entries/rights/#2.2

[14] Similar considerations to those invoked for the creation of a right also apply to exercise of a pre-existing right. Indeed, "someone" can enforce "his" right only if he himself is capable of being aware of "his" right in the first place. This is conditional on the existence of reason. Nonetheless, reason as such is not sufficient to allow the individual concerned to "enforce" his right, as his will must also be present.

[15] This leads us to the metaphysical problem of creating a legal obligation. As a matter of fact, reason, will and authorisation to establish a legal obligation cannot be perceived as the cause of creation of a norm, but rather as a *conditio sine qua non,* which nonetheless is insufficient in itself. If reason, will and authorisation were the cause of creating a norm, then by the logic of a causal link, the norm would arise as a cause and the relevant obligation as a consequence. However, this is not so. Creation of a norm presupposes that the individual concerned is intellectually and legally capable of wishing something, i.e. have his own will. That, though, is a necessary, but insufficient precondition. Someone wishing to establish an obligation not only needs to have his own will, but must simultaneously give rise to (or cause) such a specific obligation. The question of whether or not an obligation has been established is conditional upon the existence of free will and exercise of that free will. This is thus another question that cannot be answered by means of analytical legal philosophy and therefore needs to remain unresolved.

[16] OSTHEIM, R. *Zur Rechtsfähigkeit von Verbänden im österreichischen bürgerlichen Recht*. Wien: Manz, 1967, pp. 28–29.

qua non for both legal conduct and for any conduct in general. A human being lacking reason and will cannot engage in any "conduct". That being the case, we might perhaps conclude that he cannot engage in "legal conduct" either. The problem is that "legal conduct" is not reserved for human beings, but rather for persons. While any human being can engage in conduct, only natural or juristic person can engage in legal conduct. What is the meaning of legal conduct of persons?

2.4 Who can engage in legal conduct?

What does a man exist? Maybe to apply his reason, and thus engage in conduct. Nonetheless, persons, rather than human beings, are the focal point of jurisprudence. Consequently, jurisprudence cannot provide an answer to the question of the essence a human being and *raison d'être* of human existence (otherwise, it would amount to theology and not science). By the same token, jurisprudence does not ask why a human being exists, but why a person exists. The answer is not that complicated: a person, whether natural[17] or—all the more so—juristic, is a legal concept aimed to create a bearer of rights and obligations; i.e. every person is vested with legal personality.

The fact alone that law attributes legal personality to a person, in the sense of the *"capacity to have rights and obligations within the legal order"* (Section 15 of the Civil Code), certainly does not mean that a certain person has, in fact, specific private rights. The capacity to have rights merely indicates that a person may have certain rights and obligations. Nonetheless, if persons are designed to have rights and obligations, a way must exist for them to acquire rights and obligations. This means that, from the viewpoint of acquiring rights, legal personality is a necessary, but insufficient precondition. Boguszak concludes in this respect that *"a legal title is a precondition for an entity to have certain rights and obligations"*.[18] "Legal conduct" is arguably the most common and usual way of acquiring rights and obligations.[19] In this sense, legal conduct ranks among those categories of legal facts that presuppose the existence of, and are thus associated with, the reason and will of the person

[17] In this respect, see Kelsen: *"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."* (KELSEN, H. *General Theory of Law and State*. New Brunswick (U.S.A.): Transaction Publishers, 2007, p. 96.)

[18] BOGUSZAK, J., ČAPEK, J., GERLOCH, A. *Teorie práva [Theory of Law]*. Prague: ASPI Publishing, 2004, p. 135.

[19] Admittedly, rights can also be acquired in a way other than through legal conduct, i.e. typically based on legal events; nonetheless, even such legal events are, in most cases, associated with circumstances depending on the reason and will of a human being. By way of example, I can mention good faith in case of acquisition by prescription. Good faith is, in fact, hardly conceivable without the subjective aspect of a human being, to whom it must be ultimately attributed.

concerned.[20] Moreover, since the purpose of any person within law is to acquire rights and obligations, every person must necessarily enjoy the capacity to acquire rights in one way or another, for which human reason and will are indispensable.

This might lead to the following conclusions:

1. A human being who is endowed with reason and will **necessarily has** the capacity to engage in legal conduct and hence is a person;
2. A human being who lacks reason and will **does not have** the capacity to engage in legal conduct and hence cannot be a person.

The correctness, or incorrectness, of the above conclusions can be verified by ascertaining whether or not law envisaged or envisages any situations where the opposite applies, i.e. where

1. a human being who is endowed with reason and will **does not have** the capacity to engage in legal conduct and is not a person;
2. a human being who lacks reason and will **is a person and does have** the capacity to engage in legal conduct.

2.5 Slave as a human being who is endowed with reason and still is not a person

The concept of slavery provides an answer to the question as to whether it is possible for **a human being to be endowed with reason and will and still lack the capacity to engage in legal conduct on his own behalf**. While a slave was a human being undoubtedly bestowed with reason and will, it is generally understood that he was a thing. Nonetheless, the legal perception was more complex in reality than it would seem *prima facie*. Indeed, Roman law understood a "slave" not only as a thing (i.e. *"res corporales"*), but also as a person.[21] And yet, how could a slave be deemed a thing and

[20] Acquisition of rights and obligations by a person solely on the basis of legal facts that are independent of human will, such as legal events, might seem conceivable in theory. And yet, I am convinced that reason and will must always be present, even in relation to facts that do not depend on human will. To illustrate this point, we can take the example of attaining the age of majority, and thus full legal capacity, at 18. If an individual who is 18 or older lacks the power of reasoning, meaning that the concept of time and passing of time escapes him and he is not aware of his age, he is also unable to recognise that his legal status changed once he attained the age of 18 and he now has the capacity to perform legal transactions that he previously was not authorised to perform. That is not to say that no right can be established independently of human will. Indeed, legal personality of a human being arises upon his birth and is vested even in new-born children, who are completely unaware of having one. However, that is to say that exercise of any right presupposes that the entity concerned is aware of it in the first place, for which reason is indispensable. I therefore believe that reason and will must be involved not only in legal conduct, but actually in all cases, regardless of what specific legal fact gave rise to establishment, amendment or termination of a right.

[21] This follows *inter alia* from the fact that Gaius conceives slave law as *"ius quod ad personas pertinent"* and clearly refers to a *"persona servilis"* and *"persona servi"* (Gai Institutiones, 1.121: *"In eo solo praediorum mancipatio a ceterorum mancipatione differt, quod personae serviles et liberae, item animalia, quae mancipi sunt, nisi in praesentia sint, mancipari non possunt…"*) Gai Institutiones, 3.189: *"… sed*

an object of legal relations, which could be donated, sold or leased, and simultaneously also a person having the "status of a slave"? Such a perception would seem *a priori* inaccurate since an object cannot be simultaneously a party to legal relations (a subject). However, is that really impossible? I believe that in fact, even the current legislation envisages situations where a human being becomes an object of legal relations.

As an example, we can refer to players hired by sports clubs. That sports clubs trade in and sell their players, i.e. human beings, is a well-known fact.[22] Notwithstanding the above, the fact that a player, i.e. a human being, is treated as an object of certain legal relations, i.e. in a way similar to an animal or a thing, in no way prevents him from being considered a human being enjoying the status of a natural person in other legal relations. Considering the above, even under Roman law, a slave could be considered a thing within a specifically defined scope of legal relations, of which he was the object, and simultaneously a party to other legal relations (a subject). That being the case, what was the difference between a slave and a mere thing? The answer is that a slave was a human being, whose reason in conjunction with his will distinguished him, like any human being, from animals. The reason of a slave, as a human being, allowed him to be aware of his duties and assess possible sanctions that could be imposed on him should he fail to obey. Consequently, it is more accurate to conceive a slave as an "enslaved person", in the sense of not a mere object, but rather an **obliged entity**.

From the current perspective, being a person involves not only being the subject of duties, but also being the subject of rights. That said, what rights are involved? What rights can a person acquire? The answer to this question simultaneously provides an answer to the question of what makes a human being a person. Being a person means enjoying the capacity to acquire rights that the person wishes to acquire, or rights that may be acquired by all persons under law. This aspect indeed constitutes a free person, as opposed to a slave. Put in other words, freedom of persons is manifested in the fact that law protects the right of persons to autonomously determine their interests and pursue them through establishing their subjective rights. *"Indeed, the fact that slaves' interests were not considered worth legal protection meant that slaves themselves were not considered subjects of rights."*[23] The status of a slave meant that the only interests a slave could pursue consisted

postea inprobata est asperitas poenae, et tam ex servi persona quam ex liberi quadrupli actio praetoris edicto constituta est." or Iustiniani Institutiones, 4.4.7: *"... nam secundum gradum dignitatis vitaeque honestatem crescit aut minuitur aestimatio iniuriae: qui gradus condemnationis et in servili persona non immerito servatur, ut aliud in servo actore, aliud in medii actus homine, aliud in vilissimo vel compedito constituatur."* (For *(Czech)* translation, see BLAHO, P., SKŘEJPEK, M. *Iustiniani Institutiones*. Prague: Karolinum, 2010, p. 317).

22 Technically speaking, the transaction consists in a transfer of the player's agreement with a sports club to some other sports club. The player is admittedly in a different position than a slave because such a transfer is subject to the player's consent. The consent is nonetheless usually already given in the initial agreement between the player and his club, and the player is often deprived of the possibility to grant his consent *ad hoc* to his future sale to some other club.

23 OSTHEIM, R. *Zur Rechtsfähigkeit von Verbänden im österreichischen bürgerlichen Recht*. Wien: Manz, 1967, p. 11.

in fulfilment of heteronomously imposed duties.[24] It is therefore more fitting to describe the legal status of a slave in that **legal personality *(or personhood)* of a slave was derived from the person of his master**, rather than claiming that a slave was deprived of legal personality altogether. From the above viewpoint, I believe that there was not such an abysmal difference between a slave and other persons subjected to *patrimonium*, or the power of the *pater familias*, which in actuality encompassed not only things, including slaves, but also members of his family. The will of all such persons *"alieni iuris"* can thus probably be considered a medium through which the will of the *pater familias* was expressed. The personhood of a slave hence represented an extension of legal personality of the *pater familias*. The will of a slave was indeed irrelevant from the viewpoint of acquisition of rights that would pertain to the slave as a separate person. Conversely, the will of a slave could be and was relevant from the perspective of the person exerting his power over the slave.

In summary, reason is common to natural persons and slaves alike and allows them to determine and pursue their own interests. However, conversely to the status of a natural person, the status of a slave prevents the latter from acquiring rights corresponding to his own interests because a slave is only allowed to have interests consisting in fulfilment of duties that have been heteronomously imposed on him. Accordingly, conduct of a slave could not have been imputed to him as a distinct person; this, however, in no way prevented imputing the slave's conduct to some other person, such as the person of his master. Given that a slave was not vested with legal personality *(or personhood)* under law, no rights and obligations could have been imputed to him, irrespective of whether or not he, in fact, had his own reason and will.

It follows from the above that while reason and will are factual preconditions for legal conduct, they are insufficient on their own. At the same time, reason and will must be imputed to a person, who can also be perceived as the "point of imputation".[25] The concept of a slave hence reveals an important theoretical finding: conduct of a specific human being need not correspond to that same human being as a natural person. Put differently, while the capacity to engage in conduct differentiates a human being from an animal, such capacity in itself does not make the human being a natural person. The following types of capacity hence need to be differentiated:

a) the capacity to engage in conduct;
b) the capacity to engage in legal conduct on one's own behalf (as a natural person);
c) the capacity to engage in legal "conduct" on behalf of someone else.

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[24] It also follows from the above that even people formally having the status of a natural person can in fact fall under the slavery status. Their actual situation means that to save their own life or livelihood, they must pursue someone else's interests, without having any real chance to even consider their own interests. Examples of people living in such a state need not be sought in too distant past. Although Nazism in no way amended the provisions of Section 1 BGB, it in fact distinguished among people on the principle of nationality and even envisaged such differentiation in the bill of the National Civil Code. (In this respect, cf.: BYDLINSKI, F. Die "Person" im Recht. In: KALSS, S., NOWOTNY, Ch., SCHAUER, M. (eds.) *Festschrift Peter Doralt zum 65. Geburtstag*. Wien: Manz, 2004, p. 82.)

[25] In this respect, cf.: BERAN, K. Osoba jako „bod přičitatelnosti" [Person as the "Point of Imputation"]. *Právník.* 2017, No. 6, p. 522.

In simple terms, legal conduct serves as a means for a human being to pursue his own interests through law. Still, a human being may pursue not only his own, but also someone else's interests. His legal conduct is accordingly imputed to him or to someone else, depending on whose interests he pursues. That being the case, a question arises as to whether or not a human being deprived of his own reason and will can be a person and have the capacity to engage in legal conduct.

2.6 A human being without reason as a person lacking legal capacity

Above all, we have to bear in mind that every human being, each of us, was once in a phase where his will was not controlled by reason, as he was not endowed with reason. Once born, every human being must have will to be able to survive; his initial will is nonetheless conative, uncontrolled by reason. Indeed, should a new-born human being start "reasoning" what to do and what to omit, he most certainly would not survive. Law must take account of this given fact and provide for the situation of a human being who is incapable of assessing his interests and determining what is permitted and what is prohibited, being unable to do so due to lacking the power of reasoning.

In theory, law could indeed envisage that **a human being whose power of reasoning is inadequately developed is not deemed a person** and will only be deemed a person once he is endowed with reason. Nonetheless, such a solution has not been adopted precisely with reference to varying statuses of human beings, i.e. for example to distinguish between the status of an enslaved and a free human being. Indeed, where a slave is conceived as a "non-person", his reason and will (albeit existing) can never be relevant from the viewpoint of his own legal conduct. And here lies the fundamental difference between a slave and a human being who is not a slave but temporarily (or even permanently) lacks the power of reasoning and will. In practice, a new-born slave and a new-born free human being are in the same position as both such children lack the power of reasoning and cannot engage in any conduct whatsoever, let alone in legal conduct. Nonetheless, the legal status of a child who is considered a person is different in that the child, **as a person, can "potentially" acquire rights and obligations, whereas a slave can never acquire any rights for himself**.

The grounds on which a human being must currently be considered a person even if he lacks the power of reasoning and will are closely linked to the grounds on which the concept of slavery was abandoned. It is morally unacceptable to consider a human being a mere object having a similar status to that of a slave. On these grounds precisely, every human being, even one without reason, is deemed a person.

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Given these points, the initial assumption that every human being endowed with reason and will is a person does not necessarily apply in law. By the same token, the assumption that a human being lacking the power of reasoning and will is not a person is also inaccurate. However, law cannot disregard the fact that reason and will represent a *conditio sine qua non* for legal conduct of any person. This necessarily leads to inconsistencies. How can a person, or a human being, engage in legal conduct if he lacks the power of reasoning and will and hence is incapable of engaging in any conduct "in reality"? On the other hand, why a person endowed with reason and will, and necessarily engaging in conduct (albeit as a slave), cannot simultaneously engage in legal conduct? A satisfactory solution to this question presupposes and requires separation of the real world (facts) and the normative world, or realm, as conceived in the pure theory of law.[26] The realm of reality is governed by the principle of causality. The reason and will of a human being are the cause from which we derive the capacity to act as a consequence. Nonetheless, the normative order does not perceive human reason and will as a cause that would necessarily, by application of the principle of causality, lead to the conclusion that a person incapable of engaging in conduct is (also) incapable of engaging in legal conduct.[27] This, however, does not stem from some kind of magic, but rather from a concept aptly defined by normativists as **"imputability"**.[28] The aforementioned concept alone makes it possible for a human being who in reality simply cannot, and does not, engage in any conduct due to a lack of reason and will to engage in legal conduct within the normative order, having been attributed with the reason and will of some other human being.

This is also the reason why law distinguishes between a person who "enjoys" legal capacity and a person who lacks legal capacity.

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[26] KELSEN, H. *Pure theory of law*. California (U.S.A.): University of California Press, 1967, p. 76.

[27] In this respect, see Kelsen: *"If we analyze our statements about human behavior, however, we discover that we connect acts of human behavior toward each other and toward other facts not only according to the principle of causality (i.e., as cause and effect), but also according to a principle entirely different from that of causality—a principle for which science does not as yet have a generally accepted word. If we succeed in proving that such a principle exists in our thinking and is applied by the sciences that have as their object mutual human behavior as determined by norms (that is, by sciences that have as their object the norms which determine the behavior) then we are entitled to consider society as an order or system different from that of nature and the sciences concerned with society as different from natural sciences. Only if society is understood as a normative order of human behavior can society be conceived of as an object different from the causal order of nature; only then can social science be opposed to natural science. Only if the law is a normative order of mutual behavior can it be differentiated from nature, as a social phenomenon; only then can the science of law as a social science be differentiated from natural science."* (KELSEN, H. *Pure theory of law*. California (U.S.A.): University of California Press, 1967, p. 76.)

[28] Weyr, among others, explains the term "imputability" as the correlation between a norm and the subject *"who shall comply with the norm [...] The aforementioned relation is purely normative. It can be generally designated as mental capacity, or imputability. This means that a person, being the obliged person, is* compos mentis *and hence the point of imputation of the norm; accordingly, the norm is imputable to the obliged person. A person 'non compos mentis' (in the sense of not being the point of imputation) is not an obliged person with respect to one norm or another; qualifying a certain norm as not 'imputable' means that a certain entity, who might as well be the point of imputation for some other norm, has no duties under the former norm."* (WEYR, F. *Teorie práva [Theory of Law]*. Prague: Orbis, 1936, p. 36.).

2.7 Legal capacity in the sense of imputability of reason and will

The question of legal capacity, or lack thereof, thus in fact lies in the question as to **whose reason and will are imputed to a specific person**. The applicable Czech law confirms this in Section 31 of the Civil Code, which stipulates that *"[a]ny minor who has not yet acquired full legal capacity is presumed to be capable of making legal transactions which are, as to their nature, proportionate to the intellectual and volitional maturity of minors of his age"*. The above-cited provision confirms that, if a person who would normally lack legal capacity, is able to apply his reason and will, law vests in such a person at least limited legal capacity. Where reason and will cannot be imputed because there are none, it is necessary to impute "someone else's" reason and will, replacing the "own" reason and will.

This perspective allows us to better understand the meaning of Section 15 of the Civil Code, which stipulates that **legal capacity** is the *"capacity to acquire rights and assume obligations for oneself by performing one's own legal transactions"* (to engage in legal conduct). **One's own conduct** can only mean imputability of one's own reason and will. This is why, in most cases, a person acquires legal capacity upon attaining the age of majority (Section 30 of the Civil Code). Attaining the age of majority at 18 in actuality means that the human being has achieved adequate intellectual and volitional maturity to be capable of acting independently. His reason and will are hence imputed directly to him, as a person enjoying legal capacity. This also explains why a person "enjoys" legal capacity.

Nonetheless, given that law envisages the existence of people lacking their own reason and will, this means that someone else's reason and will must be imputed to them. The aforementioned alternative applies to cases where the factual precondition for engaging in one's own conduct is not met because the person concerned has not yet developed his own reason and will (children); or has never been endowed with reason and will; or has developed but subsequently lost his reason and will (people suffering from a mental disorder). In this context, the concept of a statutory representative or guardian actually defines the scope of imputability of reason and will to a person lacking reason and will of his own. Furthermore, it follows from the above that a person lacking legal capacity is incapable of determining, pursuing and protecting his own interests; this in no way means that a person lacking legal capacity has no interests of his own. Law actually recognises the interests of such persons—even though they lack legal capacity—and therefore provides for a statutory representative or guardian responsible for protecting their interests.

That being the case, a human being can pursue his own interests as a natural person, and simultaneously act in the interest of someone else as a representative. **There are indeed various types of representation.** Under contractual representation, the representative is not authorised to determine the principal's interests and merely complies with instructions issued by the principal. The concept of a statutory

representative is different. Reason and will of the person represented are absent, and therefore the authorisation to represent is not based on a power of attorney, but rather stipulated in the national legislation—in a law. In this context, Krtoušová noted the following difference: *"A principal enjoying legal capacity is free to decide as to whether or not he wishes to be represented under a contract. In contrast, a person lacking legal capacity must have a statutory representative or else he cannot establish and manifest his will vis-à-vis third persons in a legally relevant manner."*[29]

The statutory representative plays a specific role as he is authorised to assess and determine what is and, conversely, what is not in the interest of the person represented and to perform legal transactions on the latter's behalf accordingly. Nonetheless, the scope of the statutory representative's authorisation to determine the interests of the person represented varies depending on the type of statutory representation. The widest scope of deliberation is arguably vested in parents, who may, as the statutory representatives of their child, subjectively determine the course of action that is in the child's best interests (even though, from an objective perspective, this might not be the case). A person acting as a body of a juristic person may exert substantially narrower scope of deliberation in determining the interests of the legal person, assuming that we consider the governing body of a juristic person to be its statutory representative. The restrictions in this respect may be imposed directly by law,[30] or stipulated by the statutes of the juristic person or a resolution of its general meeting. Regardless of the type of statutory representation, it holds that any manifestation of the interest of a represented person requires the reason of the representative, who applies his power of reasoning to put the interest of the person represented in concrete terms, within the set limits. Concretisation of an individual interest is indeed impossible without application of the representative's reason, which means, in turn, that the representative must always participate, to broader or narrower extent, in determining the interest of the person represented.

This leads to a conclusion that is logical, albeit not often openly expressed. Where a human being, as a natural person, is not attributed with his own reason and will, this necessarily means that other people will actually decide on his fate. The other people,

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[29] NOVOTNÁ KRTOUŠOVÁ, L. Následky konfliktu zájmů člena statutárního orgánu právnické osoby jako zástupce a právnické osoby jako zastoupeného [Consequences of a Conflict Between Interests of Director of a Juristic Person Acting as a Representative, and the Juristic Person as a Principal]. *Právní rozhledy*. 2016, No. 17, p. 591.

[30] For example, Section 172 of the UK Companies Act 2006 even defines the interest of a corporation as meaning the success of the company for the benefit of its members as a whole, and in doing so, the governing body shall have regard (amongst other matters) to—:
(a) the likely consequences of any decision in the long term,
(b) the interests of the company's employees,
(c) the need to foster the company's business relationships with suppliers, customers and others,
(d) the impact of the company's operations on the community and the environment,
(e) the desirability of the company maintaining a reputation for high standards of business conduct, and
(f) the need to act fairly as between members of the company.

being the statutory representatives or guardians, in fact exercise their power over that human being and determine what he is and what he is not allowed to do. Even though such a human being is still considered a natural person vested with legal personality *(personhood)*, his legal position is similar to that of a person *alieni iuris* from this perspective. Indeed, despite being a person, an individual lacking legal capacity cannot acquire any rights other than those allowed by his statutory representative or guardian. This means that, even under current circumstances, a person lacking legal capacity is, in fact, subjected to the power of someone else, even though such power is no longer designated as *dominica potestas*.[31]

2.8 Summary

To explain the concept of **legal conduct**, it was first necessary to define the notion of "conduct" as such. Conduct can be defined as purposeful behaviour characterised by the following two components: (i) external manifestation of will, consisting in behaviour (either in the form of an act or an omission); and (ii) a purpose determined by application of reason, which is pursued by such behaviour. The existence of an individual attributed with reason and will is a factual precondition of each and every conduct. The difference between conduct in general and legal conduct lies in the purpose of and the entity engaging in the conduct. The purpose of legal conduct is to establish, modify or terminate a right. Legal conduct hence represents a type of conduct (or a subset of conduct in general) that aims to establish, modify or terminate a right. Human reason and will are a *conditio sine qua non* for both legal conduct and for any conduct in general. However, "legal conduct" is not reserved for human beings, but rather for persons. While any human being can engage in conduct, only natural or juristic person can engage in legal conduct. What is the meaning of legal conduct of persons?

The notion of a person serves to create an entity bearing certain rights and obligations. Nonetheless, if persons are designed to have rights and obligations, **a way must exist for them to acquire rights and obligations**. This, in any case, requires reason and will of a human being. A conclusion could follow that a human being bestowed with reason and will must have the capacity to engage in legal conduct and, *a contrario*, a human being deprived of reason and will must lack the capacity to engage in legal conduct. However, none of the above assumptions apply in law:

[31] The right of a *pater familias* to ownership of his property *(dominica potestas)* was in all probability the primary manifestation of ownership, consisting in a general and unlimited power over a thing. Where the power over a thing was not general, it had to be limited for the sake of the protection of the interests of others, such as in the case of *iura in re alinea,* which had to be exercised in *civiliter modo*. See, for example, ŠEJDL, J. Několik odrazů „umění dobrého a spravedlivého" na nauku služebností [Certain Reflections of the "Art of Good and Justice" in Theory of Servitudes]. In: *Umenie a právo, zborník príspevkov z medzinárodnej vedeckej konferencie [Art and Law, Proceedings of the International Scientific Conference]*. Bratislava: Slovak Academic Press, 2016, pp. 193–194.

A slave was undoubtedly a human being bestowed with reason and will and, still, his reason and will were not imputed to him as a person (but rather possibly to the person of his master). On the other hand, the existence of an insane person proves that even a human being deprived of reason and will can be considered a person. How can a person, or a human being, engage in legal conduct if he lacks the power of reasoning and will and hence is incapable of engaging in any conduct "in reality"? On the other hand, why a person endowed with reason and will, and necessarily engaging in conduct (albeit as a slave), cannot simultaneously engage in legal conduct? The above incongruity is resolved through the concept of "imputability". Explained in simple terms, what is reason and will of a human being engaged in conduct does not stem from the "nature" of the human being himself, but rather follows from the statutory provisions. Law may stipulate that reason and will of a given person shall (also) be imputed to someone else. Distinction must therefore be made among: (i) an individual's capacity to engage in conduct; (ii) the capacity to engage in legal conduct on the individual's own behalf (as a natural person); and (iii) the capacity to engage in legal "conduct" for someone else. The aforementioned concept makes it possible for a human being who in reality simply cannot, and does not, engage in any conduct due to a lack of reason and will to engage in legal conduct within the normative order, having been attributed with the reason and will of some other human being. This is also the reason why law distinguishes between a person who enjoys legal capacity and a person who lacks legal capacity.

The question of legal capacity, or lack thereof, thus in fact lies in the question as to whose reason and will are imputed to a specific person. One's own conduct can only mean imputability of one's own reason and will. Nonetheless, given that law envisages the existence of people lacking their own reason and will, this means that someone else's reason and will must be imputed to them. The aforementioned alternative applies to cases where the factual precondition for engaging in one's own conduct is not met because the person concerned has not yet developed his own reason and will (children); or has never been endowed with reason and will; or has developed but subsequently lost his reason and will (people suffering from a mental disorder). In this context, the concept of a statutory representative or guardian actually defines the scope of imputability of reason and will to a person lacking reason and will of his own. Furthermore, it follows from the above that a person lacking legal capacity is incapable of determining, pursuing and protecting his own interests; this in no way means that a person lacking legal capacity has no interests of his own. Law actually recognises the interests of such persons—even though they lack legal capacity—and therefore provides for a statutory representative or guardian responsible for protecting their interests.

CHAPTER THREE
CAN A JURISTIC PERSON REALLY ENJOY LEGAL CAPACITY?

3.1 Introduction

The answer to the question as to whether or not a juristic person can really enjoy legal capacity is in fact an answer to the question as to whether or not a juristic person can engage in its own legal conduct. Given that the existence of one's own reason and will is a *conditio sine qua non* for the capacity to engage in one's own legal conduct, we first need to determine **whether a juristic person is endowed with its own reason and will**. Unlike for a natural person, where this question can be answered through empirical observation of the individual concerned,[32] this method cannot be used for a juristic person. Conduct of a juristic person is only conceivable if recognised as such by a legal regulation—a law.

Consequently, any considerations concerning the existence or absence of legal capacity of juristic persons must be based on positive law. Positive law, though, may stipulate diametrically opposite solutions in this respect. To demonstrate this point, we may refer to the provisions governing legal conduct of juristic persons as applicable before and after the re-codification of private law in the Czech Republic in 2014.

The Czech Civil Code adopted in 1964 (hereinafter the "1964 Civil Code") provided in its Section 20 (1) as follows: *"**Legal acts of a juristic person** in all matters are performed by persons authorised to this end by the memorandum of association or the foundation deed of the juristic person or by a law ('governing bodies')."* Similar wording was adopted in the second sentence of Section 13 (1) of the 1991 Commercial Code, stipulating that *"**a juristic person acts through its governing body**; or an appointed representative acts on its behalf"*. The two normative sentences meant that a juristic person enjoyed capacity to engage in its own legal conduct, which was manifested towards third persons through its governing bodies, precisely because the latter were bodies, rather than representatives, of the juristic person. Accordingly, for example the first sentence of Section 191 (1) of the 1991 Commercial Code read as

[32] Observation of a human being allows determination of whether he acts consciously or whether he is *non compos mentis.* If this were not the case, it would be impossible to determine through an expert report whether someone is *compos mentis* or *non compos mentis*.

follows: *"The board of directors is the governing body which manages the activities of the company and* ***acts on its behalf****."*

The legal basis completely changed under the effects of the **New Civil Code**. Section 20 (1) of the New Civil Code stipulates that *"a juristic person is an organised unit whose legal personality is established or recognised by law. A juristic person may have rights and obligations consistent with its legal nature, regardless of its objects of activities."* While the cited provision stipulates that a juristic person is vested with legal personality, i.e. the capacity to have rights and obligations, it contains no mention of the legal capacity of juristic persons, unlike with respect to individuals. That a juristic person lacks legal capacity follows not only from the fact that such a capacity is not granted to it in Section 20 of the New Civil Code, but particularly from the provision of Section 151 (1) of the New Civil Code, which stipulates that: *"the law stipulates, or the founding legal act determines, the manner and scope in which members of the bodies of a juristic person make decisions for and* ***replace the will of*** *the juristic person"*. Assuming that a juristic person lacks its own will, it cannot enjoy legal capacity and, therefore, cannot independently engage in legal conduct. Accordingly, the New Civil Code builds on the concept that a juristic person does not itself engage in any conduct, but rather that members of the governing body act on behalf of a juristic person as its **representatives,** as envisaged in Section 164 of the New Civil Code.[33]

Having regard to the above, we can conclude that, where the applicable legal regulations contain wording to the effect that a juristic person acts through its bodies, this implies that a juristic person enjoys the capacity to engage in its own legal conduct. Conversely, where the applicable legislation contains provisions to the effect that governing bodies replace the will of a juristic person, this rather indicates that a juristic person lacks capacity to engage in its own legal conduct. However, neither positive law nor its teleological interpretation explains why a juristic person is deemed once capable and once incapable of engaging in legal conduct, or put in other words, why a juristic person enjoys legal capacity under certain circumstances and lacks legal capacity under other circumstances. I believe that positive law cannot provide answers to the above questions, which in fact lie in theoretical explanation of the concept and manner of conduct of a juristic person. In search for an answer to the question of whether or not a juristic person shall enjoy legal capacity, we must first study the theories of juristic persons, in particular the theory of legal fiction and the organic theory.

[33] Section 164 of the New Civil Code stipulates that "members of the governing body may represent the juristic person in all matters."

3.2 Conclusions derived from theories of juristic persons in terms of legal capacity

The theory of legal fiction can be considered the oldest theory of juristic persons, which is directly associated with the very term "juristic person". The theory was developed by Friedrich Carl von Savigny, who in 1840 published his renowned work System of the Modern Roman Law (Volume Two). There, Savigny not only laid the fundaments of the theory of legal fiction, but also developed the modern perception of a juristic person, as a concept that has remained in use to the present time. Savigny followed the premise that the original concept of a person or legal entity must coincide with the concept of human being, when contemplating:[34] *"Who can be the bearer, or subject, of a legal relationship? This question concerns possible 'possession' of rights, or legal capacity [...] Therefore, the original concept of a person, or legal entity, must coincide with the concept of a human being, where the original identity of both concepts can be expressed through the following formula:Every (individual) human being and only (an individual) human being enjoys legal capacity."*[35] Nonetheless, Savigny further stated that legal personality can be extended to artificial entities, recognised as mere (legal) fictions.[36] *"We designate such an entity a juristic person, being a person created (angenommen) merely to serve legal needs."*[37]

In this respect, Savigny emphasises that the artificial legal capacity of juristic persons may only apply to relations under private law. Consequently, juristic persons are exclusively a property-law concept. Unlike natural persons, juristic persons in fact cannot pursue their interests outside property-law relations. Savigny therefore defines a juristic person as an **"artificially created (adopted—angenommenes) subject having legal capacity under property law"**.[38] That is also the reason why Savigny uses the term juristic person, which is intended to reflect the fact that such a person does not exist except for "juristic" (in the sense of private law) needs. Savigny therefore rejected the term "moral person", which had been in use previously instead of the term "juristic person" and also appeared as a legal notion in the 1811 Austrian Civil Code (Allgemeines bürgerliches Gesetzbuch).[39]

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34 SAVIGNY, F. C. *System des heutigen Römischen Rechts (Volume II).* Berlin: Veit, 1840, p. 2.

35 *"Hier ist also die Frage zu beantworten: Wer kann Träger oder Subjects einen Rechtsverhältnisses seyn? Diese Frage betrifft das mögliche Haben der Rechte, oder die Rechtsfähigkeit […] Darum muß der ursprüngliche Begriff der Person oder des Rechtssubjects zusammenfallen mit dem Begriff des Menschen, und diese ursprüngliche Identität beider Begriffe läßt sich in folgender Formel ausdrücken: Jeder einzelne Mensch, und nur der einzelne Mensch, ist rechtsfähig."*

36 SAVIGNY, F. C. *System des heutigen Römischen Rechts (Volume II).* Berlin: Veit, 1840, p. 236.

37 Ibid, p. 236.

38 Ibid, p. 240.

39 In this respect, cf. BERAN, K. Proč byla morální osoba nahrazena osobou právnickou? (Přirozenoprávní kořeny pojmu „morální osoby") [Why Was Moral Person Replaced with Juristic Person? (Natural-Law Roots of the Notion of "Moral Person")]. *Právník*. 2012, No. 2.

Legal capacity of juristic persons under property law is the key to explaining the theory of legal fiction. In most cases, acquisition of a proprietary right requires legal conduct. *"Nonetheless, conduct as such presupposes a thinking and willing being, an individual human being, which is not the case of juristic persons, being a mere legal fiction; an incongruity thus arises in the presence of an entity capable of having property rights but lacking the capacity to acquire property."*[40] Wherever such incongruity occurs (e.g. also in the case of persons lacking legal capacity), it must be resolved through an artificial concept of representation. The theory of legal fiction according to Savigny is thus not founded on attributing a "fictitious will" to a juristic person, but rather on assuming that **conduct (and thus also will) of natural persons is the conduct of a juristic person, and this is precisely the rationale behind the fiction.**[41]

A juristic person hence has no will of its own and is thus akin to a person lacking legal capacity; a representative of a juristic person is then akin to its guardian.

Conversely, the **organic theory** (i.e. a theory of genuine unitary personhood), pioneered notably by **Otto von Gierke** (**1841–1921**), takes an altogether different stance towards a juristic person. Gierke analysed the question of legal personality of a juristic person, in particular, in his fundamental works *Das Deutsche Genossenschaftsrecht*[42] and *Genossenschaftstheorie und die deutsche Rechtsprechung* of 1887,[43] but also in other publications.[44] Gierke followed the assumption that a *"unitary person"* as such exists even before it has been recognised by law, claiming that: *"Wherever a unitary person arises, the jurisprudence faces the task of stipulating legal norms determining, organising and developing the internal and external life of the union, as an expression of a corporal and spiritual unit of society as a living organism."*[45] To put it briefly, there is a pre-existent "thing" that law can recognise. Gierke therefore refers to a *"spiritual organism"*, characterised by its own will, which it is capable of manifesting *vis-à-vis* third persons. There lies an important difference between the organic theory and the theory of legal fiction, concerning the role of law in determining the contents of the notion of juristic person. Savigny advocates the principle that, for the sake of legal certainty, only law can vest legal personality in a fictitious formation. *"That every human being is entitled to legal personality clearly stems from his physical appearance, inseparably belonging to everyone. The physical appearance indeed reveals to everyone else that they shall respect the rights of others, and to every judge that he shall protect such rights [...] Where natural personhood of an individual human being is transferred to an ideal subject by application of*

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40 SAVIGNY, F. C. *System des heutigen Römischen Rechts (Volume II).* Berlin: Veit, 1840, p. 282.

41 In this respect, see Savigny: *"Its existence in the realm of reality (i.e. of a juristic person, author's note) is concomitant with the substitute will of certain individuals that is imputed to the juristic person as its own will by application of a legal fiction…"* (SAVIGNY, F. C. *System des heutigen Römischen Rechts (Volume II).* Berlin: Veit, 1840, p. 312.)

42 GIERKE, O. *Das Deutsche Genossenschaftsrecht*. Berlin: Weidmann, Volume I/1868, Volume II/1873, Volume III/1881.

43 GIERKE, O. *Genossenschaftstheorie und die deutsche Rechtsprechung*. Berlin: Weidmann, 1887.

44 GIERKE, O. *Das Wessen der Menschlichen Verbände*. Berlin: Duncker & Humblot, 1902.

45 Ibid., p. 27.

a fiction, the natural verification is lacking completely; only the supreme power can replace it by creating artificial subjects of law, because if the same power were left to the mercy of private entities ('privat Willkür'), this would necessarily lead to the greatest possible degree of uncertainty in legal relations, not to mention the great risk of abuse of power if exercised in bad faith."[46] On the other hand, the organic theory implies that law recognises "some" already "living" organism that is endowed with its own will and is capable of manifesting it *vis-à-vis* third persons. There indeed lies the pre-positive essence of a juristic person, which is recognised by law and in which law vests legal personality. In view of the above, the organic theory ascribes reason and will not only to human beings, as isolated individuals, but also to groups of people, or personal unions.

A common belief has it that the organic theory assumes "real" existence of a juristic person, which often leads to confusion. In actual fact, the problem lies in that the "organic genuineness of a juristic person" escapes sensory cognisance. The organic theory therefore necessarily shows a hint of mysticism, despite being referred to as the theory of reality. While the theory assumes that a juristic person is an organism, akin to a human being, it perceives the difference between the two in that a juristic person is conceived as a spiritual, rather than biological, organism. Nonetheless, such a spiritual organism is incognisable through the senses. Sensory cognisance is possible only of certain manifestations of such an organism, which as such are unexplainable without being imputed to the relevant spiritual organism. Specifically, this refers to acts of human beings acting as "bodies" of a juristic person. The perception of legal conduct of a juristic person based on the **organic theory** means that a juristic person is an organism whose certain bodies create its "reason and will", while other bodies manifest the thus created reason and will. While acting as a body of a juristic person, the individual concerned is not a person *sui generis*, but rather serves as a mere medium through which the reason and will of a superior spiritual organism—a juristic person—are expressed. Even the above description alone sounds mystical. On the other hand, the **theory of legal fiction**, put simply, implies that a juristic person cannot independently engage in its own legal conduct as it does not exist as such and hence is not bestowed with its own reason and will. The legal fiction concerning a juristic person lies in the assumption that the reason and will of an individual acting on behalf of a juristic person represents the will of said juristic person. Considering the above points, the theory of legal fiction concerning legal persons is thus closest to the reality cognisable through the human senses. Indeed, in its line of interpretation, conduct of a real individual is ascribed to a juristic person, specifying that the individual's conduct can be deemed conduct of the juristic person solely by application of legal fiction as, in actuality, it remains the conduct of the individual concerned.

Considering the description of the aforementioned theories, it might seem that the legislator arbitrarily, in its exclusive discretion, chooses the applicable theory and decides to follow either the organic theory or the theory of fiction *(legal fiction)*. If

[46] SAVIGNY, F. C. *System des heutigen Römischen Rechts (Volume II).* Berlin: Veit, 1840, pp. 277–278.

this is the case, what use are theories of juristic persons? They might indeed appear *prima facie* useless as the choice and application of one or the other remains solely with the legislator and depends on its political decision. So why then are theories of juristic persons invoked as an argument in connection with the perception of juristic persons?[47] After all, we could simply and clearly say that answering questions germane to the perception of juristic persons and their conduct appertains exclusively to politics, where no definite solution exists. In my opinion, there are several reasons why the theories are useful.

Indeed, the theoretical concept, or perception, of a juristic person is usually considered not merely a political, but especially an entirely expert issue. Where implementing a certain concept of a juristic person, the legislator naturally relies on a theory that justifies its political decision in expert terms. Given their professional nature, theories of juristic persons are usually considered apolitical and they are indeed applied merely for the sake of ensuring the consistency of legislation. Functional and consistent legislation is hence another point where theories of juristic persons find their use. Where the legislator consistently follows one theory of juristic persons within the legislation as a whole, it is easier to avoid establishment of inconsistent rights and obligations, which ultimately always affect specific individuals, whatever the case.[48]

That said, it is appropriate to ask why there are not only two, but several "expert" theories leading to diametrically varying solutions. Why, from a certain perspective, a juristic person is endowed with its own will while, from another perspective, no such will of its own is envisaged? In this respect, doubts inevitably arise as to whether the organic theory as well as the theory of legal fiction are genuine scientific theories, or whether they merely serve as a political argument under the guise of a scientific theory.

I consider that both the aforementioned theories indeed are of political nature in certain sense. This applies both to the theory of legal fiction and the organic theory. Savigny developed the theory of legal fiction in the context of the absolute monarchy in Prussia, where the monarch ruled prudently for the benefit of his subjects. The theory of legal fiction supports the absolute power of the sovereign monarch and allows him to establish or dissolve legal persons at his own exclusive discretion. From this point of view, the organic theory represents an antithesis to the theory of legal fiction. The organic theory builds on the premise that the legislator cannot

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47 In this respect, cf. e.g. FLUME, W. *Allgemeiner Teil des Bürgerlichen Rechts. Volume I, Part 2: Die juristische Person*. Berlin, Heidelberg: Springer Verlag, 1983; DIESSELHORST, M. Zur Teorie der juristischen Person bei Carl Friedrich von Savigny. *Quaderni Fiorentini.* 1982/83, No. 11/12, p. 319 et seq.; ZITELMANN, E. *Begriff und Wesen der sogenannten juristischen Personen*. Leipzig: Duncker & Humblot, 1873; HURDÍK, J. Právnické osoby – realita nebo fikce? [Juristic Persons—Reality or Fiction?]. *Právní rozhledy*. 1999, No. 3, p. 125 et seq.

48 In this context, I refer for example to the discrepancy between the perception of a juristic person from the viewpoint of corporate criminal liability and from the viewpoint of private-law regulation of juristic persons. I believe that these concerns in fact instigated the amendment to the Corporate Criminal Liability Act, whereby conduct "on behalf of a juristic person" was omitted in Section 8 (1) of the Act.

arbitrarily create formations that lack pre-positive fundaments and, conversely and especially, that the legislator cannot deny legal personality to formations that require, or warrant, recognition by law, given their real social existence. I presume that the dispute concerning the theories of juristic persons, which was unsettled in the German literature throughout the entire 19th century, was actually a dispute over the grounds for legal recognition of juristic persons. In utmost simplified terms, we can conclude that the theory of legal fiction in its extreme form supports the concession principle, where the sovereign monarch is bestowed with unlimited discretion, while the organic theory endorses the "natural-law" entitlement of a formation showing the features of a juristic person to have its legal existence recognised.[49] With juristic persons being gradually embodied in law and becoming an integral part of the legal order, the aspect of recognition of juristic persons has mostly become obsolete. In this context, Schmidt refers to *"technicalising of the term juristic person"*, asserting that *"[c]urrently, it is indeed not necessary for lawyers to constantly reflect on the issues concealed behind that legal concept [i.e. the concept of a juristic person] in their day to day work. Juristic person has become a commonly used category. Notwithstanding the above, complaints about depriving the term juristic person of its contents are unfounded. The legal concept has simply matured in the technical sense. The once complex academic discourse achieved its purpose and thus became obsolete."*[50]

And yet, I am of the opinion that, rather than becoming obsolete, the discourse revolving around the aspect of a juristic person merely shifted to a somewhat lower level of resolving specific legal aspects related to the concept of a juristic person. This is documented by the current inconsistent opinions concerning the legal capacity of juristic persons, or the lack thereof. [51]

That said, what is the possible practical use of both the organic theory and the theory of legal fiction as concerns legal conduct of juristic persons? It is my belief that the practical difference between conduct of a juristic person's body that directly manifests the juristic person's will in the sense of the organic theory, on the one hand, and conduct of juristic person's representative, on the other hand, lies in differing legal consequences of **direct conduct of a juristic person acting through its body and representation of a juristic person, respectively**. In simplified terms, a body acting on behalf of a juristic person has, in principle, unlimited authorisation and the juristic person is hence bound by conduct of the body even if it exceeds limitations

[49] In this respect, cf.: MUMMENHOFF, W. *Gründungssysteme und Rechtsfähigkeit*. Köln: Heymanns, 1979.

[50] SCHMIDT, K. Die Juristische Person (§ 8 II). In: *Gesellschaftsrecht*. 4. Auflage. Köln: C. Heymann, 2002, p. 187.

[51] ČECH, P. Ke svéprávnosti právnické osoby a postavení člena statutárního orgánu při jednání za ni (nejen) v situaci zájmového střetu [On Legal Capacity of Juristic Persons and Status of Director when Acting on Behalf of a Juristic Person (Not Only) in case of a Conflict of Interests]. *Právní rozhledy*. 2016, No. 23–24, p. 835; NOVOTNÁ KRTOUŠOVÁ, L. Následky konfliktu zájmů člena statutárního orgánu právnické osoby jako zástupce a právnické osoby jako zastoupeného [Consequences of a Conflict Between Interests of Director of a Juristic Person Acting as a Representative, and the Juristic Person as a Principal]. *Právní rozhledy*. 2016, No. 17, p. 588 et seq.

imposed in internal regulations of the juristic person. That aspect distinguishes a juristic person's body from a mere representative; indeed, if a representative exceeds the limits of his authorisation (typically granted by virtue of a power of attorney), he does not act on behalf of the principal, but rather on his own behalf, and hence is fully responsible for this conduct.[52] In my opinion, the rather metaphysical dispute over whether or not a juristic person is bestowed with its own will in fact turns on the extent to which the reason and will of individuals who express will "for" or "on behalf of" a juristic person is imputable (to the juristic person) and the consequences of an excess or abuse of the individuals' authorisation to act. Both the organic theory and the theory of legal fiction are invoked to justify the correctness of the respective solution. Under such circumstances, a purely scientific and unbiased theoretical explanation of legal conduct of juristic persons first requires, in my opinion, an answer to the question what reason and will of a juristic person mean and how they are formed and manifested.

3.3 What is the reason and will of a juristic person?

Assuming, in line with the organic theory, that a juristic person is the analogue of an individual, we need to find an analogue for human reason that is collective, rather than individual, and also an analogue for human will that is collective, rather than individual.[53] This leads to the question of **how collective reason and collective will are formed and manifested.** I believe that collective will and collective reason alike can only be created by application of the reason and will of specific individuals who form such a reason and will. Indeed, collective reason and will cannot be (and are not) bestowed on a mindless human flock, but only and solely on an organised group of people. Typical of an organised group are processes allowing formation of a collective will (as a rule through voting, which actually serves to determine what interests most members of the group wish to pursue, without resorting to combat and physical liquidation of their opponents) and manifestation of the thus-formed will *vis-à-vis* third persons which, in fact, is again only possible through a specific, "elected

[52] It is thus no mere coincidence that representatives of a juristic person are designated as its governing bodies, rather than authorised representatives. A body of a juristic person will always have a specific status, compared to that of a common contractual representative acting on the basis of a (mere) power of attorney. In this respect, see Sections 163, 164, 166/2, 430, 431 of the Civil Code.

[53] I am aware that the considerations on collective reason and will are somewhat simplified as a juristic person need not always be composed of a union of persons. In the context of Czech law, this is the case of single-member corporations and estate-based juristic persons, such as foundations. Notwithstanding the above, I am convinced that, even in these cases, the juristic person has "special" interests that cannot be absolutely identical with those of the bodies who manifest the reason and will of the juristic person *vis-à-vis* third persons. The difference between the collective will of a corporation and "special" will of a foundation lies in the fact that collective will validates the interests pursued by the juristic person in each and every case, while the interests pursued by a foundation are put in concrete terms by application of the reason and will of the individuals authorised to this end.

individual"—a human being. While acting as a body (of a juristic person), such an individual does not manifest his own reason and will, but rather the will and reason of the group which authorised him to such external manifestation. In practice, the individual concerned thus necessarily pursues someone else's interests, pre-determined through the collective reason, and not his own interests.

If taken literally, the organic theory would mean that every individual serving as the governing body of a juristic person would **be required by law to suffer from schizophrenia**. The law would command that the "Self" (ego) of such an individual be split in two because, while acting as a body of a juristic person, the individual does not use his "own reason and will", but rather serves as a mere medium through which the reason and will of the juristic person are expressed. The other Self of an individual acting as a body of a juristic person would manifest itself in **different interests of the juristic person**, which may be, or indeed are, strikingly different from those the individual may pursue as a natural person. To describe such schizophrenia in less suggestive terms, we can refer to the jurisprudential concept of a **"duty of loyalty"** towards the interests of a juristic person. The duty of loyalty necessarily means that an individual acting as the body of a juristic person is banned from pursuing the naturally egoistic interests he has as a human being—natural person, and conversely is commanded to give precedence to the interests of the (juristic) person for or on behalf of which he acts. From this "legally philosophical" point of view, a juristic person's own reason and will are conceivable only on condition that the reason and will of an individual acting on behalf of a juristic person are not deemed identical to the reason and will imputable to him as a natural person. Only the assumption of such other Self of an individual (alter ego), manifesting itself as the reason and will of a juristic person, allows us to accept the existence of "juristic person's own legal conduct".

Such a line of interpretation is questionable, as no individual is devoid of his own legal personality *(personhood)* merely on the grounds of being the governing body of a juristic person; such an individual remains a natural person. In actuality, reason and will are only bestowed on human beings and are merely imputed to various persons, whereby the persons are authorised to act accordingly. The fact that identical reason and will are imputed to several persons indeed may give rise to conflicts between the interests of the "persons" concerned, even though they are controlled by the very same reason and will. Actual legal situations show that **conflicts** do indeed often arise **between the interests** of a natural person acting as a body of a juristic person, on one part, and the juristic person, on the other part.[54] The organic theory *stricto sensu* would

[54] For the consequences of a conflict of interests, see DĚDIČ, J. Úprava konfliktů zájmů v zákoně o obchodních korporacích ve vazbě na nový občanský zákoník [Provisions on Conflicts of Interests in the Corporations Act in Conjunction with the New Civil Code]. *Právní rozhledy*. 2014, No. 15–16, s. 524; LASÁK, J. In: LASÁK, J., POKORNÁ, J., ČÁP, Z., DOLEŽIL, T. *Zákon o obchodních korporacích. Komentář. Svazek I [Corporations Act. Commentary. Volume I]*. Prague: Wolters Kluwer, 2014, p. 458; HAVEL, B. Konflikt zájmů při správě obchodních korporací (vztah § 437 odst. 2 ObčZ a § 54 a násl. ZOK) [A Conflict of Interest in Managing Corporations (The Relationship between Section 437 (2) of the Civil Code and Section 54 et seq. of the Corporations Act)]. *Právní rozhledy*. 2015, No. 8, p. 272;

render the existence of any such conflict of interests for governing bodies action on behalf a juristic person could never pursue any interests other than the interests of the juristic person and would be banned from pursuing their own interests. While it is apparently true that directors mostly comply with their duty of loyalty, their obedience does not stem from any mandatory schizophrenia commanded by law, but rather from their own utilitarian needs, for the simple reason that loyalty pays off and, conversely, disloyalty is often punished.

Any considerations on the legal conduct of a person, whether natural or juristic, must in fact disregard the psychological profile of the individual acting on behalf of a juristic person. Rather than exploring whether a human being has dual reason and will, the question in fact turns on the **meaning of own and alien reason and will of a person**, and not of a human being. The answer seems ridiculously simple: one's "own" reason and will are those that are not simultaneously derived from someone else (and consequently are one's own). Nonetheless, such a state of affairs is only conceivable for natural persons, and moreover only under certain circumstances.[55] On the other hand, "someone else's" reason and will presuppose the existence of another person whose reason and will are imputed not only to himself, but also to some other person and, in the latter sense, constitute "someone else's" reason and will. In terms of legal analysis, "someone else's reason and will" implies that reason and will primarily pertaining to an individual are simultaneously imputed to someone else.

To illustrate this multiple imputability, we can take the example of an individual who is a natural person and a parent, and hence the statutory representative of his child, and simultaneously a director of a limited liability company. Reason and will of such an individual are primarily imputed to him, as a **natural person**, as his **"own" reason and will**; concurrently, they are imputed to the person of his child and to the person of the limited liability company of which he is director, in both cases as **"someone else's"** reason and will. In all three aforementioned cases, reason and will of the same individual are imputed to various persons and consequently the said "reason and will" establish obligations and rights pertaining to the persons concerned.

It further follows from the above that law must apply to the legal conduct of a juristic person *mutatis mutandis* as provisions governing the legal conduct of a person lacking his own reason and will. This also explains why **a juristic person, unlike a natural person, cannot really enjoy legal capacity in the proper sense of the word** *(as a persona sui juris)*. Natural persons who have attained the age of majority

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NOVOTNÁ KRTOUŠOVÁ, L. Následky konfliktu zájmů člena statutárního orgánu právnické osoby jako zástupce a právnické osoby jako zastoupeného [Consequences of a Conflict Between Interests of Director of a Juristic Person Acting as a Representative, and the Juristic Person as a Principal]. *Právní rozhledy*. 2016, No. 17, p. 588.

55 In this respect, see KELSEN: *"The relation between a so-called physical (natural) person and the human being with whom the former is often erroneously identified consists in the fact that those duties and rights which are comprehended in the concept of the person all refer to the behaviour of that human being."* (KELSEN, H. *General theoryoftheory of Law and State*. New Brunswick (U.S.A.): Transaction Publishers, 2007, p. 95.)

are attributed with their "own reason and will" as a rule and with "someone else's" reason and will only in exceptional cases. Conversely, imputing someone else's reason and will to a juristic person is a rule without any exceptions. Here indeed lies the difference between a juristic person and a natural person from the perspective of legal analysis. Assuming that every human being is a person, the above necessarily implies that, in terms of imputability of reason and will, every juristic person is dependent on some other individual (natural) person, i.e. a distinct point of imputability. That being the case, the reason and will of such a natural person are necessarily imputed twice: once to the natural person himself and once to the juristic person.

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It can thus be concluded that a juristic person can never engage in its own legal conduct. Indeed, the reason and will of a juristic person are in fact always simultaneously attributed to a distinct individual, who certainly is not devoid of his own legal personality *(personhood)* merely on the grounds of being the governing body of a juristic person. Accordingly, we have to embrace the conclusion that the reason and will of a juristic person always represent "someone else's reason and will" as they are always derived from "someone else". For the purpose of legal analysis, the theory of legal fiction appears to be more fitting since, under that theory, the will of a specific natural person is only "considered" the reason and will of the relevant juristic person, without claiming that these are the actual will and reason of the juristic person "in reality". In this context, a juristic person does not, never has and never could have enjoyed legal capacity *stricto sensu*, and could have merely been considered to "have" such capacity. What has actually been at stake is not the legal capacity of a juristic person, or lack thereof, but rather the consequences that shall be attributed to conduct of the governing bodies of juristic persons. Nonetheless, the consequences can indeed be determined by virtue of the legislator's political decision, without having to rely on the organic theory or the theory of legal fiction, as the case may be. In theory, whatever solution the legislator considers desirable and beneficial is legally permissible. That being the case, the assessment of appropriateness or inappropriateness of certain legal arrangements is not purely a matter of legal analysis (and thus theory of law), but rather a matter of legally political considerations.

3.4 Summary

Legal capacity means the capacity to engage in one's own legal conduct. Accordingly, the question as to whether or not a juristic person can enjoy legal capacity, in fact, provides an answer to the question as to whether or not a juristic person can engage in its own legal conduct. Conduct of a juristic person is only conceivable if recognised as such by a legal regulation—a law. Nonetheless, positive law may envisage different

arrangements concerning legal conduct of juristic persons. Positive law thus contains provisions to the effect that a juristic person acts through its bodies, implying that a juristic person enjoys the capacity to engage in its own legal conduct, as well as provisions stipulating that governing bodies of a juristic person replace its will, which tends to support the conclusion that a juristic person lacks the capacity to engage in its own legal conduct. However, positive law alone cannot explain why a juristic person is deemed once capable and once incapable of engaging in legal conduct, or put in other words, why a juristic person enjoys legal capacity under certain circumstances and lacks legal capacity under other circumstances. To resolve this issue, we have to find support in theories of juristic persons, in particular the organic theory and the theory of legal fiction.

The perception of legal conduct of a juristic person based on the **organic theory** means that a juristic person is an organism whose certain bodies create its "reason and will", while other bodies manifest the thus created reason and will. While acting as a body of a juristic person, the individual concerned is not a person *sui generis*, but rather serves as a mere medium through which the reason and will of a superior spiritual organism—a juristic person—are expressed. On the other hand, the **theory of legal fiction**, put simply, implies that a juristic person cannot independently engage in its own legal conduct as it does not exist as such and hence is not bestowed with its own reason and will. The legal fiction concerning a juristic person lies in the assumption that the reason and will of an individual acting on behalf of a juristic person represents the will of said juristic person. Considering the description of the aforementioned theories, it might seem that the legislator arbitrarily, in its exclusive discretion, chooses the applicable theory and decides to follow either the organic theory or the theory of fiction *(legal fiction)*. From this perspective, both the relevant theories are of a political nature, which manifested itself in the past through a dispute over recognition of a juristic person. I believe that even the current debates concerning legal capacity of juristic persons, or a lack thereof, turn in fact on the consequences that shall be derived from excess or abuse of authorisation to act, vested in the individuals expressing will "for" or "on behalf of" a juristic person. Under such circumstances, an answer has to be sought to the question what reason and will of a juristic person mean and how they are formed and manifested.

Assuming, in line with the organic theory, that conduct of bodies of a juristic person is the juristic person's own conduct would necessarily mean that every individual serving as the governing body of a juristic person would be required by law to suffer from schizophrenia. The law would command that the "Self" of such an individual be split in two, because while acting as a body of a juristic person, the individual does not use his "own reason and will", but rather serves as a mere medium through which the reason and will of the juristic person are expressed. These however are not the merits of the issue. Rather than exploring whether a human being has dual reason and will, the question in fact turns on the meaning of own and alien reason and will of a person, and not of a human being. One's "own" reason and will are those that are not simultaneously derived from someone else (and consequently are one's own).

On the other hand, "someone else's" reason and will presuppose the existence of another person whose reason and will are imputed not only to himself, but also to some other person and, in the latter sense, constitute "someone else's" reason and will. "Someone else's reason and will" implies that reason and will primarily pertaining to an individual are simultaneously imputed to someone else. This also explains why **a juristic person, unlike an individual, cannot really enjoy legal capacity in the proper sense of the word** *(as a persona sui juris)*. Indeed, the reason and will of a juristic person are in fact always simultaneously attributed to a distinct individual, who certainly is not devoid of his own legal personality *(personhood)* merely on the grounds of being the governing body of a juristic person. Accordingly, the reason and will of a juristic person will always represent "someone else's reason and will" as they will always come from "someone else". From this viewpoint, a juristic person cannot enjoy legal capacity *stricto sensu*, and can merely be considered to have this capacity. What is actually at stake is not the legal capacity of a juristic person, or lack thereof, but rather the consequences that shall be attributed to conduct of the governing bodies, or statutory representatives, of juristic persons. Nonetheless, the consequences can indeed be determined by virtue of the legislator's political decision, without having to rely on the organic theory or the theory of legal fiction, as the case may be.

CHAPTER FOUR
JURISTIC PERSONS AS HOLDERS OF FUNDAMENTAL RIGHTS

4.1 Introduction

Fundamental rights were gradually established after the democratic revolutions of the 18th and 19th centuries as inherent and inalienable rights guaranteed to people by constitutional charters.[56] Using the words of *Christian Tomuschat*, Professor Emeritus at Humboldt University: "Nothing seems to be more trivial than to state that human beings are the holders of human rights."[57] However, it should be emphasised that at the time when the first catalogues of fundamental rights were created, these rights were not granted to all people—for example, political rights were initially limited to a rather small group of individuals. Looking at the situation in France and the United States of America, i.e. countries that already adopted their catalogues of fundamental rights in the 18th century, the benefits of fundamental rights were available only to a minority of the population.[58] Certain groups (such as the indigenous

[56] In accordance with the settled terminology of Czech theory of constitutional law, I will refer to human rights enshrined in positive law as fundamental rights—see BARTOŇ, M., KRATOCHVÍL, J., KOPA, M., TOMOSZEK, M., JIRÁSEK, J., SVAČEK, O. *Základní práva [Fundamental Rights]*. Prague: Leges, 2016, p. 28; WAGNEROVÁ, E. Úvod [Introduction]. In: WAGNEROVÁ, E., ŠIMÍČEK, V., LANGÁŠEK, T., POSPÍŠIL, I. et al. *Listina základních práv a svobod. Komentář [Charter of Fundamental Rights and Freedoms. Commentary]*. Prague: Wolters Kluwer, 2012, p. 1; HAPLA, M. Idea přirozeného práva a občanský zákoník [Idea of Natural Law and Civil Code]. *Acta Iuridica Olomucensia*. 2017, No. 2, pp. 223–225. The terminology reflects the German differentiation between Menschenrechte (human rights) and Grundrechte (fundamental or constitutional rights)—see STERN, K. *Das Staatsrecht der Bundesrepublik Deutschland. Vol. III/1: Allgemeine Lehren der Grundrechte*. München: C. H. Beck, 1988, p. 61; STERN, K. Idee der Menschenrechte und Positivität der Grundrechte. In: ISENSEE, J., KIRCHHOF, P. (eds.) *Handbuch des Staatsrechts der Bundesrepublik Deutschland. Band IX. Allgemeine Grundrechtslehre*. 3. Auflage. Heidelberg: C. F. Müller Juristische Verlag, 2011, p. 21.

[57] TOMUSCHAT, Ch. *Human Rights between Idealism and Realism*. 3rd edition. Oxford: Oxford University Press, 2014, p. 112.

[58] The title of the French Declaration of the Rights of Man and of the Citizen of 26 August 1789 alone attests to the discord of two concepts—the universalistic concept of the rights of man, on the one hand, and those of the citizen which, on the other hand, are not borne by everyone, but rather only by a citizen who actively participates in the exercise of public authority. Sieyès' concept of active citizenship limited to a group of individuals, rather than all the citizens of the country, found its expression

or African-American populations of the United States of America) lacked even the most fundamental of rights.

The reality of the early 21st century is somewhat different, at least as regards the normative base.[59] Human rights are borne by all humans and, moreover, their scope extends to the entire legislation, including fields of law where they were originally absent—typically, the field of private law. One of the consequences of broader application of fundamental rights is an extension of the circle of entities bound by such rights. On the one hand, one can speak about obligations ensuing for natural and legal persons in cases where they themselves interfere with a fundamental right. On the other hand, however, it should be noted that it is primarily still up to the state to ensure respect for fundamental rights in its territory through the doctrine of positive obligations, and it is thus liable for any harm to the fundamental rights of individuals that occurs as a result of interference by private entities. As noted by *August Reinisch*, the doctrine of positive obligations has effects similar to the concept of liability for the actions of third parties (vicarious liability);[60] according to the mentioned doctrine, the state is responsible for not exercising due diligence in terms of implementing and protecting fundamental rights.[61]

However, this chapter deals with legal relationships involving juristic persons as holders of fundamental rights. As already argued in the introductory chapter of this monograph, the existence of rights guaranteed directly to a juristic person is important in terms of the concept of its legal conduct.[62] I shall leave the question of consequences ensuing for the state in situations where fundamental rights have been infringed by private entities aside in this paper.

Although the first modern catalogues of fundamental rights do not mention juristic persons as subjects of such rights, it should be noted that certain rights granted in the Middle Ages to certain legal entities can be included among forms preceding modern

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in the new French law of December 1789, distinguishing between passive citizenship, which did not give rise to the right of vote, and active citizenship. For details, see MAGNETTE, P. *Citizenship: the history of an idea*. Colchester: ECPR Press, 2005, p. 119.

59 However, as correctly noted by N. Bobbio, it is necessary primarily to evaluate the actual functioning of these rights, see BOBBIO, N. *The Age of Rights*. Cambridge, UK: Polity Press, 1996. While they are currently protected on the grounds of their universal nature, in actual fact the degree of protection of human rights differs worldwide depending on various circumstances in the given state (democratic regime, economic development, ...).

60 REINISCH, A. The Changing International Legal Framework for Dealing with Non-State Actors. In: ALSTON, P. (ed.) *Non-State Actors and Human Rights*. Oxford: Oxford University Press, 2005, p. 79. In respect of liability for the actions of third parties (vicarious liability), cf. the chapter by V. Janeček in this monograph.

61 A separate question which, however, goes beyond the scope of this paper, would be the limits of imputability to the state of liability for infringement of fundamental rights by private entities. It is clear that, at present, the state is limited in the exercise of public authority by a number of factors (such as international commitments, human rights, as well as the role of civil society in liberal democracies). The idea of a powerful, controlling state, which is responsible in each and every case for ensuring that the rights reflected in the catalogues of fundamental rights are not limited, is hardly reconcilable with the concept of a liberal democracy.

62 See Chapter 1 (Legal Transactions and Legal Responsibility of Juristic Persons) above.

catalogues of human rights.[63] *Klaus Stern* recalls the privileges granted to churches as well as to towns and cities.[64] Analogously, one could also mention guilds and universities. However, such privileges often also served to delegate certain public-law authorities, where the relevant entities pursued activities that would now be designated as public administration.

The question of how these rights operate in legal relationships involving juristic persons will be the main focus of this chapter. In my opinion, this is an important aspect of the primary topic of this paper because the position of a beneficiary of fundamental rights substantially influences both his legal conduct and the responsibility of any entity. In the first part of this chapter, I will focus on the theory of justification of fundamental rights because fundamental rights can be granted to juristic persons only on the basis of certain theories. Then I will turn my attention to one of the key questions, specifically which juristic persons may hold fundamental rights and which cannot. Primarily, I shall deal with the situation in the Czech Republic, with its relatively recent regulation of fundamental rights and freedoms, and a doctrine that is still being developed after the period of an undemocratic regime existing until 1989. Furthermore, for comparison I will describe the case-law and doctrine in Germany and of the European Court of Human Rights, which are two legal systems often described in theoretical works dealing with the application of fundamental rights, where I shall put under scrutiny the details and differences of the individual approaches. In conclusion, I will attempt to compare current practice against the doctrinal background mentioned in the introductory parts of this chapter. The present chapter also touches on the aspects of procedural actions taken by juristic persons,[65] as it describes the issue of standing in disputes before constitutional courts.

4.2 Theories of justification of human rights and their applicability in respect of juristic persons

Classical human rights documents mostly lacked any definition of the scope *ratione personae* of fundamental rights. With the sole exception of political rights, which were limited to citizens, fundamental rights were guaranteed to all people. The notion of man followed from the natural-law idea of "human nature".[66] However, as already

[63] In spite of these analogies, it should be reiterated that Savigny, for example, considered juristic persons to be fictitious creations making sense only in private law—in more detail, on his theory of juristic persons, see Chapter 1 above. Consequently, I believe that the basic arguments for the existence of fundamental rights of juristic persons cannot be sought in history.

[64] Of course, in the case of medieval privileges, one cannot speak about human rights. K. Stern denotes them as *"Vorformen der Grundrechte"*—STERN, K. *Das Staatsrecht der Bundesrepublik Deutschland. Vol. III/1: Allgemeine Lehren der Grundrechte*. München: C. H. Beck, 1988, p. 61 et seq.

[65] Analysed in more detail in the chapter by B. Dvořák in this monograph.

[66] BREHMS, E. *Human Rights. Universality and Diversity*. The Hague, Boston, London: Martinus Nijhof Publishers, 2001, p. 17.

indicated, the actual state of affairs differed from the normative background, e.g. in that certain groups of people were excluded from the scope of fundamental rights.

The changes in society occurring in the 19th century led to the growing importance of organised associations of people (whether business corporations, societies, trade unions or political parties, and actually also public-law corporations). It became doubtful in this respect to what degree fundamental rights could also apply to such associations. Indeed, for example, if certain economic activities were protected by fundamental rights, exclusion of juristic persons from such protection would necessarily lead to potential inequality.[67]

Moreover, certain fundamental rights directly envisage the existence of juristic persons—for example, the freedom of religion envisages the existence of churches and religious societies, the freedom of association presupposes the existence of societies, etc.[68] The exercise of certain fundamental rights is thus only conceivable in connection with the existence of juristic persons. That, however, says nothing in itself as to whether fundamental rights should be borne directly by juristic persons or only by those persons who created the juristic person, i.e. its members, shareholders, etc. Such persons could exercise the fundamental rights individually, or collectively, as the case may be, regardless of whether fundamental rights are vested in juristic persons. On the other hand, the acknowledgement of rights borne by a juristic person as an entity would be advantageous in terms of protecting the rights of its members. For instance, if a juristic person is involved in a dispute and its procedural right is breached, and this results in harm incurred by the natural persons who established the juristic person, it would be more simple in terms of their protection if the fundamental right was invoked directly by the juristic person, rather than by the persons standing behind it. This would also avoid the complex question of whether protection should be claimed by those persons individually or collectively, whether the rights should be invoked by all the persons involved or only by some of them, etc.

To answer the question of the degree to which it is appropriate to enable a juristic person to invoke fundamental rights, I consider it necessary to go back to the roots of fundamental rights in legislation, and specifically to the aspect of the reasons for their validity. Indeed, different theories of justification of human rights provide, *inter alia*, different answers to the question of the grounds for applicability of fundamental rights to juristic persons.[69] In a different paper, *Jan Broz* and I distinguished between two major groups of justification of fundamental rights: the foundationalist conception and the anti-foundationalist (or political and sociological) concept of human

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67 TOMUSCHAT, Ch. *Human Rights between Idealism and Realism*. 3rd edition. Oxford: Oxford University Press, 2014, p. 117.

68 On the doctrine of *Doppelgrundrechte* (dual fundamental rights), see part 5 below.

69 After the adoption of human rights catalogues, the rights protected therein are denoted as fundamental rights, which nonetheless changes nothing about the need for their justification, as a mere reference to the constitutional legislator's decision within the majority discourse does not express their specific nature. However, as shown below, it might be important to distinguish between human and fundamental rights in relation to juristic persons.

rights.[70] The crucial difference lies in the question of whether we seek the basis of human rights in a certain axiomatic concept or whether we perceive such rights as a product of the development of society—the latter is, as a matter of fact, the object of a political conflict.

Cruft, *Mathew Liao* and *Renzo* distinguish, within the first group (foundationalist theories), concepts that are justified by protection of certain features of humanity—e.g. basic human needs or the idea of a good life, for instance in basic forms of human good in the works of *John Finnis*.[71] All the concepts mentioned above have in common an instrumental justification of human rights. However, both concepts run into theoretical problems associated with grasping the basic criteria; in the conditions of moral pluralism and relativism,[72] it is difficult to define both the qualitative basis of life and, after all, also other than biological needs. As correctly pointed out by Czech legal theorist *Martin Hapla*, in searching for basic needs as the root of human rights, we must go beyond sole persistence.[73]

The aforesaid instrumentalist justifications are opposed by a concept in which human rights are considered a basic moral status, regardless of the aims they achieve—this includes, along with older concepts of theological justification of human rights, also e.g. *Robert Alexy's* justification based on a combination of an individual's autonomy and his ability for rational discourse.[74] Of course, the aforesaid brief summary is not exhaustive in terms of the sources of legitimacy of human rights.[75] Some authors then refer to plurality of such sources.[76]

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70 BROZ, J., ONDŘEJEK, P. Human Rights Limits on State Power. In: KYSELA, J. (ed.) *State as a Giant with Feet of Clay*. Frankfurt am Main: Peter Lang, 2014, p. 105 et seq.

71 CRUFT, R., LIAO, S. M., RENZO, M. The Philosophical Foundations of Human Rights. An Overview. In: CRUFT, R., LIAO, S. M., RENZO, M. (eds.) *Philosophical Foundations of Human Rights*. Oxford: Oxford University Press, 2015, p. 11.

72 See analogously, in Czech literature, SOBEK, T. *Právní myšlení. Kritika moralismu [Legal Thought. Criticism of Moralism]*. Plzeň: Aleš Čeněk, 2011, p. 71 et seq.

73 HAPLA, M. Lidská práva a základní potřeby [Human Rights and Basic Needs]. *Právník*. 2018, No. 1, p. 45.

74 ALEXY, R. Menschenrechte ohne Metaphysik? *Deutsche Zeitschrift für Philosophie*. 2004, No. 1, year 52, 2004, pp. 15–24. Summarised in English literature in: ALEXY, R. Rights and Liberties as Concepts. In: ROSENFELD, M., SAJÓ, A. (eds.) *The Oxford Handbook of Comparative Constitutional Law*. Oxford: Oxford University Press, 2012, pp. 290–291.

75 In Czech legal theory alone, we can find a number of other categories, such as constructivist justification of human rights following from the works by *Jack Donnelly*, which are characterised by a certain compromise between the foundationalist approaches and sociological or political justification of human rights—see BAROŠ, J., DUFEK, P. Teorie lidských práv [Theory of Human Rights]. In: HOLZER, J., MOLEK, P. (eds.) *Demokratizace a lidská práva. Středoevropské pohledy [Democratic Processes and Human Rights. Central European Perspectives]*. Prague, Brno: Sociologické nakladatelství, 2013, p. 97. Another approach used in this respect is the welfarist approach, which comes close to the above-mentioned instrumental theories based on protection of the idea of humanity and a good life—see HAPLA, M. *Lidská práva bez metafyziky: legitimita v (post)moderní době [Human Rights Without Metaphysics: Legitimacy in (Post-)Modern Times]*. Brno: Masaryk University, Faculty of Law, 2016, p. 98.

76 Czech legal theorist Pavel Maršálek claims, for example, that with the exception of the theological concept of human rights, several legitimacy factors can be considered a source of human rights

It is clear that foundationalist theories are often unsuitable for describing the application of fundamental rights to a juristic person. A majority of justification grounds ensuing from human nature are hardly applicable to a juristic person. A juristic person does not need protection of its physical aspect: its life and health.[77] However, the position of a juristic person and that of an individual as a human being do not always differ fundamentally: for instance, a juristic person may own property or act as a party to a dispute. In case of infringement of these rights, the question of invoking fundamental rights may appear legitimate because the respective positions of a juristic person and of a human being are similar in these situations. However, in terms of justification of fundamental rights, one must ask whether a juristic person has a similar nature, or whether the exercise of certain rights it possesses is derived from the same fundamental status based on the substance of humanity, dignity, freedom, etc. Indeed, it is still conceivable that the rights of juristic persons could be protected by means of laws, but not through catalogues of fundamental rights.[78]

In contrast, political justification of human rights is based on the fact that human rights, too, are a product of the democratic process and development of human society in general. Indeed, the development of social relationships, such as the freedom of speech in relation to the media or the social right to associate in trade unions, might be protected inadequately at the present time if the media or trade unions themselves were unable to invoke their own rights.[79]

The disputes regarding the applicability of fundamental rights to juristic persons might be reflected in the solution adopted in some legal systems that explicitly grant fundamental rights to juristic persons in their constitutional documents, insofar as such rights are reconcilable with such persons' nature (e.g., Art. 19 (3) of the Basic Law of the FRG,[80] Art. 2 of the Constitution of the Italian Republic,[81] Art. 12 (2) of the Constitution of Portugal[82]). It would naturally go far beyond the scope of the present

(including, e.g., moral principles, usefulness for society, efficiency of the arrangement they guarantee, consent of society, and historical arrangement)—see MARŠÁLEK, P. Soudobá delegitimizace lidských práv [Contemporary De-legitimation of Human Rights]. In: GERLOCH, A., ŠTURMA, P. (eds.) *Ochrana základních práv a svobod v proměnách práva na počátku 21. století v českém, evropském a mezinárodním kontextu [Protection of Human Rights and Freedoms in Transformations of Law at the Beginning of the 21st Century in the Czech, European and International Context]*. Prague: Auditorium, 2012, p. 84, and more comprehensibly in: MARŠÁLEK, P. *Příběh moderního práva [The Story of Modern Law]*. Prague: Auditorium, 2018, p. 156.

77 See the approach adopted by the European Court of Human Rights in this respect in part 6 of this chapter.

78 GREAR, A. Challenging Corporate 'Humanity': Legal Disembodiment, Embodiment and Human Rights. *Human Rights Law Review*. 2007, vol. 7, No. 3, p. 517.

79 KARAVIAS, M. *Corporate Obligations under International Law*. Oxford: Oxford University Press, 2013, p. 182.

80 See part 5 below.

81 *"The Republic recognises and guarantees the inviolable rights of the person, both as an individual and in the social groups where human personality is expressed."* The cited English translation is available at https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf.

82 *"Legal persons enjoy the rights and are subject to the duties that are compatible with their nature."* The cited English translation is available at http://www.en.parlamento.pt/Legislation/CRP/Constitution7th.pdf.

paper to describe in detail all the approaches to protection of the fundamental rights of juristic persons—I shall mention, in turn, only three systems of protecting human rights: the Czech system, the German system and the Strasbourg system, which is based on the European Convention on Human Rights.

4.3 Fundamental rights vested in juristic persons in the Czech Republic

Unlike some other countries mentioned in the previous chapter, the Constitution of the Czech Republic does not explicitly deal with the question of applicability of fundamental rights to juristic persons. However, the Czech Act establishing the Constitutional Court as a specialised judicial body for the protection of constitutionality (similar, e.g., to the German Federal Constitutional Court) explicitly admits in Section 72 that a constitutional complaint against infringement of a fundamental right protected by the constitutional order could also be filed by a juristic person. In this respect, the Czech constitutional theory and practice are based, in principle, on the German model, where this is only possible in situations in cases where fundamental rights and freedoms can also be attributed, in view of their nature, to a juristic person.[83] An authoritative commentary on the Constitutional Court Act summarises the most typical cases in which the Czech Constitutional Court protects fundamental rights of juristic persons: the right to own property; the right to manage its affairs and establish its bodies; the right of a church or religious society to establish religious and other church institutions independent of the state; the right of association; the freedom of speech and the right to information; the right to operate a business and other economic activities; and the right to judicial and other legal protection.[84]

The statistics available in the database of rulings of the Czech Constitutional Court (at http://nalus.usoud.cz) show that, in the period from its inception in 1993 to 31 August 2017, the Court rendered a total of 728 decisions in proceedings on a constitutional complaint initiated by a juristic person.[85] This corresponds, on average, to approximately 29 judgements a year, which is only a fraction of the Court's decisions.[86]

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[83] WAGNEROVÁ, E., ŠIMÍČEK, V., LANGÁŠEK, T., POSPÍŠIL, I. et al. *Listina základních práv a svobod. Komentář [Charter of Fundamental Rights and Freedoms. Commentary].* Prague: Wolters Kluwer, 2012, p. 321.

[84] Ibid.

[85] This represents a relatively small number of cases; according to the official statistics of the Czech Constitutional Court, the number of applications to initiate proceedings on a constitutional complaint, together with other applications to initiate proceedings other than proceedings on abstract control of constitutionality, has varied around 4,000 per year since 2010 (save for 2012, when this number reached almost 5,000). See https://www.usoud.cz/fileadmin/user_upload/ustavni_soud_www/Statistika/Rocni_statisticke_analyzy_2016.pdf.

[86] Since 2010, the number of judgements of the Constitutional Court has varied between 200 and 250 per year. See https://www.usoud.cz/fileadmin/user_upload/ustavni_soud_www/Statistika/Rocni_statisticke_analyzy_2016.pdf.

However, these cases where heard *in rem*, meaning that the Court did not reject the application to initiate proceedings. In total, the number of complaints filed by juristic persons has been increasing;[87] however, the same trend can also be seen in the numbers of complaints made by natural persons.

In terms of the scope of applicability of the fundamental rights to juristic persons, it should also be noted that the Corporate Criminal Liability Act adopted in the Czech Republic in 2011[88] extended to juristic persons certain constitutional guarantees in criminal proceedings, such as the principles of presumption of innocence, *nullum crimen sine lege*, and the prohibition of retroactivity to the offender's detriment. The relatively rare application of the Act during the initial years after it came into effect shows, however, that the Constitutional Court has yet to hold proceedings on this type of rights in practice.

The situation regarding fundamental rights of juristic persons is, moreover, complicated by the fact that juristic persons also include public-law entities which have public authority. Although, as mentioned above, Czech legislation and constitutional order do not define the circle of juristic persons that have the right to file a constitutional complaint, the existence of an entity which exercises state power and, at the same time, invokes a certain right appears problematic and goes against the traditional concept of human rights where a public-law corporation (the state) was the obliged entity rather than the holder of rights. Consequently, we need to deal in more detail with the subject of juristic persons under public law, which currently belongs among the most discussed topics in the Czech Republic touching on applicability of fundamental rights to juristic persons.

4.4 Specific features of juristic persons of public law

Theoretically, various approaches can be taken to the question of fundamental rights invoked by public-law juristic persons. The first option is to follow a line of argument based on the genesis of fundamental rights belonging only to humans, which corresponded to modern foundationalist justification (see above). Fundamental rights were not conceived as rights of the state, but rather as rights vested in humans against the state. If we should reflect on the development of social relationships by extending protection to juristic persons, we will encounter an insurmountable limit to such an extension of the sphere of fundamental rights. This limit is represented by the exercise of public authority. Indeed, it would be contrary to the very substance of fundamental rights if they could be invoked by the state or some other public-law corporation in the exercise of public authority.[89]

87 From 1993 to the end of 1999, a decision was made only in 69 of the aforesaid 728 cases.

88 Act No. 418/2011 Coll., on corporate criminal liability and prosecution.

89 WINTR, J. Má stát základní práva? Glosa k nálezu Pl. ÚS 20/15 [Does the State Enjoy Fundamental Rights? Comment on Judgement Pl. ÚS 20/15]. In: GERLOCH, A., ŽÁK KRZYŽANKOVÁ, K.

The opposite view is offered by an argument of equality before the law, or rather equality before the Constitution. If one acknowledges general protection of ownership,[90] it is unclear why protection against unconstitutional interference should apply only to private property and not to property of public-law corporations, such as towns, cities, regions or even the state. A similar question may arise in respect of procedural rights. If one recognises the principle of equality of arms in civil procedure, why only some parties, and not others, should be able to claim infringement of the fundamental right to a fair trial? Although, in a majority of jurisdictions, including the Czech Republic, the question of infringement of procedural rights guaranteed by the Constitution is dealt with in proceedings of a different type than classical civil procedure, one can legitimately ask whether or not permissibility of a constitutional complaint should also be affected by the concept of equality of arms.

The rule of law in the Czech Republic has reflected on the mentioned issue since the mid-1990s, when it became settled that the decisive criterion lies in the legal relationship in which the juristic person is involved, rather than the nature of the juristic person. For example, the state may act in private-law relationships as a juristic person (according to the explicit provisions of the Civil Code, the state may, for example, conclude contracts, dispose of an ownership title, etc.[91]) and, as such, it may invoke fundamental rights just like a private entity. The Constitutional Court of the Czech Republic has admitted a constitutional complaint filed on behalf of the state by one of its bodies.[92] However, the state lacks such a right when exercising public authority.

(eds.) *Soukromé a veřejné v kontextu institucionálních a normativních proměnách práva [The Public and the Private in the Context of Instituional and Normative Transformations of Law]*. Plzeň: Aleš Čeněk, 2017, pp. 113–119.

90 Within the Czech constitutional order, Art. 11 (1) of the Charter of Fundamental Rights and Freedoms explicitly states: *"Everybody has the right to own property. The ownership right of all owners has the same statutory content and enjoys the same protection."*

91 Section 21 of Act No. 89/2012 Coll., the Civil Code, as amended, reads as follows: Within private law, the state is considered a juristic person. Another legal regulation provides for the manner in which the state makes legal acts.

92 For example, judgement of the Constitutional Court of the Czech Republic of 6 April 2006, File No. I. ÚS 182/05, where the state was represented by a district state attorney who claimed cancellation of a ruling made by the Supreme Court, whereby the court penalised disciplinary misconduct directed against another state attorney. The Constitutional Court stated in respect of the complainant's standing: *"[T]he state, acting through its bodies, may file a constitutional complaint only unless it acted as the holder of public power in the given legal relationship, i.e. in a position of superiority involving a certain authority. [...] The Constitutional Court notes that the application to initiate disciplinary proceedings regarding disciplinary liability of the state attorney was a legal act made within a labour-law relationship where the relevant organisational components, i.e. in the given case, the district state attorney of the district state attorney's office, perform legal acts on behalf of the employer—the Czech Republic as a juristic person. [...] The fact that the legal relationships ensuing from the application to initiate disciplinary proceedings also comprise public-law elements cannot, in itself, exclude that the legal relationship is a labour-law relationship.* […] *The Constitutional Court has therefore inferred that the application to initiate disciplinary proceedings concerning disciplinary liability of the state attorney was an act performed by the state as a party to a labour-law relationship (and thus a juristic person and employer—through the district state attorney), and the state was therefore not a bearer of public power in this case; in the sense of its previous case-law,*

For example, if a decision rendered by an administrative authority is cancelled on the basis of an administrative action, the administrative authority cannot claim violation of the state's right to judicial protection under Article 36 of the Charter.[93]

The question of the state as an authorised entity claiming protection of its fundamental rights was recently again dealt with in the Czech Republic in relation to the recurring dispute on remuneration of judges. Since the end of the 1990s, the Czech Constitutional Court has several times countered the Government's attempts to limit or freeze judges' pay, arguing that this constituted an interference by the executive branch in the judicial branch, and especially in the independence of the judiciary.[94] In 2011, a judge of a common court sued the state, and specifically the District Court for Brno-venkov, where she held the position of a judge, for payment of a part of her pay, which she considered too low, at variance with the case-law of the Constitutional Court on the principle of independence of the judiciary.

Details of the case are relatively complicated and would require extensive analysis which would overlap with other aspects that are not dealt with in this chapter. It can be stated in brief that the case was influenced by previous case-law of the Constitutional Court on the aspects of judges' pay, especially the judgement of the Constitutional Court of the Czech Republic of 3 May 2012, File No. Pl. ÚS 33/11, where the Constitutional Court repealed a part of the Judges Pay Act, because the thus-conceived pay was, in its opinion, too low. As a matter of fact, the judge succeeded in common courts, not only with her application for compensation of a part of her pay for the period when the Constitutional Court repealed part of the Act regarding the calculation of the judges' pay, but also with an application for a refund of pay for a certain period preceding the repealing judgement of the Constitutional Court. This fact caused a certain uproar in society—indeed, a similar action could potentially be filed by all other judges, which would have a significant impact on the state budget. Moreover, in the opinion of a number of lawyers, the common courts failed to interpret the case-law of the Constitutional Court correctly when they granted compensation to the judge even retroactively.

In this situation, when a decision in the matter has already been rendered by the Supreme Court, there was no other option for reversing the court decision than

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the Constitutional Court considers this a criterion for assessing the standing to file a constitutional complaint in similar cases. The complainant was thus entitled to file a constitutional complaint, which also followed from the fact that the legislator distinguishes between the position of the state as such—i.e. the bearer of public power—and the position of the state as a 'juristic person'." However, the ruling met with criticism, especially from the authors of the commentary on the Constitutional Court Act—see WAGNEROVÁ, E., DOSTÁL, M., LANGÁŠEK, T., POSPÍŠIL, I. *Zákon o Ústavním soudu s komentářem [Constitutional Court Act with Commentary]*. Prague: ASPI, 2007, pp. 322–323.

93 IVIČIČ, M. Stát a některé zvláštní případy působení základních práv a svobod [The State and Certain Special Cases of Operation of Fundamental Rights and Freedoms]. *Časopis pro právní vědu a praxi.* 2012, No. 1, p. 21, referring to opinion of the Constitutional Court of the Czech Republic of 9 November 1999, File No. Pl. ÚS-st. 9/99.

94 An overview of judgements on this subject, beginning with Judgement of the Constitutional Court of the Czech Republic of 15 September 1999, File No. Pl. ÚS 13/99, is provided by Jan Wintr in WINTR, J. *Principy českého ústavního práva [Principles of the Czech Constitutional Law]*. 3rd edition. Plzeň: Aleš Čeněk, 2015, pp. 118–119.

a constitutional complaint filed by the Czech Republic—the District Court for Brno-venkov, which ultimately occurred. The Constitutional Court decided by a majority of judges that retroactive refund of the judge's pay was contrary to the prevailing interest in not granting retroactive pay claims[95] (in another judgement, the Constitutional Court defined this interest as an interest in excluding unpredictable interferences with the state budget and in reducing the tension between society and judges).[96]

The outlined example shows the contradictory arguments used in the Czech theory of constitutional law, where one side opines that in the case of the state or other public-law corporations, "their private sphere can never be endangered as they, in fact, have none [...], or rather lack a consistent autonomy of will".[97] Furthermore, as noted by justice *Kateřina Šimáčková* in her dissenting opinion related to the above-specified judgement of the Constitutional Court regarding the judges' pay: "All legal acts carried out by the state entail an element of authority."[98] According to justice *Šimáčková,* as well as other legal theorists,[99] the solution would be to deal with conflicts involving the bodies of the Czech Republic ultimately by means of competence actions filed with the Constitutional Court, rather than through constitutional complaints of the state against the state (court decision), heard and decided by yet another state body (the Constitutional Court).

On the other hand, it has been argued that one can distinguish between human rights, as pre-positive natural rights, and fundamental rights, which are the result of a constitutional decision and are incorporated in the relevant catalogue of fundamental rights. Czech constitutional lawyer *Michal Bartoň* states: "Thus, although the state is not the holder of natural human rights, [...] it cannot be excluded that the constitutional legislator intended for the state to have, in its non-governance position, certain constitutionally guaranteed rights, especially where equality in their exercise is explicitly guaranteed (equality of all forms of ownership, procedural equality)".[100]

It is also not clear whether all public-law juristic persons can be likened to the state. Firstly, one could mention public institutions (such as health insurance companies), which may find themselves in a position closer to a juristic person of private

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95 Judgement of the Constitutional Court of the Czech Republic of 19 July 2016, File No. Pl. ÚS 20/15.

96 Judgement of the Constitutional Court of the Czech Republic of 10 July 2014, File No. Pl. ÚS 28/13, paragraph 95.

97 WAGNEROVÁ, E. Úvod [Introduction]. In: WAGNEROVÁ, E., ŠIMÍČEK, V., LANGÁŠEK, T., POSPÍŠIL, I. et al. *Listina základních práv a svobod. Komentář [Charter of Fundamental Rights and Freedoms. Commentary].* Prague: Wolters Kluwer, 2012, p. 21.

98 Judgement of the Constitutional Court of the Czech Republic of 19 July 2016, File No. Pl. ÚS 20/15, dissenting opinion of justice Kateřina Šimáčková, paragraph 13.

99 WINTR, J. Má stát základní práva? Glosa k nálezu Pl. ÚS 20/15 [Does the State Enjoy Fundamental Rights? Comment on Judgement Pl. ÚS 20/15]. In: GERLOCH, A., ŽÁK KRZYŽANKOVÁ, K. (eds.) *Soukromé a veřejné v kontextu institucionálních a normativních proměnách práva [The Public and the Private in the Context of Instituional and Normative Transformations of Law]*. Plzeň: Aleš Čeněk, 2017, p. 119.

100 BARTOŇ, M., KRATOCHVÍL, J., KOPA, M., TOMOSZEK, M., JIRÁSEK, J., SVAČEK, O. *Základní práva [Fundamental Rights].* Prague: Leges, 2016, p. 68.

law that strives to prevent interference with its property by the state.[101] The possible applicability of fundamental rights could thus be considered only in legal relationships *vis-à-vis* the state, rather than with private individuals. Regional and local governments (territorial self-governing units) also show certain specific features and definitely not all the arguments going against the applicability of fundamental rights to juristic persons of public law are fully applicable to such entities. However, the practice of the Czech Constitutional Court is such that, in certain cases, it grants more rights to municipalities and regions than to juristic persons of private law, with reference to the public-law character of their activity.[102]

4.5 German legislation, its genesis and practice

Pre-war theoretical disputes regarding juristic persons as beneficiaries of fundamental rights culminated in post-war Germany in the adoption of an explicit provision in the Basic Law, where Art. 19 (3) states that fundamental rights are also vested in national juristic persons if they are applicable to them in view of their substance.[103] The original draft wording of this provision did not mention the substance of fundamental rights and applied to "corporations and institutions with separate legal personality".[104] During the discussions in the Parliamentary Council, the resulting wording was refined in view of the types of juristic persons to whom the given provision was to apply. However, the central idea of the regulation, according to which the basic sense of legal protection of juristic persons lies in the penetration *(Durchgriff)* of these rights towards natural persons who stand behind the juristic persons, was maintained.[105]

This thesis on penetration of fundamental right from juristic persons towards the natural persons standing behind them has also encountered criticism in the German literature.[106] Primarily, one can mention the *Konfusionsargument* (argument from

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[101] HUBER, P. M. Artikel 19. In: VON MANGOLDT, H., KLEIN, F., STARCK, Ch. (eds.) *Das Bonner Grundgesetz. Kommentar. Band 1*. 4. Auflage. München: Franz Vahlen, 1999, p. 2241.

[102] WAGNEROVÁ, E., ŠIMÍČEK, V., LANGÁŠEK, T., POSPÍŠIL, I. et al. *Listina základních práv a svobod. Komentář [Charter of Fundamental Rights and Freedoms. Commentary]*. Prague: Wolters Kluwer, 2012, p. 323.

[103] Art. 19 (3) GG reads as follows: *"Die Grundrechte gelten auch für inländische juristische Personen, soweit sie ihrem Wesen nach auf diese anwendbar sind."*

[104] *"Körperschaften und Anstalten mit eigener Rechtspersönlichkeit"*—this provision was proposed by an important constitutional theorist and member of the Parliamentary Council at that time, Hermann von Mangoldt—see HUBER, P. M. Artikel 19. In: VON MANGOLDT, H., KLEIN, F., STARCK, Ch. (eds.) *Das Bonner Grundgesetz. Kommentar. Band 1*. 4. Auflage. München: Franz Vahlen, 1999, p. 1769. One of the reasons for the thus-explicitly formulated protection of fundamental rights of juristic persons was intended to be the protection of churches.

[105] HUBER, P. M. Artikel 19. In: VON MANGOLDT, H., KLEIN, F., STARCK, Ch. (eds.) *Das Bonner Grundgesetz. Kommentar. Band 1*. 4. Auflage. München: Franz Vahlen, 1999, p. 2240.

[106] ISENSEE, J. Anwendung der Grundrechte auf juristische Personen. In: ISENSEE, J., KIRCHHOF, P. (eds.) *Handbuch des Staatsrechts der Bundesrepublik Deutschland. Band IX. Allgemeine Grundrechtslehre*. 3. Auflage. Heidelberg: C. F. Müller Juristische Verlag, 2011, p. 914.

confusion),[107] responding to the above-described issue of fundamental rights vested in juristic persons of public law. Juristic persons may include, inter alia, the state, which has traditionally played the role of the obliged entity in legal relationships subject to fundamental rights. According to the prevailing interpretation of the German doctrine, public-law juristic persons cannot be beneficiaries of fundamental rights (even though Art. 19 (3) of the Basic Law does not distinguish between juristic persons of private and public law). Both jurisprudence and case-law reached the conclusion that if there exists legislation under which juristic persons may invoke fundamental rights only if this is permitted by their substance, this means, inter alia, that such substance requires that fundamental rights only be invoked by juristic persons of private law. In the case of juristic persons of public law, it is essentially irrelevant—unlike in the Czech constitutional practice—in what legal relationship they are involved, whether under private law or under public law.

However, there are exceptions to this principle. From its inception, Art. 19 (3) was aimed, among others, at churches, which however are conceived in Germany as public-law corporations.[108] Universities and public-service media (radio and television) are not excluded from the circle of entities allowed to file constitutional complaints either.[109] The basic reason for this option lies in the requirement for independence of the state and the possibility of protection in cases of state interference.[110] As regards specific rights, the commentaries mention, e.g., the general principle of freedom (Art. 2 (1) GG), the requirement for equal treatment (Art. 3 (1) GG), and furthermore, *Doppelgrundrechte*, which are exercised simultaneously by natural and juristic persons. The above includes, for example, the freedom of assembly, entailing the aspect of assembly of people, as well as the right of a juristic person, which by its nature cannot physically participate in such assemblies, but has the right to organise them.[111]

Finally, *Isensee* recalls that certain procedural rights which can be invoked by the state according to the case-law of the Federal Constitutional Court form another

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[107] HUBER, P. M. Artikel 19. In: VON MANGOLDT, H., KLEIN, F., STARCK, Ch. (eds.) *Das Bonner Grundgesetz. Kommentar. Band 1*. 4. Auflage. München: Franz Vahlen, 1999, p. 2250. In Czech literature, see WINTR, J. Má stát základní práva? Glosa k nálezu Pl. ÚS 20/15 [Does the State Enjoy Fundamental Rights? Comment on Judgement Pl. ÚS 20/15]. In: GERLOCH, A., ŽÁK KRZYŽANKOVÁ, K. (eds.) *Soukromé a veřejné v kontextu institucionálních a normativních proměnách práva [The Public and the Private in the Context of Instituional and Normative Transformations of Law]*. Plzeň: Aleš Čeněk, 2017.

[108] In respect of fundamental rights of churches in Germany, cf. RÜFNER, W. Grundrechtsträger. In: ISENSEE, J., KIRCHHOF, P. (eds.) *Handbuch des Staatsrechts der Bundesrepublik Deutschland. Band IX. Allgemeine Grundrechtslehre*. 3. Auflage. Heidelberg: C. F. Müller Juristische Verlag, 2011, p. 782.

[109] HUBER, P. M. Artikel 19. In: VON MANGOLDT, H., KLEIN, F., STARCK, Ch. (eds.) *Das Bonner Grundgesetz. Kommentar. Band 1*. 4. Auflage. München: Franz Vahlen, 1999, pp. 2252–2255; RÜFNER, W. Grundrechtsträger. In: ISENSEE, J., KIRCHHOF, P. (eds.) *Handbuch des Staatsrechts der Bundesrepublik Deutschland. Band IX. Allgemeine Grundrechtslehre.* 3. Auflage. Heidelberg: C. F. Müller Juristische Verlag, 2011, p. 782 et seq.

[110] HUBER, P. M. Artikel 19. In: VON MANGOLDT, H., KLEIN, F., STARCK, Ch. (eds.) *Das Bonner Grundgesetz. Kommentar. Band 1*. 4. Auflage. München: Franz Vahlen, 1999, p. 2255.

[111] Ibid., p. 2270.

exception to the exclusion of the state's eligibility to claim fundamental rights—this is true especially of the right to a statutory judge and the right to a public hearing before the court.[112]

Consequently, the group of exemptions from the indefinite rule in the Basic Law can be characterised in that current German practice tends to adopt a pragmatic approach to the question of fundamental rights borne by juristic persons. These rights are granted in conformity with the case-law of the Federal Constitutional Court, which complemented the highly general constitutional regulation.

4.6 Admissibility of applications filed by juristic persons with the European Court of Human Rights

In contrast to a number of other international conventions, the European Convention on Human Rights comprises explicit provisions on the protection of rights of juristic persons. They can be found in several places: from among substantive provisions, this is true of Article 1 of the First Additional Protocol, guaranteeing the right to protection of property to "every natural or legal person". In addition, Article 10, providing for freedom of expression, refers in its first paragraph to the possibility of licencing the media.[113]

However, in my opinion, the most important provision is enshrined in Article 34, providing for procedural standing, which belongs not only to an individual, but also to a "non-governmental organisation or group of individuals". The notion of "non-governmental organisation" must be construed, similar to a number of other concepts in the Convention, autonomously,[114] i.e. regardless of its meaning in the laws of the individual jurisdictions. The *travaux preparatoire* for the Convention even attest to the fact that legal (juristic) persons were originally supposed to be explicitly included among entities with a standing to initiate proceedings against the state (the original proposal referred to "any natural and legal person"; the variant of "corporate body" was also considered subsequently).[115] However, the resulting text, which is narrower

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[112] ISENSEE, J. Anwendung der Grundrechte auf juristische Personen. In: ISENSEE, J., KIRCHHOF, P. (eds.) *Handbuch des Staatsrechts der Bundesrepublik Deutschland. Band IX. Allgemeine Grundrechtslehre*. 3. Auflage. Heidelberg: C. F. Müller Juristische Verlag, 2011, p. 944.

[113] *"This Article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises."* For details, see KARAVIAS, M. *Corporate Obligations under International Law*. Oxford: Oxford University Press, 2013, p. 180.

[114] HARRIS, D., O'BOYLE, M., BATES, E., BUCKLEY, C. et al. *Law of the European Convention on Human Rights*. 2nd edition. Oxford: Oxford University Press, 2009, p. 16.

[115] TYMOFEYEVA, A. *Non-Governmental Organisations under the European Convention on Human Rights. Exceptional Legal Standing*. Passau, Berlin, Prague, Waldkirchen: rw&w Science & New Media, 2015, p. 43, referring to EMBERLAND, M. *The human rights of companies: exploring the structure of ECHR protection*. Oxford: Oxford University Press, 2006, p. 35.

than the original draft, was later again extended by the European Court of Human Rights in subsequent practice, in that a legal (juristic) person can file an application against the state provided that it is independent of the state.[116]

Tymofeyeva states that the first decision based on an application filed by a juristic person was the judgement of the European Court of Human Rights of 30 May 1967, *Wiener Stadtische Wechselseitige Versicherungsnastalt v. Austria* (application No. 2076/63).[117] During the proceedings, which were concerned with a national procedure before Austrian courts, an agreement was reached between the company and the state and no ruling was thus made on the application *in rem*. However, what is important is that, in the court's opinion, the juristic person as applicant did not lack standing. For a juristic person to have a standing to initiate proceedings by filing an application, it must be independent of the state, which is to be assessed by the Court depending on the nature and context of the activities pursued by the juristic person and also on the degree of the entity's independence of political authorities.[118] It is not necessarily decisive whether the given entity is established under private or public law—a private-law entity that is under the economic control of the state does not meet the condition of independence,[119] while a public-law entity can be an applicant if it is sufficiently independent of the state (e.g. radio, religious society or university).[120] An important role in this respect is played especially by the courts' practice—the commentaries mention, e.g., an established practice according to which applications cannot be filed by local and regional governments (self-governing units) although they are independent of the state.[121]

In the judgement of the Fifth Section of the European Court of Human Rights of 10 July 2006, *Sdružení Jihočeské matky v. the Czech Republic* (application No. 19101/03),[122] the European Court of Human Rights expressed its opinion on whether a juristic person could be a subject of all the rights guaranteed by the

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116 KMEC, J., KOSAŘ, D., KRATOCHVÍL, J., BOBEK, M. *Evropská úmluva o lidských právech. Komentář [European Convention of Human Rights. Commentary]*. Prague: C. H. Beck, 2012, p. 25.

117 Judgement of the European Court of Human Rights of 30 May 1967, *Wiener Stadtische Wechselseitige Versicherungsnastalt v. Austria* (Application No. 2076/63); decision available in the HUDOC database (http://hudoc.echr.coe.int).

118 TYMOFEYEVA, A. *Non-Governmental Organisations under the European Convention on Human Rights. Exceptional Legal Standing*. Passau, Berlin, Prague, Waldkirchen: rw&w Science & New Media, 2015, p. 40, referring to the case of Ukraine-Tyumen v. Ukraine of 22 November 2007 (application No. 22603/02).

119 Ibid, p. 41, referring to the case of Transpetrol v. Slovakia of 15 November 2013 (application No. 40265/07).

120 GRABENWARTER, Ch. *European Convention on Human Rights. Commentary*. München, Oxford, Basel: C. H. Beck, Hart, Helbing Lichtenhahn Verlag, 2014, p. 3.

121 See, e.g., REID, K. *A Practitioner's Guide to the European Convention on Human Rights*. 4th edition. London: Sweet and Maxwell, 2011, p. 52; KMEC, J., KOSAŘ, D., KRATOCHVÍL, J., BOBEK, M. *Evropská úmluva o lidských právech. Komentář [European Convention of Human Rights. Commentary]*. Prague: C. H. Beck, 2012, p. 26.

122 Judgement of the Fifth Section of the European Court of Human Rights of 10 July 2006, *Sdružení Jihočeské matky v. the Czech Republic* (application No. 19101/03), available in the HUDOC database (http://hudoc.echr.coe.int).

Convention. The Court declared inadmissible an application filed by a private-law association which complained about violation of its right to the freedom of expression, fair trial and national remedy given that the Czech authorities and, subsequently, the courts had rejected the objections filed by the mentioned environmental association against auxiliary service structures at the Temelín nuclear power plant. The association pleaded, among other things, violation of the right to life, health and property of the persons that it protected. However, the Court noted in respect of that plea that the association was a juristic person which could not claim that it was aggrieved by violation of rights that are vested only in natural persons, such as the right to life and health.[123] *Grabenwarter* states that the following rights under the Convention benefit only natural persons: Art. 2 (right to life); Art. 3 (prohibition of torture and inhuman and degrading treatment); Art. 5 (right to liberty and security); Art. 1 of Protocol No. 6 (prohibition of the death penalty); Art. 8 (right to respect for private and family life); and Art. 12 (right to marry).[124]

It can thus be summarised that according to case-law of the European Court of Human Rights, similar to the practice in Germany, rights may only be invoked by some juristic persons (which meet the prerequisite of independence of the state), and this is only true of certain fundamental rights which are not directly bound to natural persons.

4.7 Summary

The operation of fundamental rights in legal relationships involving juristic persons has given rise to certain controversies. This is probably because this concept does not fit into the traditional human-rights discourse inferring these rights from morals (in this concept, human rights are based on moral objectivism)[125] or from "human nature". In relation to juristic persons, this human nature is protected indirectly via a newly created entity—the juristic person. In view of the basic historical purpose of the concept of a juristic person—the autonomy of property and protection of the property of members of the juristic person—justification of fundamental rights vested in juristic persons relates more to support for the economy than to morals. This concept has sometimes been critically denoted as "trade-related market-friendly human rights".[126]

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123 Ibid., part 2.1 of the decision. *"La Cour note d'abord que l'association requérante est une personne morale, qui ne saurait se prétendre victime d'une violation des droits personnels dont les titulaires ne peuvent être que les personnes physiques, tels les droits à la vie et à la santé."*

124 GRABENWARTER, Ch. *European Convention on Human Rights. Commentary*. München, Oxford, Basel: C. H. Beck, Hart, Helbing Lichtenhahn Verlag, 2014, p. 3.

125 SOBEK, T. Právní welfarismus [Legal Welfarism]. In: MACHALOVÁ, T., VEČEŘA, M. et al. *Aktuální otázky metodologie právního myšlení [Current Questions of Legal Thought Methodology]*. Prague: Leges, 2014, p. 280.

126 KARAVIAS, M. *Corporate Obligations under International Law*. Oxford: Oxford University Press, 2013, p. 181.

Granting fundamental rights to juristic persons in human rights documents and case-law reflects social developments. Firstly, it must be emphasised that fundamental rights of juristic persons are not intended to replace human rights vested in man, who does not lose such rights by becoming a member of a juristic person. On the other hand, fundamental rights granted to juristic persons are not dependent on membership of people in such persons.[127] According to *Karavias*, recognition of fundamental rights of juristic persons results in the creation of another layer of protection of human rights, thus filling the space between freedom of an individual and sovereign power.[128]

However, if fundamental rights are granted to a juristic person, we must simultaneously bear in mind that specific people always stand behind a juristic person and they are the ones who ultimately profit from the protection of the fundamental rights of a juristic person. Consequently, protection of fundamental rights of a juristic person can serve as a means of protecting other, e.g. economic, interests.[129] As a matter of fact, in the 1990s the Czech Republic made a similar experience with international agreements on the promotion and protection of investments, which were drafted unfavourably for the state and often resulted in the duty to compensate damage caused by allegedly frustrated investments. A related issue pertains to the substantial economic power of certain juristic persons (especially multinational companies)—if such persons are granted and claim fundamental rights, this logically only further increases their strength. In the case of disputes between juristic persons and natural persons, reliance on fundamental rights by juristic persons can then ultimately lead to limitation of fundamental rights vested in natural persons.

Finally, it appears problematic to grant protection to fundamental rights vested in public-law juristic persons. Arguments referring to their position in private-law relationships have, in principle, been rejected by the German legal doctrine, as well as in the practice of the European Court of Human Rights. The practice of the Czech Constitutional Court is based on a doctrine distinguishing between the positions of public-law corporations in relationships governed by private law and those governed by public law; however, as mentioned above, the debate on this issue in the professional literature has yet to be closed.

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127 ISENSEE, J. Anwendung der Grundrechte auf juristische Personen. In: ISENSEE, J., KIRCHHOF, P. (eds.) *Handbuch des Staatsrechts der Bundesrepublik Deutschland. Band IX. Allgemeine Grundrechtslehre*. 3. Auflage. Heidelberg: C. F. Müller Juristische Verlag, 2011, pp. 913–914.

128 KARAVIAS, M. *Corporate Obligations under International Law*. Oxford: Oxford University Press, 2013, p. 183.

129 Klaus Stern refers in this respect to protection of a natural person wearing the "clothes" of a juristic person—STERN, K. *Das Staatsrecht der Bundesrepublik Deutschland. Vol. III/1: Allgemeine Lehren der Grundrechte*. München: C. H. Beck, 1988, p. 1088.

CHAPTER FIVE
HOW CAN A JURISTIC PERSON ACT UNDER SUBSTANTIVE LAW?

(APPLICABILITY OF RULES ON REPRESENTATION TO ACTS MADE BY A MEMBER OF THE GOVERNING BODY OF A JURISTIC PERSON ON ITS BEHALF UNDER NEW CZECH CIVIL LAW)

The Czech legislation applicable until the end of 2013 made a distinction between direct and indirect acts of a juristic person. Direct acts (made "in the name of" that person) comprised acts made by the governing body or one of its members (for companies and co-operatives under the second sentence of Section 13 (1) of the Commercial Code), or by the liquidator (Sections 70 (3) and 72 of the Commercial Code). Indirect acts (made on behalf of that person, within its representation) comprised acts made by other persons authorised to bind the juristic person, i.e., acts made by (contractual and statutory) representatives.

The new Civil Code abandoned this distinction and came to treat members of the governing body (or the liquidator) as representatives of the juristic person (see, in particular, Section 164 (1) of the Civil Code). The seemingly minor change has brought about many practical difficulties, primarily in terms of how the provisions governing representation (Section 436 et seq. of the Civil Code) apply to the members of the governing body. Such difficulties can be overcome only once the legal nature of such representation has been clarified. Is such representation contractual, statutory, or other? This chapter aims to analyse the above-mentioned questions.

5.1 Status of the governing body when acting on behalf of a juristic person

5.1.1 Basic concept—member of the governing body as a juristic person's representative *sui generis*

The uncertainties surrounding the status of a member of the governing body who acts on behalf of a juristic person are apparent in the variety of approaches observable in the current academic literature. A major commentary[130] on the new Civil Code outlines all conceivable concepts, presented by the individual authors of the relevant parts. On p. 536, T. Dvořák maintains that *"a member* [of the governing body] *always acts as a statutory representative of the juristic person"*. By contrast, on p. 1037, K. Svoboda concludes that *"the newly created direct representation of a juristic person by its governing bodies is a specific form of direct representation, a cross between statutory and contractual representation"*. The author then implies that *"legal acts made by governing bodies on behalf of a juristic person are subject to the general provisions on both contractual (Section 441 et seq.) and statutory representation (Section 457 et seq.)"*. Finally, on p. 1089, J. Pokorná argues that a member of the governing body is a contractual representative.

In other sources, the concept of statutory representation largely prevailed. For example, K. Eichlerová,[131] M. Juráš,[132] B. Havel,[133] and L. Novotná Krtoušová[134] classified representation by a member of the governing body as a certain form of statutory representation. M. Tomsa[135] also came to support the idea of statutory representation: *"A juristic person's governing body (or members of the governing body) is empowered to act on its behalf to the full extent and in all matters. This is a statutory empowerment whose scope practically corresponds to the scope of action carried out by the entrepreneur himself."* Likewise, F. Zoulík maintained, in his textbook on civil substantive law: *"A juristic person's governing bodies or the governing body*

[130] ŠVESTKA, J., DVOŘÁK, J., FIALA, J. et al. *Občanský zákoník. Komentář. Svazek I (§ 1–654) [Civil Code. Commentary. Volume I (Sections 1–654)]*. Prague: Wolters Kluwer, 2014.

[131] ČERNÁ, S., PLÍVA, S. et al. *Podnikatel a jeho právní vztahy [An Entrepreneur and his Legal Relations]*. Prague: Charles University, Faculty of Law, 2013, p. 17.

[132] JURÁŠ, M. Zastoupení právnické osoby v civilním právu—aktuální problémy [Representation of Juristic Persons—Current Issues]. *Právní rozhledy*. 2014, No. 12, pp. 428–432.

[133] HAVEL, B. Konflikt zájmů při správě obchodních korporací (vztah § 437 odst. 2 ObčZ a § 54 a násl. ZOK) [A Conflict of Interest in Managing Corporations (The Relationship between Section 437 (2) of the Civil Code and Section 54 et seq. of the Corporations Act)]. *Právní rozhledy*. 2015, No. 8, pp. 272–275.

[134] NOVOTNÁ KRTOUŠOVÁ, L. Následky konfliktu zájmů člena statutárního orgánu právnické osoby jako zástupce a právnické osoby jako zastoupeného [Consequences of a Conflict Between Interests of Director of a Juristic Person Acting as a Representative, and the Juristic Person as a Principal]. *Právní rozhledy*. 2016, No. 17, pp. 588–585.

[135] TOMSA, M. In: ŠTENGLOVÁ, I., DĚDIČ, J., TOMSA, M. et al. *Základy obchodního práva. Vysokoškolská učebnice [Foundations of Commercial Law. A University Textbook]*. Prague: Leges, 2014, p. 60.

members are primarily the ones to act on behalf of the juristic person as its statutory representatives. They possess a general authority unless that authority has been expressly restricted in the entity's constitution, and partly delegated to another body. This means that governing bodies are essentially empowered to make all acts of a juristic person. A member of the governing body may represent a juristic person in all its matters (Section 164)."[136]

In the same textbook, M. Hendrychová suggested a compromise. She drew a distinction between (classic) statutory representation and the representation of a juristic person through its governing bodies. She referred to the latter as (specific) representation based on the law: *"If, in case of insufficient capacity (or ability) to act, the law (the Civil Code) prescribes that one person acts for another person, we speak of statutory representation. Such representation arises in the following cases: (a) a minor's parents or tutor are the minor's statutory representatives; other persons, i.e., the minor's curator or foster parents, may act on behalf of the minor (based on a statutory provision or a court decision), but they are not the minor's statutory representatives;(b) juristic persons are not, of their nature, able to make legal acts themselves (cf. Title 7, Section 3)—they are represented by virtue of statutory provisions or the juristic person's constitution, or another legal act, e.g., a representation agreement."*[137] J. Lasák picked up this idea of specific representation based on statutory provisions (rather than statutory representation), concluding that *"a member of a juristic person's governing body acts as that juristic person's representative sui generis (neither as a contractual, nor as a statutory representative)."*[138] Likewise, J. Dědič (referring to M. Hendrychová) implied that *"the representation of a juristic person through a governing body member is neither contractual nor statutory, but rather a special type of representation based on statutory provisions. Only general provisions on representation will apply, together with special provisions on representation by governing body members under Sections 164 and 165 of the Civil Code. In relation to (business) corporations, these provisions will apply without prejudice to the relevant provisions of the Corporations Act."*[139]

The concept of representation of its own kind eventually became established even in current case law. The High Court in Prague (in its resolution of 4 August 2015, File No. 14 Cmo 184/2014, focusing on the permissibility of joint representation by a governing body member and a corporate agent—see below) expressly indicated: *"... the authority to act vested in the governing body stems from the*

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136 ZOULÍK, F. In: DVOŘÁK, J., ŠVESTKA, J., ZUKLÍNOVÁ, M. *Občanské právo hmotné 1. Díl první: obecná část [Substantive Civil Law 1. Part I: General Part]*. Prague: Wolters Kluwer, 2013, p. 277.

137 Ibid., pp. 312–313.

138 LASÁK, J. In: LAVICKÝ, P. et al. *Občanský zákoník I. Obecná část (§ 1−654). Komentář [Civil Code I. General Part (Sections 1−654). Commentary]*. Prague: C. H. Beck, 2014, p. 842.

139 DĚDIČ, J. Úprava konfliktů zájmů v zákoně o obchodních korporacích ve vazbě na nový občanský zákoník [Provisions on Conflicts of Interests in the Corporations Act in Conjunction with the New Civil Code]. *Právní rozhledy*. 2014, No. 15–16, pp. 524–532.

constitution and appointment (election) to the office, and the authority to act vested in the governing body is, under Section 164 (1) of the Civil Code, unlimited. The provisions effective as from 1 January 2014, as documented by the cited provisions of Section 164 (1) and (2) of the Civil Code, are based on a new premise that a governing body member acts as a juristic person's representative sui generis (rather than a statutory or contractual representative). Nevertheless, this conceptual shift does not imply that acts made by such a governing body member are equivalent to and arbitrarily combinable with acts taken by contractual or statutory representatives of the juristic person." The Civil and Commercial Division of the Supreme Court approved the decision (including the quoted text from the reasoning) for publication in the Collection of Rulings and Opinions No. 42/2016). Thus, it can be expected that this decision will become influential in the decision-making of small chambers of judges of the Supreme Court.

I welcome the conclusion that the governing body is deemed to act on behalf of a juristic person as a representative *sui generis*, and I consider it easily justifiable. The supporters of statutory representation occasionally argue (besides raising the argument of a juristic person's incapacity and brandishing the theory of fiction) that a juristic person is obliged to form and have a governing body.[140] Yet, we may contend that the duty to be represented, even if imposed by the law, does not render the representation statutory in its nature. A mandatory representative in proceedings before the Supreme or Constitutional Court can thus still be just a contractual representative. The distinction between contractual and statutory representation lies in the legal ground for representation: whether it is based on agreement between the parties or on some other legal fact [including the law (i.e. statute)]. An independent category was already created for governing bodies in this respect during the pre-war period. According to E. Tilsch, *"the authority to act on somebody else's behalf"* (besides contractual, statutory, or judicial grounds) stemmed from *"the organisation of a juristic person"*.[141] In the category of cases where the authority to represent ensued from *"a different legal relationship between the representative and the represented party"*, rather than from a contract, J. Krčmář added *"the bodies of a juristic person"* as the fourth item to the following list: *"(a) the legitimate custodial father; (b) the husband; (c) tutors, curators and foster parents"*.[142] In relation to such bodies, he went further to imply: *"As regards juristic persons, their articles of association correspond to (an open) power of attorney."* Even M. Hendrychová, in the substantive civil law textbook mentioned above, demurred as to the extent to which governing bodies could be regarded as

[140] NOVOTNÁ KRTOUŠOVÁ, L. Následky konfliktu zájmů člena statutárního orgánu právnické osoby jako zástupce a právnické osoby jako zastoupeného [Consequences of a Conflict Between Interests of Director of a Juristic Person Acting as a Representative, and the Juristic Person as a Principal]. *Právní rozhledy*. 2016, No. 17, p. 591.

[141] TILSCH, E. *Občanské právo. Část všeobecná [Civil Law. General Part]*. Prague: Wolters Kluwer, 2012, p. 189.

[142] KRČMÁŘ, J. *Právo občanské. Výklady úvodní a část všeobecná [Civil Law. Introductory Explanations and General Part]*. Prague: Wolters Kluwer, 2014, p. 208.

"classic" statutory representatives.[143] She noted that a juristic person is represented by *"representatives deriving their authority from the law (statute), a judicial decision, or the juristic person's constitution"*.[144] Elsewhere in the textbook, juristic persons are explicitly described as having legal capacity.[145] In the light of the foregoing arguments, that can be seen as a very progressive view.

I believe that the concept of representation *sui generis* best expresses the specificity of a governing body's position in comparison to all other representatives, both contractual and statutory. Juristic persons essentially themselves set up and select their governing bodies to provide them with will, *"as if they were the brains or hands of juristic persons"* (according to E. Tilsch). The constitution determines (albeit compulsorily) the number of members to make up the governing body, and (if there are several of them) the manner in which they will bind the company *vis-à-vis* third parties, etc. This is dissimilar to all examples of statutory representation.

5.1.2 Member of the governing body (exceptionally) as a juristic person's contractual representative

In exceptional cases, where laid down by the law, even a member of the governing body might find him/herself in the position of a purely contractual representative (classical proxy of the juristic person). Under the legislation applicable until the end of 2013, it was disputable whether members of the governing body could (in a situation where at least two of them were supposed to act jointly under the memorandum or articles of association) grant a power of attorney to one of them to represent the juristic person in making a specific legal act. Case-law indicated that this would probably not be possible (cf. the judgement of the Supreme Court of the Czech Republic of 27 November 2007, File No. 32 Cdo 118/2007, or—generally in respect of authorisation for a member of the governing body—the reasons stated by the Supreme Court for its judgement of 10 May 2005, File No. 29 Odo 560/2004, published in the Soudní judikatura journal, number 9, year 2005, under number 140), unless there existed certain special circumstances under which such an individual power of attorney would be permissible, such as a temporary obstacle on the part of one of the jointly acting

[143] ZUKLÍNOVÁ, M. In: DVOŘÁK, J., ŠVESTKA, J., ZUKLÍNOVÁ, M. *Občanské právo hmotné 1. Díl první: obecná část [Substantive Civil Law 1. Part I: General Part]*. Prague: Wolters Kluwer, 2013, p. 313, footnote 60: *"However, in such cases, the expression 'statutory representatives' is not commonly used, as it has been traditionally reserved for cases under subparagraph (a)."*

[144] Ibid., p. 313.

[145] ZOULÍK, F. In: DVOŘÁK, J., ŠVESTKA, J., ZUKLÍNOVÁ, M. *Občanské právo hmotné 1. Díl první: obecná část [Substantive Civil Law 1. Part I: General Part]*. Prague: Wolters Kluwer, 2013. See ZOULÍK, F. ibid., p. 265: *"3. Legal persons also have the capacity to* make legal acts*. While in the case of natural persons, this capacity may be restricted by the law or a judicial decision, or natural persons may not have such capacity at all, in the case of legal persons, the scope of personality overlaps with the capacity to make legal acts. 4. The same applies to the capacity to commit a wrong or liability of a legal person for wrongful acts committed by its bodies."*

members (illness, etc.), preventing the given member from exercising the authorisation to act for the juristic person (see, on a similar note, the conclusions made by the Supreme Court of the Czech Republic in its judgement of 25 January 2011, File No. 32 Cdo 4133/2009). Not even literature was clear on this issue (cf., e.g., the note by J. Dědič on the judgement rendered by the Grand Chamber of the Civil and Commercial Division of the Supreme Court of the Czech Republic of 15 October 2008, File No. 31 Odo 11/2006, in the Obchodněprávní revue journal, number 1, year 2009, p. 24).

The new Civil Code explicitly permits this option in Section 164 (2) *in fine*, according to which *"[i]f the founding legal act requires the members of the governing body to act jointly, a member may represent the juristic person individually as an agent only if he has been authorised to make a specific legal act."* The power of attorney is to be granted by a juristic person in conformity with the manner of representation laid down in the founding legal act registered in the Commercial or other public Register, i.e. while maintaining the rule of four or more eyes. The authorised body member thus (together with one or more other members of the body, as required by the prescribed manner of representation) will represent the juristic person as the principal when granting the power of attorney, on the one hand, while simultaneously acting as its recipient, i.e. the attorney, on the other hand. The legal act to which the power of attorney pertains is then—*stricto sensu*—not made by him/her for the juristic person as a member of the governing body (this function of his/her was already exhausted by granting the power), but rather as a contractual proxy, i.e. an attorney-in-fact. The opinion, expressed by T. Dvořák,[146] according to which a power of attorney is granted by one member of the governing body to another, and the principal (the represented party) is thus a member of the governing body, and not the juristic person, is in clear contradiction with the wording of the law (and the above is probably confused with the situation envisaged in Section 159 (2) of the Civil Code). While the authorised member of the governing body will represent the juristic person in the given legal act as an attorney-in-fact (his/her authority to represent will follow from the power of attorney, and not from his/her membership in the governing body as such), (s)he will nonetheless bear all the duties of a member of the governing body, especially the duty to act with due managerial care (Section 159 (1) of the Civil Code).

The principle of mutual control, which forms the substance of the rule of four or more eyes, is maintained in this case as the control takes place when the power of attorney for a specific legal act is being granted. Even the responsibilities of the two acting members of the governing body are not affected; liability for any loss incurred by the juristic person would be borne both by the authorised member of the governing body and the one who co-signed the power of attorney.

As I emphasise above, a power of attorney subject to Section 164 (2) of the Civil Code is granted to the given member of the governing body by the juristic person

[146] DVOŘÁK, T. In: ŠVESTKA, J., DVOŘÁK, J., FIALA, J. *et al*. *Občanský zákoník. Komentář. Svazek I (§ 1 až 654) [Civil Code. Commentary. Volume I (Sections 1 to 654)]*. Prague: Wolters Kluwer, 2014, p. 542.

itself, and only the latter will thus be in the position of principal. Existing sources mostly note in respect of such an act of granting a power of attorney that, within this act, the juristic person is represented by members of its governing body (including, possibly, the proxy him/herself). Nonetheless, this does not rule out, as correctly pointed out by J. Dědič in one of his recent papers,[147] that the juristic person could also be represented in this legal act by another person whose authority to represent the juristic person also covers the act for which the power of attorney is being granted, and thus also, logically, a power of attorney for such an act. In view of the nature of such a legal act, this could be true, e.g., of the juristic person's contractual representative (e.g. a corporate agent), as well as a statutory representative under Section 430 (1) of the Civil Code (for example, the chief executive officer or a director whose mandate, and thus also the statutory authorisation under the said provision, covers such an act).

The notion of *"specific legal act"* will need to be construed in conformity with the above. On the one hand, I am convinced that it is not necessary to insist on this being a genuinely individual expression of will *stricto sensu* (e.g. acceptance of a specific offer). Authorisation can thus also be granted, e.g., for execution of a certain contract, even if several legal acts might be made within the process of its conclusion (proposal, counterproposal, acceptance ...). All the more so is it not necessary that the power of attorney specify in detail the contents of the legal act to which it pertains (e.g. specify that it is aimed to conclude a contract with customer *A* on the purchase of *x* items of goods of type *y* for a price not exceeding *z* per item, while complying with the set conditions in terms of time, place and manner of delivery). On the other hand, for example, "conclusion of a certain type of contracts" cannot be considered a specific legal act. I therefore consider at least questionable the opinion presented by J. Lasák:[148] *"In my opinion, there is no reason to believe that the aforesaid authorisation can allow a member of a collective governing body to perform merely a single, individually specified legal act (e.g. entering into a specific contract with a specific counterparty). I consider that the requirement for a specific legal act does not prevent a procedure where a specific member of a collective governing body is empowered, e.g., to act for the juristic person in all matters following from a certain contract (e.g. a contract for work, or for construction of a specific technological unit)."*

Indeed, I consider that in view of the above-described sense and purpose of the relevant rule, the requirement laid down in Section 164 (2) of the Civil Code, i.e. that a power of attorney must aim at making a specific legal act, will only be met by an "individual power of attorney", i.e. a power of attorney for a specifically defined legal act. A special power of attorney (i.e. authorisation to perform legal acts of a certain type) will not meet the above condition. For distinction between an individual and

[147] DĚDIČ, J. Porušení pravidla „čtyř očí" při zastupování právnické osoby členy statutárního orgánu (s akcentem na obchodní korporace) [Violation of the "Four Eyes" Rule in Representation of a Juristic Person by Members of the Governing Body (with Emphasis on Corporations)]. In: *XXV. Karlovarské právnické dny [XXV. Karlovy Vary Jurists' Days]*. Prague: Leges, 2017, pp. 446–460.

[148] LASÁK, J. In: LAVICKÝ, P. et al. *Občanský zákoník I. Obecná část (§ 1−654). Komentář [Civil Code I. General Part (Sections 1−654). Commentary]*. Prague: C. H. Beck, 2014, p. 846.

a special power of attorney, see, e.g., resolution of the Supreme Court of the Czech Republic of 25 June 2009, File No. 29 Cdo 5297/2008: *"It has already been inferred in literature (e.g. Švestka, J., Spáčil, J., Škárová, M., Hulmák, M. et al. Občanský zákoník I. § 1–459 Komentář. (Civil Code I. Sections 1 to 459. Commentary.) 1st edition. Prague: C. H. Beck 2008), that a power of attorney is also considered a special power of attorney if it grants authorisation to perform repeated specified legal acts on the principal's behalf (e.g. to enter into specific types of contracts for the principal)."* This does not rule out, on the other hand, that a power of attorney permissible in the sense of Section 164 (2) of the Civil Code (as still individually defined) might also cover several specifically defined legal acts. As an example of such a power of attorney for several specified legal acts *largo sensu*, one might mention a power of attorney granted for representation of company *A*, which is a shareholder of company *B*, at a general meeting of company *B*. Although a shareholder usually performs several legal acts *stricto sensu* at a general meeting (especially voting on the individual items of the agenda), a power of attorney to represent at a specific general meeting (granted on the basis of an existing invitation, i.e. including the draft agenda of the meeting) can be considered a power of attorney for a specific legal act within the meaning of Section 164 (2) *in fine* of the Civil Code, or for several mutually linked legal acts whose scope is clearly specified and delimited by the items on the agenda which the meeting is to discuss.

Nonetheless, I am convinced that it cannot be inferred from Section 164 (2) of the Civil Code, or from the principles on which it is based, that a power of attorney envisaged in that provision must be limited in its scope. I believe that an unlimited power of attorney will also suit the sense and purpose of that rule. For distinction between the two types of powers of attorney and the question of their required specificity, see especially the opinion of the Civil and Commercial Division of the Supreme Court of the Czech Republic of 28 June 2000, Cpjn 38/98, published in the Collection of Court Rulings and Opinions under No. 44/2000: *"A power of attorney may be—in terms of the attorney's authorisation—either general, empowering the representative (attorney) to all legal acts, or special, limited to certain legal acts or only a single legal act; in both cases, the power of attorney may be formulated as unlimited, empowering the attorney to act freely according to his/her best knowledge and conscience, or as limited, specifying the boundaries within which and the manner how the attorney is to act. The requirement for specificity will thus also be met by a power of attorney whereby the real estate owner empowers the attorney to enter into a purchase contract on transfer of the real estate (Section 588 of the Civil Code) for the owner and on his/her behalf, without specifying in the contract to whom and for what price the real estate is to be sold. Such a power of attorney should then be construed in that the attorney was empowered to choose the purchaser according to his/her best knowledge and conscience, and to agree with the purchaser on the purchase price of the real estate."*; and recently, e.g., the judgement of the Supreme Court of the Czech Republic of 31 May 2016, File No. 29 Cdo 1899/2014.

5.1.3 Member of the governing body (exceptionally) as a juristic person's statutory representative

It is finally a question to what extent a member of the governing body might even become a purely statutory representative of the juristic person, e.g. because the juristic person would authorise him (beyond the scope of the discharge of his/her duties as member of the governing body) to perform a certain activity within the meaning of Section 430 (1) of the Civil Code, where the given member would then have, based on the cited provision, the authority to represent the juristic person in all acts that are usually made within such an activity.

Under the legislation effective until the end of 2013, the Supreme Court unified the decision-making practice on this issue through a judgement rendered by the Grand Chamber of its Civil and Commercial Division on 15 October 2008, File No. 31 Odo 11/2006, published under number 76/2009 of the Collection of Court Rulings and Opinions, where—in respect of a co-operative—it concluded on the question of concurrent discharge of duties of (a member of) the governing body and statutory representation under Section 15 of the Commercial Code that *"a person who is a member of the governing body of a juristic person cannot simultaneously be* [within the scope of the discharge of duties of a governing body member—added by the author] *a statutory representative of that person"*. The Supreme Court then affirmed these conclusions, e.g., in judgement of the Supreme Court of the Czech Republic of 23 June 2009, File No. 29 Cdo 2008/2007, and in judgement of the Supreme Court of the Czech Republic of 23 September 2010, File No. 29 Cdo 3540/2008.

Nonetheless, the said conclusion does not mean that a member of the governing body can under no circumstances act a statutory representative of a juristic person which follows the "four eyes" rule. If the law (cf. Section 61 (3) of the Corporations Act), case-law and doctrine all admit that a director may have a validly concluded employment contract with his/her juristic person concerning the performance of activities not falling within the competence of the governing body (programmer, IT specialist, driver, etc.), then under Section 430 (1) of the Civil Code, the director may perform for the juristic person all legal acts that are usually entailed in such activities as a statutory representative under the said provision. In that case, the employment contract is an authorisation within the meaning of that provision. In that case, the director will also be liable for any potential breach of duties following from the employment contract under the Labour Code, and the statutory surety under Section 159 (3) of the Civil Code will not apply in case of damage caused to the juristic person. Analogously, it can admittedly be assumed that if a director of a private limited company may, e.g., use a company car, this entitlement can be considered an authorisation to perform a certain activity within the meaning of Section 430 (1) of the Civil Code, and the director, even if otherwise limited by the "four eyes" rule, can independently, e.g., purchase gas at a gas station.

Nonetheless, a general (basically unlimited) authority to represent vested in such members of governing bodies is practically excluded by Section 430 (1) of the Civil Code.

5.2 Applicability of the rules on representation to acts made on behalf of a juristic person by a member of the governing body

The legal nature of a juristic person's representation by a member of its governing body is relevant not only for legal theory. It is also crucial for assessing whether or not (and to what extent) the representation by such a member is regulated by the provisions on representation (general provisions (Sections 436–440 of the Civil Code); the provisions on contractual representation (Sections 441–449 of the Civil Code); and the provisions on statutory representation (Section 457 et seq. of the Civil Code)). However amusing the possibility to apply Section 461 (1) of the Civil Code (under which a statutory representative is merely to manage the assets and liabilities in a usual manner, while for matters other than usual, the representative needs court approval) may be, there has been some confusion as to whether the member of the governing body may—if this is stipulated neither in the constitution nor in the agreement to discharge office—grant a power of attorney to act on behalf of the juristic person (cf. Section 438 of the Civil Code). Likewise, there has been a discussion about a conflict of interests (Section 437 of the Civil Code), subsequent confirmation in the case of *ultra vires* acts (Section 440, Section 446 or even Section 431 of the Civil Code?), and so on.

If we accept that the representation of juristic persons by members of their governing body is neither contractual nor statutory, then the relevant provisions governing these types of representation will not apply to acts made by such members. Only the general rules will apply (i.e., Sections 436–440 of the Civil Code), but only without prejudice to the special provisions set out in Title II, Chapter 3 of the Civil Code, or in the Corporations Act.

5.2.1 Can a member of the governing body grant a power of attorney for the given juristic person? (Applicability of Sections 438 and 439 of the Civil Code)

The basic provision dealing with the status of a member of the governing body as a representative of a juristic person is enshrined in Section 164 (1) of the Civil Code, stipulating that *"a member of the governing body may represent the juristic person in*

all matters". The wording implies that the member may, notwithstanding Section 438 of the Civil Code, grant a power of attorney to a third party authorising the third party to act on behalf of the juristic person. Numerous decisions of the Supreme Court have confirmed that granting a power of attorney is a legal act[149] which falls under "all matters" within the scope of the governing body member's authority to represent as laid down by the law. The application of Sections 438 and 439 is thus excluded by Section 164 of the Civil Code.

5.2.2 Presumption of representation—why is a representative deemed to act on his own behalf in case of doubt? (Applicability of Section 436 (1) of the Civil Code)

In terms of the general provisions, the representation of a juristic person by a member of its governing body is covered by Section 436 of the Civil Code.

The basic rule laid down in the first sentence of Section 436 (1) of the Civil Code will undoubtedly apply. According to that rule, a person who is authorised to make legal acts on behalf of another person is the latter's representative; rights and obligations ensue directly to the represented person.

However, as confirmed by case-law related to former legislation, acts taken by a member of the governing body for the juristic person will also be subject to the second sentence of Section 436 (1) of the Civil Code. The latter provision comprises an important presumption. If it is not evident that someone is acting for some other person, (s)he is conclusively presumed to act on his own behalf. In other words, in case of doubts, the court must always prefer the conclusion that the representative probably acted for him/herself rather than for another person. The same will also be true of representation by a member of the governing body. Even though a member of the governing body may bind the juristic person in all matters, this does not automatically mean that any act made by him/her will actually bind the juristic person, even if it pertains to it. A member of the governing body may also bind him/herself, i.e. act on his/her own behalf, even in matters pertaining to the juristic person. It must therefore be always clear from a legal act (e.g. its header, a text under the signature, etc.) that the member of the governing body is acting for the juristic person, not on his/her own behalf. When in doubt, the court will prefer the conclusion that the given act taken by the governing body member did not bind the juristic person, although it pertained to it.

One can recall, e.g., the conclusions in the judgement of the Supreme Court of the Czech Republic of 11 November 2008, File No. 28 Cdo 3790/2008. A company

[149] See, e.g., judgement of the Supreme Court of the Czech Republic of 3 January 2002, File No. 22 Cdo 870/2000: *"Power of attorney is a unilateral legal act whereby the principal has expressed his will, directing the agent to make legal acts on his behalf."*

director borrowed money for the company's operations; the creditor even remitted the money to a company account. Nonetheless, the contract did not clearly indicate that the company would be the debtor. To the contrary—the contract explicitly mentioned only the director. Although the act in question probably related to financing of the company and the company received the relevant funds, the courts nonetheless inferred that, not the company, but rather the director himself was the debtor. The Supreme Court noted in this respect, in general terms: *"Although acts made by the governing body of a juristic person are considered to be directly acts made by the juristic person […], this does not release the governing body from the duty to indicate that it is acting on behalf of the juristic person, and not on its own behalf. If each and every act taken by the governing body bound the juristic person, then the governing body would be unable to make any legal acts on its own behalf (as a natural person) even if the body did not indicate that it was acting on the juristic person's behalf."*

Special attention needs to be paid to endorsements of securities where the endorsement is being made by a juristic person. It is frequent in practice that an endorsement does not indicate that it is being made by a member of the governing body for the juristic person. The given member of the governing body merely attaches his/her signature to the endorsement clause (e.g. to the text *"In our stead, to the order of …"*) and, at most, writes that (s)he is the juristic person's director. In such cases, according to settled case-law of the Supreme Court, a transfer of the security is not effected if it is not possible to discern from the endorsement that it is being made by the given member of the governing body for the juristic person, and the endorsement thus cannot be binding on it. See, e.g., the conclusions of the ruling in the judgement of the Supreme Court of the Czech Republic of 29 October 2008, File No. 29 Odo 1620/2006, as regards an endorsement on a promissory note: *"The signature of a juristic person under the endorsement must include identification of the person who is performing the legal act, i.e. must indicate that the signature is being attached on behalf of the juristic person. If this is not so, the signature of the natural person as the governing body (member of governing body) of the juristic person on the note cannot be considered a signature of the juristic person […]. The conclusion reached by the appellate court that the note was not transferred through endorsement is thus correct."*Analogously, as regards an endorsement made on shares, see the judgement of the Supreme Court of the Czech Republic of 30 September 2009, File No. 29 Cdo 494/2008.

However, problems also arise in practice when a power of attorney is being granted for a juristic person. Since granting of such a power also constitutes a legal act, then if the power of attorney is to be binding on the juristic person, its wording must indicate beyond any doubt that the member of the governing body is granting it for the juristic person, and not for him/herself. Members of governing bodies often err in practice when they conceive a power of attorney as a substitute power of attorney, i.e. grant it in respect of company matters, but on their own behalf (for themselves). Such an attorney then cannot bind the juristic person on its basis as (s)he—*stricto sensu*—lacks a power of attorney from the juristic person. Among

all the cases dealing with this issue, one can mention the facts that stood behind the recent resolution of the Supreme Court of the Czech Republic of 29 October 2015, File No. 29 Cdo 3471/2013. It can be inferred from recapitulation of the reasons that the company director formulated the power of attorney in that case as follows: *"O. Z., as the director of a private limited company named INTERNATIONAL INVEST s. r. o., formerly ICOM holding s. r. o., Id. No.: 45475792, hereby authorises Mr R. L. to represent him within the scope of the authorisation of a statutory representative' in the following matters."* The appellate court did not consider the power of attorney granted for the company, and thus concluded that the attorney could not enter into an agreement on assignment of a receivable for the company on its basis. The Supreme Court upheld this conclusion. It stated literally: *"The applicant's plea that the power of attorney was granted to Mr R. L. by the bankrupt does not render the application for appellate review admissible as the interpretation of the contents of the power of attorney of 5 September 1998 used by the appellate court (according to which the power of attorney was not granted by the bankrupt, but rather by O.Z. as the governing body to represent himself) is in conformity with the rules of interpretation given in Section 35 (2) of the Civil Code, as well as the principles of interpretation of legal acts, formulated, e.g., within the reasons stated for judgement of the Supreme Court of the Czech Republic of 30 March 2000, File No. 20 Cdo 2018/98, published under number 35/2001 of the Collection of Court Rulings and Opinions, […] and in the judgement of the Constitutional Court of the Czech Republic of 14 April 2005, File No. I. ÚS 625/03, published in the Collection of Judgements and Resolutions of the Constitutional Court, volume 37, year 2005, part I., under serial number 84. […] in the case at hand, the power of attorney was not granted by the juristic person for its representation, but rather a natural person (O. Z.) for representation of the latter as the company director."*

For it to be possible to attribute (impute) acts taken by the governing body to the juristic person, it is often sufficient to attach the juristic person's stamp to the director's signature. That alone will be enough to clearly indicate that the given act is to bind the juristic person, and rule out the possible conclusion on personal commitment of the acting person, which would otherwise follow from above-cited Section 436 (1) of the Civil Code. In this respect, see, e.g., the conclusions of the Supreme Court of the Czech Republic comprised in the judgement of 19 January 2010, File No. 29 Cdo 1225/2008: *"on the basis of a signature of the acting person alone, it can be, in principle, inferred whether the will to sign a promissory note was expressed (through its governing body) by the relevant juristic person or whether this is 'merely' a signature of a natural person. The deed usually—except for a situation where the person who is to be the debtor under the note can be identified based on its further wording (e.g. identification of the debtor under the note in the wording of the deed)—does not include (and in view of an insufficient space on traditional promissory notes, cannot include) any further source of information in this regard."* The importance of the link between the location of the stamp and the signature cannot be overstressed, even under law of bills and notes, as documented, e.g., in further reasoning of the same

decision: *"It is thus clear from the contents of the promissory note (as established based on evidence taken by the courts of lower instances) that a juristic person is designated as its maker (by means of an imprint of a stamp comprising the business name and registered office of the company); above this designation (in a part that is in no way graphically separated or markedly distant from the company designation), there is a signature of the person (the defendant) who acted on its behalf. The Supreme Court is convinced that the above indicates that the debtor under the note in the case at hand (its maker) is not the defendant, but rather F. A. a.s. The opposite conclusion cannot be inferred even from the fact that the note also includes additional details (the defendant's birth identification number and address) further identifying the person who attached his signature to the note (next to the designation of the juristic person). If the other details on the note (as in the case at hand) clearly indicate that the note was made by a juristic person, the mentioned details (which are, moreover, superfluous in terms of the note's validity) cannot be ascribed any other meaning than that they serve to identify the person acting on behalf of the maker—the juristic person."* Similarly, see the judgement of the Supreme Court of the Czech Republic of 29 April 2015, File No. 29 Cdo 2207/2014: *"In the opinion of the Supreme Court, the fact that the signature of the natural person acting on behalf of the endorser (identified through its business name) is located only at the end, on a single line of the endorsement, rather than directly next to the endorser's business name, cannot warrant a conclusion on the absence of the ('two-component') signature of the endorser and non-existence of a continuous series of endorsements."*

I add that in a specific case, the juristic persons's stamp attached to the signature of the acting person can even "impair" his/her signature which would otherwise be logically considered an expression of the undersigned person's personal act. Worthy of attention are, for example, the facts of the case in which the Supreme Court issued its judgement of 20 January 2011, File No. 29 Cdo 3922/2008. A promissory note was made in that case by a private limited company acting through its executive director. The creditor under the note required security in the form of personal guarantee (aval) provided by the executive director. That was also how the declarations were phrased on the front part of the note, and the number of signatures on the note also corresponded to this fact: the executive director signed the note twice. However, the problem was that she also stamped the note twice. In other words, she attached the company's stamp to both her signatures. The creditor criticised the absurdity of the conclusion that the company should be bound by the note as the maker and, simultaneously, as the avalist (providing guarantee for its own debt). Nonetheless, the Supreme Court did not confirm personal liability of the executive director as her second signature on the note was entirely clearly (through the attached stamp) also made on the company's behalf. It concluded literally: *"If the second defendant* [executive director of the maker] *attached to her signature on the note a stamp comprising identification of the first defendant* [the company that made the note] *(its business name, registered office and identification number), the Supreme Court considers that there is no leeway for considering that the given act might have been made by the first*

defendant. At the same time, it is irrelevant what the actual intention of the parties to the promissory note was at the time of its execution (regarding the person who was to provide guarantee (aval) for payment of the note) or that such an act has no practical benefit for the note owner (in terms of increasing his certainty that the note will be paid) under the circumstances (where the maker and avalist were one and the same person. Indeed, in view of the above-described location of the disputable signature, it cannot but be concluded that the second defendant [executive director of the maker] *did not sign the note as a natural person and is thus not a debtor under the note (in the position of avalist).”*

Finally, it should be noted that, in practice, the contracting parties are often juristic persons who may be represented by the same natural persons acting as members of both their respective governing bodies. Numerous decisions of the Supreme Court attest to what already would follow from the aforesaid rules, i.e. that it is not sufficient in that case if the contract is executed by the given natural person for only one of the parties. Although that person may simultaneously also bind the other party, if (s)he does not attach a second signature with specification that (s)he is doing so for that other party (or if it is not clear from his/her signature that it is being explicitly attached for both parties for whom (s)he can act), his/her signature with details on one of the parties cannot automatically be also considered an expression of will of the other party to the contract and the latter’s consent to the contract. In this respect, see, for example, the facts and conclusions in the judgement of the Supreme Court of the Czech Republic of 31 May 2011, File No. 29 Cdo 4038/2009: *“If only two of three board members signed the pledge agreement on the pledgor’s behalf, without any of them having been authorised to do so in writing by the board of directors, they acted at variance with the manner of acting on behalf of the pledgor as specified in the Commercial Register, and their action does not bind the pledgor (it is not considered the pledgor’s act […]). The mentioned conclusion cannot then be affected in any way by the fact that the later bankrupt company (as personal debtor) also signed the pledge agreement and did so through its executive director, Ing. M. L., who was the third member of the pledgor’s board of directors at the decisive time. As follows from the second sentence of Section 13 (1) and Section 13 (2), acts taken by the governing body are considered acts made directly by the company. If an expression of will is made by an executive director on behalf of a private limited company (in this case, the later bankrupt), it cannot be deemed eo ipso that the executive director made that expression of will also on behalf of another juristic person where he has the position of governing body or its member (analogously, an expression of will made on behalf of a company by its governing body does not (eo ipso) also bind the natural person who made the expression of will on behalf of the company as its governing body).”*

The same applies if one of the parties to a contract is a juristic person that has to be bound jointly by executive directors A and B, and the other party is one of these directors personally (e.g. B). If the contract is signed by both, but A does so for the juristic person and B “only” for himself, it cannot be inferred that the contract is binding on the juristic person—while B did attach his signature, he did not do so

for the juristic person, and the requirement for joint representation by two executive directors was not met for the juristic person. In this respect, see for example the facts and conclusions in the resolution of the Supreme Court of the Czech Republic of 1 October 2015, File No. 29 Cdo 2685/2015: *"The Supreme Court then added on the margin—in view of the legal opinions expressed by the applicant—that if a single executive director acts on behalf of a private limited company, although two executive directors are supposed to act on the company's behalf (execute a contract) according to the memorandum of association and the manner of acting specified in the Commercial Register, such an expression of will cannot be considered an expression of will made by the company. […] As to the incorrect conclusion according to which it was sufficient if a second executive director signed the contract 'for himself' (as a natural person—party to the contract), cf. analogously the reasons specified by the Supreme Court in its judgement of 31 May 2011, File No. 29 Cdo 4038/2009 or in its resolution of 16 October 2013, File No. 29 Cdo 3739/2011."*

5.2.3 When can representative's good faith be attributed to the juristic person being represented? (Applicability of Section 436 (2) of the Civil Code)

Section 436 (2) of the Civil Code comprises an essential rule concerning imputability (or attributability) to the represented party of good or bad faith, or rather knowledge of a certain fact, on the part of the representative. It is again a question to what extent the rule can be applied to members of the governing body when they represent the juristic person in a specific matter. However, there is also room for further considerations regarding imputability of such faith or knowledge on the part of members of the juristic person's governing body in a situation where someone else acts for a juristic person in a matter in respect of which such faith or knowledge is relevant. If, for example, goods have been acquired for a juristic person from a non-owner by a corporate agent or attorney-at-law based on a power of attorney, who acted in good faith regarding the transferor's authority to dispose of the goods, can the juristic person invoke good faith on the part of that representative if one of the three members of its collective governing body knew full well about the legal fate of the goods at the time of the acquisition?

The rule enshrined in Section 436 (2) of the Civil Code was already known by the 1964 Civil Code (Section 32 (3)). According to this rule, if a representative had good faith or must have known about a certain circumstance, this fact is also taken into consideration in respect of the represented entity. This is only fair. Although the representative expresses his own will, the law ascribes the consequences of such an expression of will directly to the represented party as if it were an expression of the latter's will. However, in that case, the awareness that created the will must also be ascribed to the represented party. Therefore, if the representative knew about (was

aware of) a certain fact regarding the subject of the legal act which the representative took for the represented party, such knowledge will be attributed to the latter even if the represented party was totally unaware of the matter and the representative failed to point it out. This is as if the representative and the represented party constituted a single unit in the matter to which the representation pertains and were to inform each other of facts that are legally relevant for the unit.[150] It is immaterial that this did not occur in the case at hand. It is sufficient that they could and should have done so. The law nonetheless adds (and so did the former Civil Code) that this is not true of circumstances that the representative learned before the representation was established. The wording of the law thus explicitly excludes from the representative's awareness attributable to the represented party those components of his/her awareness that did constitute its part at the time when the representative expressed his/her will for the represented party, but became part of it before the will (and thus also the circumstances forming it) began to be attributable to the represented party. In other words, not all the component parts of the representative's will, but rather only those that began to be created after the authority to represent was established, should be attributed to the represented party. It appears that the law does not envisage that the representative and represented party should inform each other upon establishment of the representation of facts relevant for its subject. At the same time, it is not without significance that at least a part of legal theory questions to what extent the mentioned limitation is materially correct and justifiable, and on these grounds, reduces through interpretation the applicability of the limitation basically only to those cases where the attorney acts further to a special instruction of the principal.[151] I share this conclusion and also consider it relevant for the purposes of this book.

It is also material that while the 1964 Civil Code explicitly applied the mentioned rule to representation based on a contract, Section 436 (2) of the Civil Code belongs among general provisions which are common to all types of representation. These provisions are (in the absence of a special regulation) also applicable to representation of a juristic person by members of its governing body. One could thus also ask whether the awareness of these members of a certain matter of the juristic person in respect of which they act for the latter can only be imputed to the juristic person if they, in fact, became aware of the matter only after the creation of their authority to represent, i.e. their office. I believe that the answer should be in the negative. The awareness of members of a juristic person's governing body is imputed to the juristic person under a different regime. This special regime is inferred from Section 151 (2) of the Civil Code (for details, see below), and unlike Section 436 (2) of the Civil Code, the former provision does not distinguish when the given members actually became aware of the

[150] SVOBODA, K. In: ŠVESTKA, J., DVOŘÁK, J., FIALA, J. et al. *Občanský zákoník. Komentář. Svazek I (§ 1 až 654) [The Civil Code. Commentary. Volume I (Sections 1 to 654)]*. Prague: Wolters Kluwer, 2014, p. 1040

[151] See especially MELZER, F. In: MELZER, F., TÉGL, P. et al. *Občanský zákoník – velký komentář. Svazek III. § 419–654 [Civil Code—Large Commentary. Volume III. Sections 419 to 654]*. Prague: Leges, 2014, pp. 51–52.

matter. Imputability under Section 151 (2) of the Civil Code relates to the awareness of such members regardless of who acted for the juristic person in the specific matter. All the more so, however, is there no reason to reduce the scope of imputable facts (for the benefit of Section 436 (2) of the Civil Code) in a situation where the given member even represented the juristic person in the matter. I am thus convinced that, in respect of members of the governing body of a juristic person, Section 151 (2) of the Civil Code must always be considered a special provision, i.e. even when these members represent the juristic person.

Section 436 (2) of the Civil Code also serves as a basis for articulating the crucial rule that if the represented party lacks good faith, it cannot invoke good faith of its representative. The legal construction of a single unit formed by the representative and the represented party, as an integral association of their wills, logically cannot neglect the will of the represented party. Although the representative expresses his will, given that the law ascribes its consequences to the represented party, the facts that constituted component parts of the latter's knowledge, and could thus affect its will, must also be considered relevant. At the same time, there is no reason to exclude from the scope of this rule a juristic person that is being represented. Even though the fiction theory (according to which a juristic person lacks its own will and the ability to express it) has prevailed over the organic theory within theoretical substantiation of a juristic person under new civil law, this changes nothing to the fact that the new Civil Code, too, assumes that the will of persons other than those who represent a juristic person in a specific matter will also have to be attributed to the juristic person. Ultimately, from the legal point of view, there will still have to be a will "parallel" to the will of a juristic person's representative in a specific matter, or maybe rather the awareness of the juristic person itself (as—expressed more accurately in terms of the theory of fiction—the result of parallel wills, or awareness of other persons replacing the will of the juristic person, whose will and awareness are thus imputable to the juristic person). I do not consider relevant for the purposes of this paper what legal construction will be used to reach this will. What is crucial is that new civil law acknowledges it and respects it.

A fundamental role in determining the contents of this autonomous will of the represented party, independent of the representative's will as regards the juristic person being represented, is played by Section 151 (2) of the Civil Code. The provision requires that good faith of the members of its body be imputed to the juristic person *eo ipso*, i.e. regardless of whether they act for the juristic person in the given case. Similarly as Section 436 (2) of the Civil Code, Section 151 (2) of the Civil Code deals only with good faith. Nonetheless, I have no doubt that it also applies to bad faith, or generally to awareness of a certain legally relevant fact, whether it is for the benefit or to the detriment of the juristic person.

A more complex question could be as follows: to the members of which bodies does the relevant rule extend to? Although the legislature makes a terminological distinction among these bodies in the wording of the Civil Code (distinguishing, e.g., supreme bodies, elected bodies, governing bodies and supervisory bodies), no

such adjective is used in Section 151 (2) of the Civil Code. That could mean that it will also be possible to impute to a juristic person the awareness of members of its supreme bodies, i.e. for example, shareholders or members, and possibly *(eo ipso)* non-executive or supervisory bodies. As a matter of fact, the Supreme Court has already concluded in its case-law pertaining to the former legislation that even bad faith of the founders, i.e. shareholders, could be imputed to a public limited company (specifically, the knowledge that a person contributing real estate to the registered capital of the company lacked the authority to dispose of the real estate at the time when the ownership title to the estate was to pass to the company). Indeed, in judgement of the Supreme Court of the Czech Republic of 27 January 2009, File No. 29 Odo 788/2006, the Supreme Court states literally: *"A public limited company being founded (the later second bankrupt) cannot share faith (good or bad) other than that of its (sole) founders in terms of qualification of the alleged possession (on the same note, cf. e.g. Švestka, J., Spáčil, J., Škárová, M., Hulmák, M. et al.: Občanský zákoník I. Komentář. (Civil Code I. Commentary.) 1st edition, Prague, C. H. Beck, 2008, p. 673)."*

In spite of the broad wording of Section 151 (2) of the Civil Code, I consider that this provision cannot be extended to members of a juristic person's supreme body. On the one hand, it should be noted that this conclusion ultimately did not follow from the mentioned decision. While the reasoning did mention (sole) shareholders of a public limited company, they were simultaneously members of its board of directors. This is also supported by the attached reference to professional literature. The literature mentioned, at most, imputability of good or bad faith on the part of members of the governing body.

It must be reflected in construction of Section 151 (2) of the Civil Code, on the one hand, that the rule formulated by that provision (as well as the general concept of a juristic person used by the Civil Code) follows on from Section 337 of the Austrian Civil Code (ABGB), which applied in this country until 1950 and has never ceased to be valid in Austria. Possession by a "community" (in modern times, meaning all juristic persons, including (business) corporations[152]) was to be assessed, according to that section, "in view of honesty on the part of proxies acting on behalf of the members". While the mentioned rule also dealt, in general, with members of the community (juristic person / corporation), its interpretation settled on the conclusion that it was necessary to distinguish, from the members, a corporation's body "whose acts are considered to be acts taken by the juristic person", where a conclusion on honesty or dishonesty of the juristic person can be made on the basis of good faith of the members

[152] See, e.g., ROUČEK, F. In: ROUČEK, F., SEDLÁČEK, J. et seq. *Komentář k československému obecnému zákoníku občanskému a občanské právo platné na Slovensku a v Podkarpatské Rusi. Díl II [Commentary on the Czechoslovak Civil Code and Civil Law Applicable in Slovakia and in Carpathian Ruthenia. Part II].* Prague: V. Linhart, 1937, p. 138: *"Section 337 speaks only of 'communities', meaning, at the time when the Civil Code was issued,* universitas *of people (rather than today's political community, existing only since 1848), which term we shall use in this book for corporations as such, while we also need to mention juristic persons (and thus also corporations)."*

of that body, rather than members of the juristic person in general.[153] An identical position on interpretation of Section 337 of the ABGB has been adopted by contemporary Austrian sources.[154] This approach is also confirmed by the explanatory memorandum to the draft Civil Code. In respect of Section 151 (2) of the Civil Code, it explicitly states that these must be bodies involved in the decision-making of the juristic person, i.e. creating its will.[155] The competence to take legal acts for a juristic person, and also to adopt decisions on such acts, lies basically with the governing body. In limited companies, the supreme body (i.e. the general meeting) may not (subject to certain exceptions) interfere with that competence even by means of instructions (Section 195 (2) of the Corporations Act in respect of private limited companies, and Section 435 (3) of the Corporations Act in respect of public limited companies).

Indeed, in their other case-law (even of older dates), the Supreme and Supreme Administrative Courts clarify this issue when they repeatedly refer to the governing body in respect of imputability of the company's awareness of a certain matter in relation to the members of its body.[156] In judgement of the Supreme Court of the Czech Republic of 25 November 2014, 22 Cdo 4057/2013, the Supreme Court even disproved an opinion previously expressed by the appellate court, specifically that bad faith (regarding the ownership of real estate being contributed to its registered capital) of the contributor—shareholder, who was not an executive director, could be imputed to the given private liability company. It expressly stated that for it to be possible to establish bad faith on the part of the company, the facts casting doubt on the contributor's authority to dispose of the relevant property would have to be known to one of the company's executive directors. At the same time, according to the Supreme Court, the conclusion on such awareness could not be supported by the sole fact that the contributor was a son of one of the company's executive directors. It states literally in this respect in the reasoning of the judgement: *"It is clear from*

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153 Ibid.: *"In Section 337, the word 'proxies' means a body (rather than its members, representatives, or intermediaries), and thus qualification of possession by a juristic person is assessed based on the qualification of its bodies, and therefore the honesty or dishonesty of possession by a juristic person turns on* bona *or* mala fides *of the body (rather than the representative—see, in this respect, Section 326 in paragraph 8—and rather than its members even if they are the mentioned intermediaries)."*

154 See, e.g., GRÜBLINGER, K. In: KODEK, G., SCHWIMANN, M. *ABGB. Praxiskommentar. Band 2. §§ 285–530 ABGB. NWG und EPG*. 4. Auflage. Wien: LexisNexis, ARD Orac, 2012, p. 74.

155 The explanatory memorandum states literally: *"It is proposed to stipulate explicitly that good faith on the part of members of a juristic person's body is also imputed to that juristic person. In this respect, emphasis must be placed on good faith of the body which makes the decision because this criterion is legally significant in terms of the conclusion on (non-)existence of good faith of the juristic person."*

156 See, for example, the judgement of the Supreme Court of the Czech Republic of 19 July 2000, File No. 8 Tz 136/2000; judgement of the Supreme Administrative Court of the Czech Republic of 21 November 2013, File No. 2 As 125/2012; judgement of the Supreme Court of the Czech Republic of 9 April 2014, File No. 22 Cdo 427/2013, and judgement of the Supreme Court of the Czech Republic of 25 November 2014, File No. 22 Cdo 4057/2013; resolution of the Supreme Court of the Czech Republic of 21 May 2015, File No. 29 Cdo 1539/2014; and judgement of the Supreme Court of the Czech Republic of 26 April 2016, File No. 22 Cdo 2426/2015.

the above that for the bankrupt not to have good faith in the given case to the effect that the bankrupt is the authorised possessor of the relevant real estate, the circumstances objectively questioning the good faith would have to reach the knowledge of the company's governing body, i.e. in the case of the bankrupt, of one of the executive directors (Section 133 (1), first sentence of Act No. 513/1991 Coll., the Commercial Code). However, no such circumstances were established with certainty in the proceedings and, as a matter of fact, the appellate court does not refer to any such circumstances as it links its conclusions solely to information known to one of the shareholders of the bankrupt, rather than to information pertaining to the knowledge of the bankrupt's governing body. While it is true that the contributor's father was the bankrupt's executive director at the time of contribution of the real estate to the registered capital, it nonetheless cannot be inferred from the close family relationship that Ing. J. H. knew that his son was engaged in litigation regarding the relevant real estate. The close family relationship would have to be accompanied by another circumstance that would warrant, beyond any justified doubt, the conclusion that the company's executive director was aware of facts questioning the good faith. Even though the court performing the appellate review admits that a family relationship may play a certain role in evaluation of decisive facts, its very existence, however, is insufficient eo ipso to infer the awareness of specific facts—in the given case, facts regarding the good faith of the bankrupt's governing body."

Another issue has traditionally been associated with the question of how awareness on the part of the governing body should be imputed to a juristic person if the body consists of several persons, i.e. is a collective body. In the pre-war doctrine (in view of the construction of Section 337 of the ABGB) still prevailed the opinion that it was sufficient for establishing good faith regarding a certain fact on the part of a juristic person if the good faith was shared by a majority of the members (see especially the thesis presented by F. Rouček in the second volume of the six-part commentary on ABGB of 1937).[157] Consequently, in the case of a three-member body, the existence of good faith on the part of the juristic person was not prevented if one of its members knew of circumstances questioning the good faith. If that member did not share this knowledge with the other members, the juristic person continued to have good faith. It should be added that the mentioned opinion relied on the wording of the second sentence of Section 337 of the ABGB, which read as follows: *"However, the unfair must always compensate, for the damage, both the fair members and the owner."* It was inferred from this sentence that if bad faith on the part of a minority of members resulted in good faith of the juristic person, these minority members had to compensate the owner of the thing for the damage. This, in reverse, served as an

[157] See ROUČEK, F. In: ROUČEK, F., SEDLÁČEK, J. et seq. *Komentář k československému obecnému zákoníku občanskému a občanské právo platné na Slovensku a v Podkarpatské Rusi. Díl II [Commentary on the Czechoslovak Civil Code and Civil Law Applicable in Slovakia and in Carpathian Ruthenia. Part II]*. Prague: V. Linhart, 1937, p. 138: *"If the given body is a collective one (i.e. consists of several members, who are members of the body, rather than aforesaid members of the juristic person), what is decisive is honesty (or dishonesty) on the part of a majority of the body members."*

argument for the conclusion that a juristic person could maintain its good faith even if part of the members of its collective body did not share it.[158] I have thus always considered it incorrect when the aforesaid Rouček's thesis was adopted, without any further considerations, by professional sources pertaining to the 1964 Civil Code, which did not comprise such a supplement.[159] From there (precisely with reference to the commentaries existing at that time and, indirectly, also to F. Rouček's thesis), it infiltrated into case-law of the Supreme Court (even if only generally, without it being ever specifically applied by the Supreme Court). The reasoning of the judgement of the Supreme Court of the Czech Republic of 9 April 2014, File No. 22 Cdo 427/2013, thus states: *"In the commentary on the 1964 Civil Code (Jiří Švestka, Jiří Spáčil, Marta Škárová, Milan Hulmák et al.: Občanský zákoník I. (Civil Code I.) 2nd edition, C. H. Beck., Prague 2009, p. 742—see also the 'Lexdata' system), it is thus stated: 'Neither a juristic person nor the State have a 'psyche', and their good faith thus needs to be assessed according to criteria that partially differ from those applicable to assessing the will of natural persons. The law in no way regulates this aspect. How should one deal, e.g., with a situation where a part of the company's shareholders had good faith and a part did not? For the time being, it appears most reasonable, with reference to the judgement rendered by the Constitutional Court on 8 July 1997 under File No. III. ÚS 77/97, to assess whether the juristic person had good faith 'in view of all the circumstances', and in doing so, take into consideration the principles set out in Section 337 ABGB. According to the commentary on this (quite obsolete, in view of the way it is phrased) provision, the possession by a juristic person is qualified based on good or bad faith of that person's body, rather than that of its representative. If the juristic person's body is a collective one, a decisive role is played by the good faith of a majority of its members (Sedláček, J., Rouček, F. Komentář k čsl. obecnému zákoníku občanskému a občanské právo na Slovensku a v Podkarpatské Rusi. Díl II. (Commentary on the Czechoslovak Civil Code and Civil Law Applicable in Slovakia and in Carpathian Ruthenia. Part II.), V. Linhart, Prague, 1935, p. 138). If the governing body of the juristic person, or rather a majority of its members (Section 20 (1)), lacks good faith in view of all the circumstances, the juristic person will not be the authorised possessor."*

I am convinced that such a conclusion will not prevail under the conditions established by the new legislation as it is not supported by the wording of Section 151 (2) of

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158 Ibid, below: *"And the dishonest body members must then compensate, for the damage, both the owner and the juristic person (Section 337 (2)), and this is 'always' true: indeed: depending on what has been said about a collective body, the juristic person will be considered, according to the majority of its members, either 'honest' (then, damage will be incurred by the owner of the given thing) or 'dishonest' (in which case, damage will arise on the part of the juristic person, as it will eventually be unsuccessful in a vindicatory dispute). If it is considered honest, the minority of body members must compensate the owner for damage; if it is considered dishonest, the majority of body members must pay damages to the juristic person."*

159 See especially SPÁČIL, J. In: ŠVESTKA, J., SPÁČIL, J., ŠKÁROVÁ, M., HULMÁK, M. et al. *Občanský zákoník I. § 1–459. Komentář [Civil Code I. Sections 1 to 459. Commentary]*. 2nd edition. Prague: C. H. Beck, 2009, p. 742.

the Civil Code, and there is also no substantive reason for maintaining it. I believe that if even a single member of the collective governing body of a juristic person knows about a certain fact, this will be absolutely sufficient for imputing his/her awareness to the juristic person and thus "contaminating" its good faith in the opposite being true. As a matter of fact, in Austria itself, this solution was also gradually reached by both doctrine and case-law, even with an unchanged phrasing of Section 337 of the ABGB.[160] In Czech legal environment, the same conclusion is supported not only by more recent literature,[161] but also by case-law. In relying on this conclusion, the Supreme Court refers to older standpoints regarding delivery of documents to a juristic person via a member of its governing body. According to those standpoints, it was sufficient to deliver a document addressed to the juristic person to a single member of its collective governing body, without it being necessary to ensure that a majority of its members became aware of its delivery or contents. The Supreme Court of the Czech Republic thus stated literally in the reasoning of its resolution of 21 May 2015, File No. 29 Cdo 1539/2014: *"The Supreme Court has no doubt that if a certain fact is known to a member of the company's governing body, it is—in principle—also known to the company itself (cf., on a similar note, the reasons for the judgement of the Supreme Court of the Czech Republic of 10 February 2009, File No. 29 Cdo 2863/2008, published in the Soudní judikatura journal, No. 9, year 2009, under number 138, or the resolution of the Supreme Court of 21 July 2011, File No. 29 Cdo 865/2010, which is available to the public—as are other decisions of the Supreme Court issued after 1 January 2001—on the website of the Supreme Court)."* In the judgement of the Supreme Court of the Czech Republic of 10 February 2009, File No. 29 Cdo 2863/2008, which is referred to, the Supreme Court concluded: *"For a notice of resignation to be delivered to the company, it is necessary that it reaches the sphere of its control, where it is only logical if such a notice is always accepted, for the company as a juristic person, by a certain natural person, e.g. a person authorised to accept mail for the company. Handover of the notice of resignation to the chairman of the board of directors of a public limited company fully meets this requirement, as the chairman is undoubtedly a person authorised to accept mail for the company (see Section 20 (1) of the Civil Code, in conjunction with the second sentence of Section 13 (1) of the Commercial Code)."*

In other words: the fact alone that a single member of the governing body has learned of facts contained in a document being delivered has always sufficed for such a knowledge to be attributable (imputable) to the juristic person. As a matter of fact,

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160 See, e.g., GRÜBLINGER, K. In: KODEK, G., SCHWIMANN, M. *ABGB. Praxiskommentar. Band 2. §§ 285–530 ABGB. NWG und EPG*. 4. Auflage. Wien: LexisNexis, ARD Orac, 2012, p. 74, or ECCHER, B. In: KOZIOL, H., BYDLINSKI, P., BOLLENBERGER, R. et al. *Kurzkommentar zum ABGB. Allgemeines bürgerliches Gesetzbuch, Ehegesetz, Konsumentenschutzgesetz, IPR-Gesetz, Rom I- und Rom II-VO*. 3. Auflage. Wien, New York: Springer, 2010, p. 312.

161 See, e.g., DVOŘÁK, T. In: ŠVESTKA, J., DVOŘÁK, J., FIALA, J. et al. *Občanský zákoník. Komentář. Svazek I (§ 1–654) [Civil Code. Commentary. Volume I (Sections 1–654)]*. Prague: Wolters Kluwer, 2014, p. 517.

see also the conclusions made by the Supreme Court of the Czech Republic in its resolution of 22 May 2012, File No. 29 Cdo 272/2011. In that case, the Supreme Court assessed at what time a document can be considered delivered to a co-operative if it was addressed not to the co-operative, but rather to the home address of its president. It considered crucial not the time when the document reached the sphere of control of the president (as it would hold if the document was delivered to the address of the co-operative or was intended personally to its president), but rather when the president familiarised herself with its contents, i.e. when the co-operative learned, via her, of the contents of the document intended for the co-operative. See, literally, the reasoning of the ruling: *"Although it can be inferred that the consignment was delivered to the co-operative upon its delivery to the president of the co-operative (see also the resolution of the Supreme Court of 21 July 2011, File No. 29 Cdo 865/2010), in view of the fact that the consignment was not addressed to the co-operative, but rather to its president, it has to be concluded that the objection reached the sphere of the co-operative's control, not already on the date when its president (objectively) could have first collected it, but rather only when she became familiar with the contents of the consignment, and was thus able to discern that this was a pleading intended for the co-operative (objection against a resolution of the assembly of the co-operative's members), rather than, e.g., her private mail."*

It can be added that in some cases, by way of exception, case-law does not attribute to the juristic person even the awareness of a majority of members of its governing body. This is so if facts are involved which are decisive for the running of a subjective period of limitation related to the right to compensation for damage caused to the juristic person through unlawful conduct of the members of such bodies (or persons close to them, involved in such conduct or profiting from it). The reason lies in the fact that, in view of a severe conflict of interests, it can hardly be expected that these persons would sue the perpetrators for damages on the juristic person's behalf (this is even not procedurally possible in terms of the perpetrators themselves as the defendant cannot simultaneously represent the plaintiff in the dispute). It would thus not be fair if the period of limitation for filing such an action was running for the juristic person if merely these persons know about the damage and its possible originator. Only when another person whose awareness is imputable to the juristic person learns of circumstances decisive for the commencement of the subjective period of limitation, will these facts also reach the awareness of the juristic person.[162]

I add that in terms of application of Section 151 (2) of the Civil Code (compared to Section 436 (2) of the Civil Code), it cannot be relevant whether the member of the governing body learned of a fact relevant for determining good or bad faith of the juristic person only after the inception of his/her office, or already

[162] See, in this respect, e.g., judgement of the Supreme Court of the Czech Republic of 2 September 2009, File No. 29 Cdo 3526/2007, judgement of the Supreme Court of the Czech Republic of 15 September 2010, File No. 29 Cdo 2308/2009, and judgement of the Supreme Court of the Czech Republic of 26 May 2015, File No. 29 Cdo 3212/2013.

beforehand. The rule itself does not differentiate in this way and, unlike in respect Section 436 (2) of the Civil Code, one can thus rely on an argument *a contrario*. I cannot find any substantive reasons for such differentiation, either. As also follows from the explanatory memorandum to the draft Civil Code, teleological reasons for attributing the awareness of a member of the governing body to the juristic person under Section 151 (2) of the Civil Code are not based on the general authority of such a member to represent the juristic person, but rather on his/her involvement in decision-making on matters of the juristic person, and thus in substance, on the creation of its will (see also the relationship to Section 151 (1) of the Civil Code). At the same time, the law presupposes that a member of the governing body (acting with due managerial care) has to contribute all his/her skills, abilities and knowledge (potentially even expert knowledge), as well as contacts (s)he has available, to the decision-making process within the juristic person.[163] That logically also includes skills, abilities, knowledge and contacts acquired before the inception of the office, as they are often the reason why (s)he was chosen and elected in the first place. This corresponds to a concept, which is not ruled out even by the fiction theory and according to which members of the governing body of a juristic person are considered its hands and brain.[164] From this point of view, it cannot be decisive when these members became aware of the relevant facts. It is material that they were aware of them (formed a part of their awareness) at the time when they discharged the office and as at which time one assesses good or bad faith of the juristic person.

5.2.4 How should a conflict of interests between a member of a (business) corporation's governing body and that corporation be resolved? (Applicability of Section 437 of the Civil Code)

Section 437 of the Civil Code generally prohibits a representative to represent another person if his/her interests are contrary to the interests of the represented

[163] See, e.g., ŠTENGLOVÁ, I. In: DĚDIČ, J., ŠTENGLOVÁ, I., ČECH, P., KŘÍŽ, R. *Akciové společnosti [Public Limited Companies]*. 6th edition. Prague: C. H. Beck, 2007, pp. 480–481, and conclusions of the judgement of the Supreme Court of the Czech Republic of 30 July 2008, File No. 29 Odo 1262/2006: *"It holds in general that a member of the board of directors need not have expert knowledge, skills or abilities required for the pursuit of all the activities falling within the competence of the board. It is also true that the members of the board need not always perform these activities personally, but may rather arrange for their performance through third parties. However, if a member of the board has certain expert knowledge, skills or abilities, it can be inferred from the requirement for due care (Section 194 (5) of the Commercial Code) that (s)he is obliged to utilise them in the discharge of his/her office, as far as (s)he is capable of doing so."*

[164] TILSCH, E. *Občanské právo. Část všeobecná [Civil Code. General Part]*. Prague: Wolters Kluwer, 2012 (reprint), p. 137: *"Acts taken by these individual people or groups of people within the limits of articles of association are considered acts of the juristic person itself and this is why these people are called bodies of the juristic person (as if they were its brain and hands)."*

person. There is no doubt that this rule must be applicable to acts made on behalf of a juristic person by a member of the governing body. However, it should be noted that as regards (business) corporations, special rules to resolve conflict of interests are provided for by Section 54 et seq. of the Corporations Act. Therefore, Section 437 of the Civil Code will essentially not apply to a conflict of interests between a member of the governing body of a (business) corporation (a representative) and the corporation itself (the represented party). Only, if such a member fails to comply with the duties under Section 54 et seq. of the Corporations Act, or if (s)he fails to comply with the prohibition imposed by the supervisory board or the general meeting under Section 56 (2) of the Corporations Act, the provision of Section 437 of the Civil Code will apply to representation by a member of the governing body. This approach has recently been upheld by the Supreme Court. In resolution of the Supreme Court of the Czech Republic of 12 August 2015, File No. 29 Cdo 4384/2015, the Court explicitly concluded: *"With effect from 1 January 2014, members of the governing body of a juristic person are its representatives (cf. Section 164 (1) of the Civil Code and, for example, the reasoning of the resolution of the Supreme Court of the Czech Republic of 30 September 2015, File No. 29 Cdo 880/2015). Where the interests of such a member are contrary to the interests of the juristic person, the member of the governing body may not represent the juristic person as regards any legal acts affected by the conflict of interest (Section 437 (1) of the Civil Code). […] In addition, it should be noted that in respect of corporations, a conflict of interests between members of (governing) bodies and corporations is regulated by Section 54 of the Corporations Act. If a member of a (governing) body complies with his/her notification duty under Section 54 (1) and (2) of the Corporations Act, and neither the supervisory nor the supreme body of the corporation suspends the discharge of his/her office (Section 54 (4) of the Corporations Act), the member of the (governing) body may represent the corporation regardless of the conflict of interests; Section 437 of the Civil Code does not apply in that cse. Then, it is not possible to appoint a curator for the corporation under Section 165 (2) of the Civil Code (such appointment would be groundless because the corporation has a member of the governing body who is empowered to act on its behalf). However, if such a member breaches the duty to notify the corporation about a (potential) conflict of interests under Section 54 (1) and (2) of the Corporations Act, the existing conflict of interests between the member and the corporation prevents the member of the governing body from making legal acts on behalf of the corporation (Section 437 of the Civil Code applies to acts taken by a member of the governing body with all the ensuing consequences)."*

It is true that, in its reasoning, the Supreme Court failed to mention what consequences would follow violation of the prohibition, i.e., what penalties may be imposed if a member of the governing body represents the (business) corporation in cases where there is an unresolved conflict of interests. Undoubtedly, the sanctions will be those provided in Section 437 (2) of the Civil Code. The (business) corporation will be able to invoke violation of the prohibition if the third party knew or must

have known about the conflict. This wording inevitably points towards voidability of such acts.[165] This interpretation brings the new legislation closer to the interpretation prevailing before the end of 2013. Case law of that time implied that the prohibition of representation by a person whose interests are contrary to those of the represented party should, by analogy, also apply to acts made on behalf of a juristic person (corporation) by the governing body or its member. The same was true of the consequences following violation of that prohibition, specifically that the act in question would be invalid. For certain exceptional situations, the Commercial Code set out specific rules of resolving a conflict of interests (e.g., Section 196a). If the governing body complied with these specific requirements (requesting consent of the general meeting; concluding the given contract at arm's length or at a price determined by an expert appointed by the court), and resolved the conflict of interests, the prohibition did not apply and no penalties were imposed. However, if the specific rules were ignored, or no specific rules were applicable to the act in question, the general prohibition applied, together with the penalties for non-compliance.[166] Hence, the only difference between the new and former legislation lies in the fact that if a member of the governing body fails to comply with the prohibition of representing a corporation in cases where there is a conflict of interests, the acts taken on behalf of the corporation will be voidable rather than directly invalid. The corporation will need to invoke the invalidity (within the general limitation period), or else the act in question will remain

[165] See ČECH, P., ŠUK, P. *Právo obchodních společností v praxi a pro praxi (nejen soudní) [Law of Corporations in and for (Not Only Judicial) Practice]*. Prague: Polygon, 2016, p. 73: *"What if a member of the governing body fails to comply with the notification duty under Section 54 et seq. of the Corporations Act? We argue that in that case, the provisions on a conflict of interests will apply as laid down in Section 437 of the Civil Code, and the member of the governing body may not represent the corporation. If such a member does represent the corporation, the corporation can invoke voidability of such acts within the general limitation period under the Civil Code (Section 619 et seq. of the Civil Code). Since a member of the governing body is not a contractual representative, it is impossible to apply the derogation under Section 437 (1) of the Civil Code allowing for representation where the represented person knew or must have known about the conflict. The same situation arises where a member of the governing body and the corporation in question fail to comply with a decision made by the supervisory board or the general meeting, and enter into a contract notwithstanding an express prohibition. In that case, too, the corporation can invoke voidability of the contract concluded, and the corporation will not be bound by the contract. The outlined solution has been promoted in academic literature (see, e.g., the article by DĚDIČ, J. On the provisions governing a conflict of interests in the Corporations Act in relation to the new Civil Code [Úprava konfliktu zájmů v zákoně o obchodních korporacích ve vazbě na nový občanský zákoník]. Právní rozhledy. 2014, No. 15–16., pp. 524–532), and has recently been supported by the Supreme Court in its resolution of 8 December 2015, File No. 29 Cdo 4384/2015."* For a different view, cf. e.g., NOVOTNÁ KRTOUŠOVÁ, L. Následky konfliktu zájmů člena statutárního orgánu právnické osoby jako zástupce a právnické osoby jako zastoupeného [Consequences of a Conflict Between Interests of Director of a Juristic Person Acting as a Representative, and the Juristic Person as a Principal]. *Právní rozhledy*. 2016, No. 17, pp. 592–593, with references to other sources.

[166] See especially the judgement of the Supreme Court of the Czech Republic of 17 November 1998, File No. 21 Cdo 11/98 (R 63/1999), partially supplemented by its judgement of 20 May 2010, File No. 29 Cdo 910/2009 (Soudní judikatura, serial No. 87), and again, e.g., the judgement of 24 September 2013, File No. Cdo 3694/2012.

valid (Section 586 (2) of the Civil Code), and invalidity cannot be asserted if the third party did not or could not have known about the grounds for invalidity.

5.2.5 Is it possible to approve *ex post* any acts taken by members of the governing body who went beyond the limits of their authorisation to represent the juristic person? (Applicability of Section 440 of the Civil Code)

Finally, it has long been unclear whether, in a situation where, under its constitution, a juristic person has to be jointly represented by at least two members of its governing body, representation by only one member of the governing body will be deemed to be an act taken by an unauthorised person under Section 440 of the Civil Code, and whether the juristic person may subsequently confirm such an act made by an unauthorised member of the governing body without undue delay (and be thus bound by it). If the details of the juristic person's manner of acting are recorded in the Commercial or other public Register, a party with whom the transaction has been carried out lacks good faith (that the member of the governing body was authorised to represent the juristic person independently), and thus may not require the given member to honour the promise made or pay damages (Section 440 (2) of the Civil Code). In other words, regardless of the conclusion made with respect to the possibility of subsequent confirmation of an act made by a member of the governing body (who was not authorised to represent the juristic person independently) under Section 440 (1) of the Civil Code, I infer that the governing body member in principle will not be bound by his/her act him/herself (the first sentence of Section 440 (2) of the Civil Code). There seems to be no reason to exclude from the rules on *ratihabitio* a situation where an unauthorised director is a member of the governing body not having authority to act independently. Yet, is it possible to confirm an "act" made by a member of the governing body who has no authority to act independently, i.e., *non negotium* (a non-existent act)? Who may, on behalf of a juristic person, express the will to confirm an act made by a member of the governing body (e.g., an employee as a statutory representative under Section 430 (1) of the Civil Code)? Could the possibility of subsequent confirmation *(ratihabitio)* lead to the erosion of the member's or shareholders' will as expressed in the constitution (instead of the "four eyes" rule, a sole member of the governing body, and his/her act is "confirmed" by a subordinate employee)?

In my earlier texts, I (together with some of my colleagues) concluded that if it was correct to assume that an act made by a member of the governing body who lacks the authority to act independently cannot be considered will expressed by the juristic person, amounting to *non negotium*, then an "act" which *de iure* does not exist arguably cannot be subsequently confirmed. Such an "act" can only be binding

on the juristic person if the "four eyes" rule is subsequently complied with, that is to say, another member of the governing body subsequently expresses the same will on behalf of the juristic person. Allowing *ratihabitio* in situations where the manner of representation was defective, I argued, would also raise the issue as to the exact time from which such acts made jointly by members of the governing body should bind the juristic person. Only rarely do members of the governing body act simultaneously. As a rule, they act successively, i.e., one member first signs a document and, subsequently, the other member co-signs it. The theory that the act made by the first member of the governing body constitutes an incomplete expression of will on behalf of the juristic person, i.e., an incomplete, non-existent act *(non negotium)*, makes it possible to associate the relevant effects only with the existence of the subsequent expression of will that completes the initially incomplete act, thus perfecting it and bringing it into existence from that very moment *(ex nunc)*. If the act made by the first director was regarded as perfect (although so far attributable solely to the actor), and thus capable of subsequent confirmation *(ratihabitio)*, we would have to admit that the act of *ratihabitio*—in terms of its effects—should apply retroactively *(ex tunc)*, i.e., as of the time when the legal act being confirmed was made, since *ratihabitio* is based on such a retroactive effect. Consequently, the legal act made on behalf of a juristic person jointly and successively by members of the governing body would be binding on the juristic person retroactively from the time the first member signed the document, rather than from the time when it was signed by the other members. I did not find this solution appropriate or practical. I added that the conclusion about the perfection (completion) of an act becoming a legal fact only after the last representative out of the prescribed number of joint representatives co-signed the document was already advocated by civil jurists in the pre-war period.[167] I found it sensible to pursue this view in the recodified law as well.[168]

Nonetheless, I eventually had to acknowledge that this opinion could not stand and had to be revised. The opposite standpoint was taken from the outset by J. Lasák.[169] Nonetheless, I definitively changed my opinion based on the crucial paper by J. Dědič.[170] In that paper, J. Dědič concludes that even an act taken by a single member

[167] See, e.g., HERMANN-OTAVSKÝ, K. *Všeobecný zákoník obchodní a pozdější normy obchodního práva v zemích historických. Svazek I [General Commercial Code and Later Commercial Law Rules in the Historical Lands. Volume I]*. Prague: Československý kompas, 1929, p. 94: *"Joint representatives represent only by joint action. They may act simultaneously or successively; in the latter case, only after the last representative has joined the others to make the required act does the act of representation become complete; joining the others to make the required act does not amount to an act of ratihabitio with a retroactive effect on the act made by the first joint representative."*

[168] In details, see also ČECH, P., ŠUK, P. *Právo obchodních společností v praxi a pro praxi (nejen soudní) [Law of Corporations in and for (Not Only Judicial) Practice]*. Prague: Polygon, 2016, pp. 48 and 49.

[169] LASÁK, J. In: LAVICKÝ, P. et al. *Občanský zákoník I. Obecná část (§ 1−654). Komentář [Civil Code I. General Part (Sections 1−654). Commentary]*. Prague: C. H. Beck, 2014, p. 845.

[170] DĚDIČ, J. Porušení pravidla „čtyř očí" při zastupování právnické osoby členy statutárního orgánu (s akcentem na obchodní korporace) [Violation of the "Four Eyes" Rule in Representation of a Juristic

of the governing body (even though joint action by several members of the body is required for making such an act for the juristic person) constitutes a legal act, and thus a relevant legal fact. Despite that such an act does not yet bind the juristic person, the law cannot entirely ignore it and must ascribe legal significance to it. The law has to admit, at the very least, that the juristic person might subsequently adopt the act as its own, i.e. confirm it in the form of *ratihabitio* under Section 440 (1) of the Civil Code. Overall, J. Dědič comes to the conclusion (and argues for this conclusion in detail and convincingly) that violation of the "four eyes" rule by a member of the governing body results in the given act not being binding on the juristic person. Nonetheless, it does have legal significance. On the one hand, it can be complemented by a successive act taken by another member of the governing body, whereby the act becomes binding on the juristic person. This logically occurs once the act is taken by the last of the representatives (i.e. *ex nunc*). However, on the other hand, J. Dědič does not rule out possible *ratihabitio* of the original independent act taken by a member of the governing body by the juristic person itself, which is then bound retroactively from the time of the act taken by the body member *(ex tunc)*. However, as the act of *ratihabitio* also represents a legal act of the juristic person (different from the act being approved), it must be performed for the juristic person in the prescribed way. It could again be done for the juristic person by members of the governing body (through joint representation, as required by the founding legal act). However, it could also be taken for the juristic person by any other person whose authority to represent also covers the act that is to be approved, and thus also logically its subsequent confirmation. In view of the nature of such a legal act, this could be true, e.g., of the juristic person's contractual representative (e.g. a corporate agent), as well as a statutory representative under Section 430 (1) of the Civil Code (for example, the chief executive officer or a manager whose mandate, and thus also the statutory authorisation under the said provision, covers such an act). I now absolutely agree with that conclusion (as well as a number of individual conclusions made by J. Dědič in the cited paper).

5.3 Joint representation by a member of the governing body and a corporate agent

In discussing the legal nature of acts made on behalf of a juristic person by a member of the governing body, the question arises as to what extent representation by such a member can be combined with representation by a corporate agent. The legislation in force until the end of 2013 was quite unequivocal in that acts made jointly with a corporate agent (i.e., where the juristic person was always jointly represented by a member of the governing body and a corporate agent) constituted an impermissible

Person by Members of the Governing Body (with Emphasis on Corporations]. In: *XXV. Karlovarské právnické dny [XXV. Karlovy Vary Jurists' Days].* Prague: Leges, 2017, pp. 446–460.

restriction on the authority to represent on the part of the governing body member.[171] Because the new law conceives such a member as a representative, there have been voices arguing that with effect from 1 January 2014, such a manner of joint representation is possible. The key argument in favour of this interpretation lies in the nature of representation of a juristic person by a member of the governing body, on the one hand, and by a corporate agent, on the other hand. Those who view this representation as contractual accept its combination with other types of contractual representation, e.g., corporate agency.[172]

Likewise, the High Court Court in Prague, when assessing the permissibility of such a combination, defined first the nature of representation of a juristic person by a member of its governing body. The court considered this representation a special type of representation, thus indirectly implying that it was incompatible with corporate agency which, by virtue of its contractual nature, constituted representation of a different type. See its resolution of 4 August 2015, File No. 14 Cmo 184/2014 (R 42/2016), as cited under 5.1.1 above.

Although I share the view that such a combination is not permissible, I believe that it is insufficient to offer solely an argument regarding the nature of representation by a member of the governing body, on the one hand, and by a corporate agent, on the other. It should be recalled that under German law, a member of the governing body is regarded as a statutory representative, but acts made by such a member may be combined with those made by a corporate agent. Hence, the differences in the nature of the two types of representation cannot be taken as an answer to this problem.

Nor do I consider convincing thorse arguments which infer the permissibility of such a combination under new Czech law merely from its permissibility in Austria and Germany[173]. In the cited resolution, the High Court in Prague aptly observed: *"First, it should be noted that neither the German nor the Austrian rules apply to corporations formed under Czech law; they could merely serve as a subsidiary source of inspiration: typically, if in doubt over interpretation of a particular legal rule; but that is not the case here."* Clearly, the situation in German and Austrian laws is fundamentally different from Czech law.

The mentioned combination is explicitly allowed under Austrian law, both for private and public limited companies. In Section 18 (3), the Private Limited Companies Act (No. 58/1906 RGBl.) provides that: *"Der Gesellschaftsvertrag kann, wenn*

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171 See, e.g., the resolution of the High Court in Prague of 28 February 2000, File No. 7 Cmo 55/99, published in the *Soudní rozhledy* journal, 6/2000, p. 170.

172 See, in particular, POKORNÁ, J. In: ŠVESTKA, J., DVOŘÁK, J., FIALA, J. et al. *Občanský zákoník. Komentář. Svazek I (§ 1–654) [Civil Code. Commentary. Volume I (Sections 1–654)]*. Prague: Wolters Kluwer, 2014, p. 1089.

173 See, e.g., JOSKOVÁ, L. Je podle NObčZ možná kombinace jednání jednatele (člena představenstva) a prokuristy? [Is it Possible, under the New Civil Code, to Combine the Acts Made by a Director (a Member of a Board of Directors) with Those Made by a Corporate Agent?]. *Rekodifikace a praxe*. 2013, No. 4, pp. 7–10.

mehrere Geschäftsführer vorhanden sind, zur Vertretung der Gesellschaft auch einen Geschäftsführer in Gemeinschaft mit einem Prokuristen, der zur Mitzeichnung der Firma berechtigt ist (§ 48 Abs. 2 UGB), berufen." For a long time, that rule was observed in this country as well because the mentioned Act was in force here until 1950. Based on contemporary official translation, the provision of Section 18 (3) had an almost identical wording, except that it referred to a different law governing corporate agency: *"Where there are more directors than one, the representation of the company may be delegated, under its memorandum of association, to one director to act jointly with the corporate agent who is empowered to co-sign documents for the company (Section 41 (3) of the Commercial Code)."* A similar rule is laid down in the Austrian Public Limited Companies Act (No. 98/1965 BGBl.), Section 71 (3): *"Where the board of directors consists of several persons, the articles of association may determine that individual members are empowered to represent the company independently or jointly with a corporate agent; in any case, it must be possible for the company to be represented by the board of directors without the corporate agent's involvement. The same instruction may be given by the supervisory board if empowered to do so by the articles of association. In these cases, the second and third sentences of paragraph 2 shall apply accordingly. (Die Satzung kann, wenn der Vorstand aus mehreren Personen besteht, auch bestimmen daß einzelne von diesen allein oder in Gemeinschaft mit einem Prokuristen zur Vertretung der Gesellschaft befugt sind; es muß aber in jedem Fall die Möglichkeit bestehen, daß die Gesellschaft vom Vorstand auch ohne die Mitwirkung eines Prokuristen vertreten werden kann. Gleiches kann der Aufsichtsrat bestimmen, wenn die Satzung ihn hiezu ermächtigt hat. Abs. 2 Satz 2 und 3 gilt in diesem Fällen sinngemäß.)"* It is noteworthy that under both provisions, this combination is permissible only if the company has several directors or members of the board of directors. A corporate agent may only (to a certain extent) "stand in" for a director in the case of joint representation with that director. However, it must always be possible for the directors to act on behalf of the company without the corporate agent.

The situation in Germany is similar in terms of explicit rules on the aforesaid combination. The German Public Limited Companies Act (of 6 September 1965, BGBl. I p. 1089) provides in Section 78 (3): *"The articles of association may also determine that individual members of the board of directors are empowered to represent the company independently or jointly with a corporate agent. The same rule may also be laid down by the supervisory board where the board has been empowered to do so by the articles of association. In these cases, the second sentence of paragraph 2 shall apply accordingly. (Die Satzung kann auch bestimmen, daß einzelne Vorstandsmitglieder allein oder in Gemeinschaft mit einem Prokuristen zur Vertretung der Gesellschaft befugt sind. Dasselbe kann der Aufsichtsrat bestimmen, wenn die Satzung ihn hierzu ermächtigt hat. Absatz 2 Satz 2 gilt in diesen Fällen sinngemäß.)"* The German Private Limited Companies Act contains no such rule; however, the permissibility of the combination is implied by analogy with the quoted provision of the Public Limited Companies Act.

The fact that Czech law does not provide for any such combination with respect to either type of company is, in my opinion, a key argument against the transferability of the Austrian, German and pre-war elements into our present legal environment.

However, it is possible to find valid arguments in the very system of new Czech law. Firstly, the provision of Section 164 (2) of the Civil Code allows derogation from the rule under which a juristic person is represented by any of several members of the governing body, only within the governing body *("... the way in which its members represent the juristic person...")*. Secondly, the voices in favour of the combination tend to ignore the fact that a corporate agent (unlike a member of the governing body) does not have unlimited authority to represent; a corporate agent represents the juristic person only in legal acts associated with the operation of a business enterprise or a branch thereof (Section 450 (1) of the Civil Code). If a member of the governing body could represent a juristic person only jointly with a corporate agent, there would be numerous legal acts that nobody could make on behalf of the juristic person. Clearly, this conclusion is unacceptable. Moreover, the same conclusion would also need to be applied to other types of representatives whose authority to represent may be even more limited in scope. Their joint representation with a member of the governing body would also need to be considered. If we accepted a combination with a corporate agent merely on the basis of interpretation (rather than based on an explicit legal provision, which existed in our country until 1950, and is still in force in Austria and Germany), it would be rather difficult to limit the range of representatives eligible for such a combination. Inevitably, the question would arise as to other persons eligible for joint representation, and the underlying reasons. Would another statutory representative, for example a manager, qualify for joint representation? Or a contractual representative, including persons outside the juristic person, for example a shareholder or a major creditor? Likewise, it would be necessary to consider the limitation applicable until 1950 in our country, and still valid in Austria, prohibiting this combination in situations where the governing body consists of a single member and there is thus only one director. Justifying the same limitation merely by drawing a historical parallel with our law before 1950, or by making a comparison with contemporary Austrian law, seems rather arbitrary.

Finally, an agreement between members or shareholders (as contained in the constitution) providing for a combination of joint representation by a member of the governing body and a corporate agent would amount to an unlawful limitation of corporate agency under Section 453 of the Civil Code, and would be legally ineffective with respect to third parties[174]. The same conclusion—this time as regards a limitation applicable to a member of the governing body—can be inferred from Section 47 of the Corporations Act. I therefore argue that a juristic person, which is to be represented, according to the relevant entry in the Commercial or other public

[174] See the reasoning of the judgement of the Supreme Court of the Czech Republic of 22 January 2003, File No. 32 Odo 99/2002.

Register, by a member of the governing body acting jointly with a corporate agent, is bound by an act made solely by such a member (the above is not specification of the manner of representation under Section 164 (2) of the Civil Code), or solely by a corporate agent (where the act has been made within the operation of a business enterprise).[175] A similar line of reasoning was presented by the High Court in Prague. Of crucial importance is primarily the following part of reasoning of its resolution which has been quoted on numerous occasions: *"The rule on the merger of acts made by the governing body member and those made by a corporate agent is also precluded by the limitation placed on acts made by a corporate agent, as laid down in the above-cited provision of Section 450 of the Civil Code, under which corporate agency has been designed as a special type of contractual representation covering the scope of legal acts associated with the operation of a business enterprise or a branch thereof (with the exceptions laid down in the second sentence of Section 450 (1) of the Civil Code), while the authority to represent on the part of the governing body is, under Section 164 (1) of the Civil Code, unlimited. The appellant's assertion that where a corporate agent acts jointly with a director, the limitation on corporate agency under Section 450 (1) of the Civil Code does not apply, is not justified under the applicable law. Moreover, joint acts made by a member of the governing body and a corporate agent are contrary to Section 163 of the Civil Code, under which the governing body has all the competence that is not entrusted to another body of the juristic person by the constitution, the law, or a decision of a public body. It should be noted that a corporate agent is not the company's body. Finally, yet another argument against joint acts made by a member of the governing body and a corporate agent lies the list of items recorded in the Commercial Register; Section 25 (1) (g) of Act No. 304/2013 Sb. on the public registers of juristic persons and individuals (the 'Public Registers Act') specifically governs the information recorded about the governing body of a juristic person registered, including the manner in which the body acts on behalf of the juristic person. Section 25 (1)(i) of the Public Registers Act governs information recorded about corporate agency and a corporate agent, including the manner in which a the latter is to act. The appellate court maintains that the conditionality between acts made by a member of the governing body and acts made by a corporate agent can apply merely as an internal limitation on the authority to represent borne by the governing body or corporate agent under Section 47 of the Corporations Act and Section 453 of the Civil Code. However, this is a different situation than entering in the Commercial Register the manner in which the governing body is to act on behalf of a juristic person. The opposite approach, based on Section 1 (2) of the*

[175] For the same opinion see, e.g., ROSICKÝ, Z. Může podle nové úpravy jednat prokurista společně s jednatelem? [May a Corporate Agent Act Jointly with a Director under the New Legislation?] [online]. *Bulletin advokacie*. Published on 2 December 2012. Available from: http://www.bulletin-advokacie.cz/muze-podle-nove-upravy-jednat-prokurista-spolecne-s-jednatelem, or LASÁK, J. In: LAVICKÝ, P. et al. *Občanský zákoník I. Obecná část (§ 1−654). Komentář [Civil Code I. General Part (Sections 1−654). Commentary]*. Prague: C. H. Beck, 2014, p. 1685–1686.

Civil Code, irrespective of the circumstances indicated above, would result in an absurd conclusion implying that the authority to act jointly with a member of the governing body may likewise be granted to other persons who are in the position of a contractual or statutory representative of the juristic person. This would ultimately totally negate the importance of the governing body in juristic persons. The appellate court concludes that the way in which the manner how a corporate agent should act based on the decision of the general meeting of 13 February 2014, is phrased as proposed for registration, is contrary to the legal provisions cited above, and the relevant part of the memorandum of association is invalid under the first sentence of Section 588 of the Civil Code; therefore, this part of the application is dismissed, consistently with the trial court's decision."

What is material is that in late 2017, the issue was also dealt with by the Supreme Court, and even on the basis of an application for appellate review of the above-cited ruling of the High Court in Prague. In its resolution of 31 October 2017, File No. 29 Cdo 387/2016, it not only fully upheld the conclusions of the High Court in Prague, but even provided more thorough and complete argumentation. It concluded overall that *"[t]he authority to represent on the part of members of the governing body cannot be bound to joint action of other persons who are not members of the governing body. Such an arrangement would be at variance with the provisions on governing bodies and the manner how their members represent the juristic person, which belong to the category of law regulating the position of persons in the sense of Section 1 (2) of the Civil Code."*

What is important is that the Supreme Court also dealt, in this decision, in detail with the consequences of violation of the rule whose application it confirmed. Since the Court denoted the definition of the manner of representation of a juristic person by members of its governing body as a "status issue" and included their circle among matters of public policy, it linked violation of the rule with resulting invalidity of the given act (Section 588 of the Civil Code). It concluded literally: *"An arrangement violating the law regarding the position of (natural and legal) persons, i.e. also the manner in which members of the governing body act for the juristic person, is prohibited explicitly and directly by the part of the sentence following the semicolon in Section 1 (2) of the Civil Code. While the legislature prohibited, in the mentioned provision, any arrangement violating the law regulating the position of persons, along with arrangements that are at variance with the public policy, it cannot be overlooked that legal norms governing the personal status (of natural and juristic persons) belong among rules protecting public policy (in legal theory, cf., e.g., Eliáš, K.: op. cit. above, pp. 60 and 77, and Melzer, F., Tégl, P., op. cit. above, p. 61). If Section 588 of the Civil Code thus considers a legal act violating the law and clearly contradicting public policy invalid (inter alia), it thus associates the same consequence with a legal act that clearly contradicts the law regulating the position of persons (forming a 'subset' of legal rules protecting public policy). As the Supreme Court explained above, an arrangement on joint acts to be taken by an executive director and a corporate agent as a manner of representing the given*

company by members of its governing body is at variance with the law (Section 1 (2), Section 164 (2) of the Civil Code) and is in clear contradiction with the law regulating the position of persons, and thus also with public policy. There can be no doubt that the sense and purpose of legal rules protecting public policy require that legal acts contradicting these rules be considered invalid (cf. also the explanatory memorandum, p. 690). Thus, in agreement with the appellate court, the Supreme Court concludes that the arrangement in the applicant's memorandum of association which is under scrutiny in the case at hand is invalid and the courts shall take the invalidity into consideration even without a motion, in conformity with Section 588 of the Civil Code." Thus, even if such variance is not invoked by the juristic person or another entity for whose benefit the rule could serve, the courts shall take invalidity of a defectively defined manner of representing the juristic person into consideration *ex officio*. If, in a certain juristic person, the manner of representation has been defined through a requirement for joint representation by an executive director or member of the board of directors, on the one hand, and a corporate agent, on the other, such an arrangement in the memorandum or articles of association will be considered as if it never existed. It will be substituted by the legal rule defined in Section 164 (2) of the Civil Code, which stipulates that if the founding legal act does not determine how the members shall represent the juristic person, each member shall act individually. Although the mentioned provision applies explicitly only to members of a collective governing body, it can be inferred from several decisions of the Supreme Court that it also has to be extended to a private limited company that has several executive directors who do not form a collective body. The Supreme Court stated this opinion for the first time, even if indirectly, in its resolution of 30 September 2015, File No. 29 Cdo 880/2015. An absolutely clear statement in this regard was made in the aforesaid resolution of the same court of 31 October 2017, File No. 29 Cdo 387/2016: *"It thus also applies to a private limited company that has several executive directors who do not form a collective body that each of the directors represents the company independently in all matters unless the memorandum of association specifies some other manner of representation."*

It can therefore be concluded that in juristic persons whose memorandum or articles of association provide for obligatory joint representation by an executive director (member of the board of directors) and corporate agent, the juristic person can ultimately be validly bound by an independent act taken by an executive director (member of the board) or by a corporate agent. An arrangement made in the memorandum or articles of association requiring co-signature by a corporate agent, on the contrary, did not establish the intended derogation from the legal rule according to which each of the mentioned persons can bind the juristic person independently. Consequently, if the members or shareholders of such a juristic person insist on the "four eyes" principle in representation of the juristic person, they must envisage this and appoint at least two executive directors (members of the board of directors) or corporate agents and require, in the memorandum (articles) of association or the deed establishing the corporate agency, co-signing by another executive director or member

of the board of directors, while requiring, in respect of the corporate agent, a second signature attached by the agent. Only thus-defined manner of joint representation will be functional and effective *vis-a-vis* third parties.

5.4 Summary

Re-codified Czech private law is built on the presumption that the governing body of a juristic person acts as the latter's representative. However, the Civil Code simultaneously makes a distinction merely between contractual representation, on the one hand, and statutory representation, on the other hand. It could be inferred from the above that acts taken by a member of the governing body of a juristic person must fall in one or the other category. In view of the resolution of the High Court in Prague of 4 August 2015, File No. 14 Cmo 184/2014 (R 42/2016), where the High Court concluded, *inter alia*, that: *"The legislation effective from 1 January 2014 is newly founded, as apparent from the cited Section 164 (1) and (2) of the Civil Code, on the assumption that a member of the governing body acts as a* ***representative*** **sui generis** ***of the juristic person*** *(this is neither statutory nor contractual representation)"*, I believe that representation of a juristic person by the governing body must be conceived not as contractual or statutory representation, but rather as representation *sui generis*. In my opinion, such a concept best reflects the specific position of a member of the governing body compared to all other representatives. Only exceptionally, under the conditions laid down by the law (e.g., in Section 164 (2) of the Civil Code), will a member of the governing body find himself, when representing the juristic person, in the position of its contractual or statutory representative. It is inferred from the above-described nature of representation of juristic persons by members of their governing bodies that the provisions on contractual or statutory representation will generally not apply to acts taken by these members. Only the general provisions common to both these types of representation (Sections 436 to 440 of the Civil Code) will apply, and this will only be true insofar as there are no special provisions in Title II, Chapter 3 of the Civil Code, or in the Corporations Act.

It follows primarily from the mentioned specificities that, unlike under the first sentence of Section 436 (2) of the Civil Code, according to which it is possible to impute to a juristic person good or bad faith, as well as knowledge of a certain legally relevant fact, on the part of persons who acted for the juristic person in a case affected by that faith or knowledge only in respect of facts of which these representatives learnt after they became authorised to act in the given matter, the regime under Section 151 (2) of the Civil Code, which does not permit such differentiation in terms of time, will have to be preferred in respect of members of the governing body. However, even a juristic person cannot invoke good faith of its representative if it itself lacked such faith (Section 436 (2), second sentence of the Civil Code). According to Section 151 (2) of the Civil Code, the existence of the thus-conceived good faith of a juristic person,

irrespective of the identity of its representative, will have to be inferred especially from good faith of members of its governing body. In the case of a collective body, it will be necessary to impute to the juristic person the knowledge of even a single of its members. At the same time, it cannot be relevant in this case, either, whether (s)he learnt about the given fact after his/her appointment or earlier.

I also agree with the conclusions made by the Supreme Court in its resolution of 12 August 2015, File No. 29 Cdo 4384/2015, that acts taken by the governing body on behalf of a juristic person are (in the case of corporations, if the special requirements laid down by the Corporations Act were not complied with) subject to application of Section 437 (1) of the Civil Code and the ensuing prohibition to represent the juristic person in the event of a conflict of interests, including the consequences of its violation. Beyond the scope of the reasoning of the mentioned ruling, I have no doubt that these consequences will be governed by Section 437 (2) of the Civil Code. In conformity with the latter provision, a juristic person will be able (within the general limitation period) to invoke violation of the given prohibition provided that the third party concerned knew or must have known about the conflict.

In contrast with my previous statements, I now conclude that the provisions governing *ratihabitio* enshrined in Section 440 (1) of the Civil Code will also apply to non-compliance with the manner of representation by a member of the juristic person's governing body. If a member of the governing body violates the "four eyes" rule, his/her acts will not be binding on the juristic person, but will nevertheless bear legal significance. On the one hand, they can later be complemented by a successive act taken by another member of the same body, whereby *(ex nunc)* the given act becomes binding on the juristic person. It cannot be ruled out, either, that the juristic person might subsequently approve such acts taken by the member of its governing body, with effects *ex tunc*. Since such an act of *ratihabitio* also represents a legal act (different from the act being approved), it must be performed for the juristic person in the prescribed way. It could again be done for that person by members of the governing body (through joint representation, as required by the founding legal act). However, it could also be taken by any other person whose authority to represent also covers the act that is to be approved, and thus also logically its subsequent confirmation. In view of the nature of such a legal act, this could be true, e.g., of a contractual representative (e.g. a corporate agent), as well as a statutory representative under Section 430 (1) of the Civil Code (for example, the chief executive officer or a manager whose mandate, and thus also the statutory authorisation under the said provision, covers such an act).

Finally, it is concluded based on the described concept of representation of a juristic person by members of its governing body (and based on further arguments) that the manner of representation of the juristic person by these members cannot be combined with other types of representation, including corporate agency. An arrangement made among the members or shareholders (and comprised in the founding legal act) which combines representation by a member of the governing body with representation by a corporate agent would not have the effect of limiting the governing body member

or the corporate agent in his authority to represent the juristic person *vis-à-vis* third parties. If joint acts taken by a member of the governing body and by a corporate agent were entered in a public register as the manner of representation of a juristic person, then an act taken even by a single member of the governing body, as well as that of the corporate agent (if made within the operation of an enterprise) would bind the juristic person.

CHAPTER SIX
SPECIFIC FEATURES OF LEGAL ACTS TAKEN (NOT ONLY BY JURISTIC PERSONS) IN PROCEDURAL LAW

6.1 Introduction

Acts that are taken by persons in civil and other procedures differ from acts they take under substantive law. This simple statement, which is clearly not questioned *"even by the most junior of trainee judges"*,[176] requires further elaboration, even though the dualism of substantive law and procedure is unambiguously accepted by the current doctrine.[177] The issue is that the conditions under which acts taken by a certain person cause certain legal consequences can differ under substantive and procedural laws. The aim of this chapter is to examine under what preconditions, as laid down by the Czech laws, persons can act in relationships governed by procedural regulations. Given that the theory of procedural acts has so far been most developed in civil procedure, I shall deal with the prerequisites of procedural acts in its framework.

In terms of the above, it is first necessary to define the notion of procedural step, ideally against the backdrop of the concept of legal acts, which are typical of private substantive law. Further, we must answer the question of who is considered a person under procedural law, i.e. a subject of procedural relationships, and whether all such procedural entities can actually act independently within proceedings. In this respect, the present chapter deals with the requisites of a procedural step, or in other words, what criteria must be fulfilled for acts taken by procedural entities to cause legal consequences in procedural relationships. In connection with the requisites of procedural steps, we must also deal with their construction, which can—as will be shown—considerably differ from the interpretation of legal acts in private law. The chapter also examines conditions possibly attached to procedural steps, especially defects of procedural steps and their consequences. Attention is also drawn to the aspects of

[176] Cf. KNAPP, V. Úvahy o civilním procesu (z podnětu Macurovy knihy „Problémy vzájemného vztahu práva procesního a hmotného") [Some Thoughts on Civil Procedure (based on Macur's book "Issues of Mutual Relationship between Substantive Law and Procedure")]. *Právník*. 1994, No. 9–10, p. 815.

[177] MACUR, J. *Právo procesní a právo hmotné [Substantive Law and Procedure]*. Brno: Masaryk University, 1993, p. 7 et seq.

procedural steps which are simultaneously legal acts under substantive law, and to the subject of procedural agreements. Finally, the text also analyses the specific features of procedural acts taken by juristic persons, as in this regard, the law of procedure has substantially deviated from the concept of their acts in substantive legal relationships.

6.2 The term "procedural act"

The court and the parties are the entities involved in civil procedure.[178] The legal relationship in the framework of which the entities involved in civil procedure engage in *legal conduct* is called a *civil procedure relationship*.[179] This kind of relationship arises upon initiation of the proceedings and terminates when the final court decision comes into legal force. Legal acts performed by the entities involved in a civil procedure are of essential importance from the viewpoint of the existence and contents of the civil procedure relationship. Indeed, such legal acts give rise to, amend the contents of and terminate a civil procedure relationship.[180]According to long-established tradition in civil-procedure doctrine[181], legal acts of the entities involved in a civil procedure relationship or other parties participating in the proceedings that aim to establish, pursue or terminate civil procedure are called *procedural acts*.[182]

The role of procedural acts in procedural law is similar to that of *legal conduct* of persons in the area of private law. Unlike legal conduct, which is subject to only minimal limitations as a result of the principle of private-law autonomy, thus providing persons under private law with a wide range of possibilities to influence their legal position according to their discretion, [183] the framework for performance of procedural acts is defined rather narrowly. Procedural acts can be performed only in civil procedure relationships and are inconceivable where no such relationship exists. Civil procedure doctrine therefore concludes that conversely to legal conduct, procedural acts are of a *dependent nature*.[184]

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178 WINTEROVÁ, A., MACKOVÁ, A. et al. *Civilní právo procesní [The Law of Civil Procedure].* 7th edition. Prague: Leges, 2014, p. 85.

179 SCHUMANN, E. In: STEIN, F., JONAS, M. *Kommentar zur Zivilprozeßordnung. Volume 1*. 20th edition. Tübingen: J.C.B. Mohr (Paul Siebeck), Einleitung, marg. number 228 et seq.

180 FASCHING, H. W. *Lehrbuch des österreichischen Zivilprozeßrechts*. 2. Auflage. Wien: Manz, 1990, p. 392, marg. number 744.

181 Cf. already OTT, E. *Soustavný úvod ve studium nového řízení soudního. Část II [Comprehensive Introduction to Civil Procedure. Part II].* Prague: Czech Academy of Emperor Franz Josef I for Science, Literature and the Arts, 1898, p. 342.

182 HORA, V. *Processní úkony dle práva rakouského [Procedural Acts under Austrian Law].* Prague: Bursík & Kohout, 1907.

183 FLUME, W. *Allgemeiner Teil des Bürgerlichen Rechts. Band II: Das Rechtsgeschäft*. Berlin, Heidelberg: Springer Verlag, 2012, p. 1.

184 In this sense, see FASCHING, H. W. *Lehrbuch des österreichischen Zivilprozeßrechts*. 2. Auflage. Wien: Manz, 1990, p. 392, marg. number 744, referring to POLLAK, R. *System des Österreichischen Zivilprozeßrechtes*. 2. Aufgabe. Wien: Manz, 1932, p. 364.

Moreover, we cannot disregard the fact that the entities involved in a civil procedure relationship have *unequal positions*. No such conclusion applies to persons under private law. Private-law regulations are indeed based—in addition to the aforementioned autonomy of will—on the principle of equality of persons.[185] This applies even in cases where the state engages in legal conduct under private law (Section 21 of the Civil Code). It follows that, in private-law relationships, any differentiation between the persons standing on the one or the other part of the relationship is irrelevant. In the other hand, a different approach in civil procedure is justified because, in civil procedure relationships, the court acts as an independent third entity, rather than a party to the proceedings.[186] Accordingly, the aim pursued by the court is not to win a dispute, but to issue an authoritative ruling based on ascertaining the actual state of private-law affairs. Consequently, procedural acts performed by the court to achieve the aforementioned goal—in particular civil court decisions[187]—differ, by definition, from the procedural acts of the parties, which lack such decision-making authority.[188]

In the subsequent part of this paper, the author discusses exclusively procedural acts of the parties (*sub* II), and also the procedural acts of juristic persons (*sub* III). Nevertheless, it should be noted that procedural acts of both the court and the parties have the nature of *public acts* and the preconditions for performance of such acts and their effects are stipulated exclusively by procedural law.

6.3 Procedural acts of the parties

6.3.1 General remarks

Procedural acts of the parties mean *manifestations of will* of the parties to civil procedure aimed to establish, amend or terminate a civil procedure relationship. Procedural law prefers *express* procedural acts in order to ensure legal certainty. This is because there should be no doubts as to the subsequent steps to be taken in the proceedings. Only in exceptional cases does procedural law attribute effects to *non-express* (implicit) manifestations of will, provided that the will of the relevant party to amend the civil procedure relationship can be unambiguously ascertained from its conduct.[189]

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185 Cf. LAVICKÝ, P. et al. *Občanský zákoník I. Obecná část (§ 1–654). Komentář [Civil Code I. General Provisions (Sections 1 to 654). Commentary].* Prague: C. H. Beck, p. 5, marg. number 1.

186 ZOULÍK, F. *Soudy a soudnictví [The Courts and Judiciary]*. Prague: C. H. Beck, SEVT, 1995, p. 18.

187 Apart from decisions, civil procedure doctrine also envisages other procedural acts by the court, including, in particular, taking of evidence or adoption of other appropriate measures (cf. Section 117 (1) of the Code of Civil Procedure).

188 Nonetheless, this is not to say that the court holds an exclusively superior position in a civil law relationship. The parties, through their procedural acts, also can instruct the court to conduct the procedure in a certain way or to resolve the case (cf. WAGNER, G. *Prozeßverträge. Privatautonomie im Verfahrensrecht*. Tübingen: Mohr Siebeck, 1998, p. 15).

189 Cf. Section 28 (3) of the Code of Civil Procedure.

It is nonetheless necessary to strictly distinguish between implicit manifestation of will and mere *inactivity* of a party. The latter usually[190] does not allow clear determination of whether any, and if so, what procedural consequences the party wished to elicit by its inactivity. Accordingly, inactivity is not, as a rule, deemed a procedural act. This is also the reason behind the fully justified criticism of the Czech provisions concerning the legal fiction of acknowledgement of a procedural act.[191]

Following from *Goldschmidt*[192], civil procedure jurisprudence traditionally distinguishes between procedural acts producing effects only indirectly, depending on the subsequent procedural act of the court *("Erwirkungshandlungen")* and procedural acts automatically amending the civil procedure relationship *("Bewirkungshandlungen")*.

The parties' *motions* (or applications) and *oral submissions* fall within the first category.[193] In this context, we can differentiate between *motions* concerning *further conduct of the proceedings* (motion to refer the case to another court for reasons of appropriateness; application to waive a party's default; motion to issue a judgement by default, etc.) and *motions to take evidence*, whereby a party asks the court to take a specific piece of evidence in order to prove a disputed fact. *Parties' oral submissions* relate to the factual and/or legal merits of the case and together serve as the basis on which the court decides whether or not the enforced claim is justified. Oral submissions can take the form either of factual assertions concerning the decisive facts, or of substantive pleas submitted by the parties. In particular German civil procedure jurisprudence calls such procedural acts "means of prosecuting or defending a case" *(Angriffs- und Verteidigungsmittel)*.[194] The new Slovak rules of civil procedure were inspired by this concept.[195]

Procedural acts falling in the second category amend the civil procedure relationship automatically; in this sense, we can say that such acts are of a constitutive nature. These include, in particular, *"disposition" procedural acts* (acts whereby a party exercises its conduct over the case), affecting the very existence of the proceedings, as well as their subject. In the Czech legal environment, the above fully applies to an action, but less to an amendment to an action or to termination of the proceedings by amicable settlement. In fact, for the latter procedural acts, the legislature apparently left it in the court's discretion to *interfere* with the autonomy of the parties to have conduct over the case and thus exclude the legal effects of a party's declaratory procedural act. Under the Czech laws, the court thus still decides on permitting an

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190 The provisions of Section 104 (1) or Section 153b (1) of the Code of Civil Procedure can be perceived as an exception to the rule.

191 Cf. LAVICKÝ, P. Zmeškání účastníka a fikce dispozičních procesních úkonů [Default of a Party and Legal Fiction of Declaratory Procedural Acts]. *Právní forum*. 2009, No. 10, p. 402.

192 GOLDSCHMIDT, J. *Prozess als Rechtslage*. Neudruck der Ausgabe Berlin 1925. Aalen: Scientia Verlag, 1962, p. 364.

193 In this sense, see HOLZHAMMER, R. *Österreichisches Zivilprozeßrecht.* 2. Auflage. Wien, New York: Springer Verlag, 1976, p. 150.

194 ROSENBERG, L., SCHWAB, K. H., GOTTWALD, P. *Zivilprozessrecht*. 16th edition. München: C. H. Beck, 2004, p. 401.

195 Cf. Sections 149 to 154 of the Slovak Civil Procedure Rules.

amendment to an action (Section 95 (2) of the Code of Civil Procedure) or on approving an amicable settlement (Section 99 (2) of the Code of Civil Procedure). In general, it can be concluded that the court's interference in the area of the parties' conduct over the case does not comply with the predominant conception of contentious proceedings. The new Section 96 (6) of the Code of Civil Procedure is an especially striking example in this respect as it even restricts the plaintiff's right to withdraw the action.

6.3.2 Requisites of procedural acts of the parties

Whether or not a procedural act produces the intended effects depends primarily on fulfilment of the prescribed requisites. These include, in particular, *procedural preconditions* relating to the characteristics of the party itself, i.e. the *capacity to be a party, procedural capacity* and, where applicable, also the *capacity to plead before the court ("postulare")*. In this context, the German civil procedure doctrine refers to preconditions for effectiveness of a procedural act of a party *(Prozesshandlungsvoraussetzungen)*.

Where an entity lacking *the capacity to be a party to the procedure* under procedural laws (e.g. a dissolved company) performs a procedural act, such act gives rise to no procedural effects.[196] The only exceptions are cases where a party files an appellate remedy, including an extraordinary remedy, against a decision whereby it was declared to "lack (procedural) capacity".[197] Lack of capacity to be a party to the proceedings can be remedied unless it already existed *upon instigation of the proceedings* (Section 104 (1) of the Code of Civil Procedure). Conversely, where a party loses its capacity to be a party *during the proceedings*, a question of procedural succession arises (Section 107 of the Code of Civil Procedure). In such a case, procedural acts of the dissolved party remain in effect for its legal successor (Section 107 (4) of the Code of Civil Procedure).

Procedural acts performed by a *party lacking procedural capacity* also have no procedural effects (Section 20 of the Code of Civil Procedure). However, if the failure to meet this procedural precondition is remedied through appropriate measures, typically by appointing a representative (Section 104 (2) of the Code of Civil Procedure), the procedural act of the party lacking procedural capacity can become effective retroactively, *ex tunc*, provided that the act is ratified by the party's representative.[198]

Further, no effects are associated with procedural acts performed by a party *lacking capacity to plead before the court*.[199] In Czech civil procedure, this applies for

[196] Cf. decision of the Regional Court in Ostrava File No. 9 Co 452/96, published in the bulletin Soudní rozhledy No. 6/1996, p. 154.

[197] Cf. resolution of the Supreme Court of the Czech Republic of 25 February 1999, File No. 2 Cdon 92/97, published in the Collection of Court Rulings and Opinions under No. 10/2000.

[198] FASCHING, H. W. *Lehrbuch des österreichischen Zivilprozeßrechts*. 2. Auflage. Wien: Manz, 1990, p. 408.

[199] In this respect, see KODEK, G. E., MAYR, P. G. *Zivilprozessrecht*. 2. Auflage. Wien: Facultas, 2013, p. 151, marg. number 318 et seq.

example to an application for appellate review submitted by a party not represented by an attorney-at-law (cf. Section 241 (1) of the Code of Civil Procedure). To remedy this lack of capacity to plead before the court, it is not sufficient for the attorney to ratify the submission already made by the applicant; rather, the attorney must replace the applicant's submission with its own one, at least as concerns specification of the extent to which the appellate decision is challenged and the grounds for the appellate review (cf. Section § 241a (5) of the Code of Civil Procedure).[200]

As concerns the *form* of procedural acts of the parties, civil procedure is governed by *the principle of informality* (Section 41 (1) of the Code of Civil Procedure). The form of a procedural act means whether it is made orally or in writing. As a rule, parties make procedural acts *orally* where dealing with the court in person (even through their representatives), typically at an oral hearing.[201] Conversely, where a party does not address the court personally, it makes procedural acts *in writing* (either in paper, or in electronic form). The Code of Civil Procedure designates written procedural acts as *pleadings* (Section 42 (1) of the Code of Civil Procedure). Where a special form is prescribed for a particular procedural act, an act not meeting the requirement of the special form has no effects unless supplemented with a written pleading within the set deadline (cf. Section 42 (2) of the Code of Civil Procedure).

The *time* of performing an act is another essential element of procedural acts of the parties. In this context, some procedural acts are permitted *only* in a certain stage of the proceedings; for example, an appeal may not be waived before promulgation of the judgement (Section 207 (1) of the Code of Civil Procedure). By analogy, procedural acts of the parties *not made in due time* can be rejected. Accordingly, the court will reject a belated application to take evidence (Section 118b (1) of the Code of Civil Procedure) or an appeal lodged after lapse of the set time limit (Section 208 (1) of the Code of Civil Procedure). A belated procedural act of a party gives rise to no effect (due to lapse of time-prescription).

The court can declare belated not only procedural acts made by a party after lapse of the set *time limit* (whether determined by the court or by law), but also procedural acts performed after the relevant *court hearing* (for example after the first oral hearing). The current Czech legislation is therefore inconsistent where it permits waiver of time default but not waiver of a failure to act at the relevant court hearing (cf. Section 58 of the Code of Civil Procedure). In this context, it should be noted that, contrary to substantive law, time limits under procedural law are met if the pleading is posted on the last day of the time limit (Section 57 (3) of the Code of Civil Procedure).

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[200] In this sense, see resolution of the Supreme Court of the Czech Republic of 10 June 2015, File No. 30 Cdo 5176/2014, which was confirmed by resolution of the Constitutional Court of the Czech Republic of 22 September 2015, File No. I. ÚS 2634/2015, rejecting the constitutional complaint. Nonetheless, appellate review proceedings are often incorrectly discontinued in such cases, whereas the correct step would be to reject the application for appellate review.

[201] ŠTAJGR, F. et al. *Občanské právo procesní [Civil Procedure Law]*. 2nd edition. Prague: Orbis, 1968, p. 115.

As concerns the *place* where procedural acts are made by the parties, oral procedural acts are submitted at the place of the court hearing. Written pleadings must be sent to the seat of the court of jurisdiction. A pleading sent to a court lacking jurisdiction could be belated unless the court lacking jurisdiction delivers the pleading to the court of jurisdiction before lapse of the set time limit.[202]

All procedural acts of the parties are *addressed acts*, without any exceptions. Procedural acts of a party are usually addressed to the court (such as an action, appeal, etc.), and sometimes also to the other party (such as questions concerning asserted facts, a petition for amicable settlement, etc.). A procedural act addressed to a third person who is not a party to the proceedings has no procedural effects unless the act subsequently becomes available to the court or the counterparty and this can be inferred from the contents thereof. An unaddressed procedural act of a party has no procedural effects.

6.3.3 Interpretation of procedural acts of the parties

One of the principal differences between (substantive) legal acts and procedural acts of the parties lies in their interpretation. Even though the legislation stipulates that both (substantive) legal acts (Section 555 (1) of the Civil Code) and procedural acts of the parties (Section 41 (2) of the Code of Civil Procedure) shall be assessed according to their *contents*, completely different viewpoints are applied to ascertaining the contents. While the *actual (inner) will*[203] of the person concerned is decisive for interpretation of its (substantive) legal acts (cf. Section 556 (1) of the Civil Code), the procedural law follows from the objective meaning of the *manifestation of will* of the party to the proceedings.[204] Put briefly, *"the manifestation of will is decisive for procedural acts (where the 'theory of manifestation of will' applies)"*, to cite *Winterová*.[205]

Fasching, who also advocates the theory of manifestation of will, thus believes that *"the applicable statutory provisions, the purpose of civil procedure, as well as the state of the case and dossier known to the court and the counterparty"* must be taken into account in order to ascertain the contents of a party's will manifested through its procedural act.[206] If the aforementioned aspects still do not allow determination of the contents of a party's procedural act, the court should invite the party to correct or

[202] Conversely, cf. the special provision on appeal (Section 208 (2) of the Code of Civil Procedure), which nonetheless does not extend to application for appellate review (Section 241b (1) of the Code of Civil Procedure *a contr*.).

[203] In this sense, see BERAN, V. In: PETROV, J., VÝTISK, M., BERAN, V. et al. *Občanský zákoník. Komentář [The Civil Code. Commentary]*. Prague: C. H. Beck, 2017, p. 593, marg. number 3.

[204] Cf. ROSENBERG, L., SCHWAB, K. H., GOTTWALD, P. *Zivilprozessrecht*. 16. Aufgabe. München: C. H. Beck, 2004, p. 407, marg. numbers 19 and 21.

[205] WINTEROVÁ, A. In: WINTEROVÁ, A., MACKOVÁ, A. et al. *Civilní právo procesní [The Law of Civil Procedure]*. 7th edition. Prague: Leges, 2014, p. 171.

[206] Cf. FASCHING, H. W. *Lehrbuch des österreichischen Zivilprozeßrechts*. 2. Auflage. Wien: Manz, 1990, p. 400, marg. number 757.

supplement its pleading so that it is comprehensible and certain (cf. Section 43 (1) of the Code of Civil Procedure), if the defect concerns a written procedural act. For oral submissions of the parties, made as a rule at a court hearing, the court should unambiguously clarify the contents of a party's procedural act through appropriate measures (for example by asking the party concerned). If the contents of a procedural act cannot be ascertained even by using these measures, the court should reject this act as uncertain or incomprehensible.

6.3.4 Are conditional procedural acts permissible?

The applicable legal regulations stipulate that a procedural act of a party that is subject to fulfilment of a certain condition or a *dies* clause shall be disregarded (Section 41a (2) of the Code of Civil Procedure). Notwithstanding the above, it is *prima facie* apparent that the procedural provisions grossly simplify the aspect of the (un) conditional nature of procedural acts. Indeed, were the principle prohibiting the parties from subjecting their procedural acts to any conditions applied rigorously, the court would have to disregard even procedural acts such as an action containing an *alternative relief sought* or plea of set-off raised by the defendant *in eventum*. It is nonetheless a known fact that the civil procedure doctrine[207] and case law[208] accept the aforementioned, as well as certain other, conditional procedural acts of the parties. What is the reason for such an approach?

In assessing the permissibility of conditional procedural acts of the parties, civil procedure jurisprudence differentiates between conditions related to non-procedural facts *("außerprozessuale Bedingungen")* and conditions related to facts or processes that are to occur in the pending proceedings *("innerprozessuale Bedingungen")*.[209]

Where a party subjects the effectiveness (or ineffectiveness, as appropriate) of its procedural act to a fact not originating in the pending proceedings, the aforementioned statutory principle applies automatically. Indeed, it is unacceptable that the effects of a party's procedural act should depend on an uncertain future event not originating in the pending procedure. Imagine an action for payment where the plaintiff determines that the action shall cease to be effective if the defendant pays him the asserted outstanding amount within a grace period. Should the court deliberate on an action whose effects (both procedural and substantive) could cease to exist? Such an approach would render the court proceedings unforeseeable and would substantially undermine the legal certainty. Similar conclusions must apply in a situation where a party's procedural act is subject to a *dies* clause.

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[207] WINTEROVÁ, A., MACKOVÁ, A. et al. *Civilní právo procesní [The Law of Civil Procedure].* 7th edition. Prague: Leges, 2014, p. 200.

[208] For the question of alternative relief sought, cf. decision of the Supreme Court File No. 22 Cdo 2887/2004, published in the bulletin Soudní rozhledy No. 2/2006, p. 55.

[209] FASCHING, H. W. *Lehrbuch des österreichischen Zivilprozeßrechts*. 2. Auflage. Wien: Manz, 1990, p. 400, marg. number 758.

A different approach is nonetheless required where a party subjects the effects of its procedural act to facts or processes that are to occur or be taken in already pending proceedings. This is because, under these circumstances, the fulfilment or non-fulfilment of the condition does not affect the existence of the proceedings as such, but rather, and exclusively, the scope of the subject of the proceedings to be discussed and resolved by the court. Notwithstanding the above, civil procedure doctrine concludes that declaratory procedural acts (basically *"Bewirkungshandlungen"*, see above *sub* II.1)[210]cannot be made conditional even in the above-described manner. In fact, such conditional acts could lead to doubts as to the manner of terminating the proceedings or specification of their subject. Consequently, acts such as acknowledgement of the enforced claim or amendment or withdrawal of an action cannot be subjected even to a condition originating in the pending proceedings. For example, the court must disregard withdrawal of an action on condition, determined by the plaintiff, that examination of a witness will demonstrate the disputed facts asserted by the plaintiff.

It follows from the above that only those procedural acts of the parties that have only derivative effects, depending on a subsequent procedural act by the court *("Erwirkunshandlungen")*, can be made conditional. These typically include *alternative motions* and *alternative submissions of the parties.*

The above-mentioned *alternative relief sought* falls within the first category; the court decides on this relief only if the primary, unconditional relief sought cannot be granted.[211] In this context, no uncertainty arises in the civil procedure relationship and the permissibility of an alternative relief sought enhances procedural economy as it is not necessary to initiate a new set of proceedings if the main claim is dismissed.

Procedural law also permits *alternative assertions of facts* and *alternative pleas* of the parties, which are to be applied in the pending proceedings only if the party fails to convince the court of the accuracy of its principal assertion of facts or justification of the main plea raised. In this respect, an *alternative plea of set-off* is often used in practice, which logically presupposes that the claim enforced by the plaintiff is justified; however, the defendant can also raise a conditional plea of set-off, to be applied in case the defendant's other pleas are found unjustified[212].

Further, it is undoubted in legal theory that an *amicable settlement* between parties to the proceedings can be concluded subject to the condition that one or both parties do not withdraw from the settlement within a certain time limit. Nonetheless, it should be noted that, in case of an amicable settlement, the existence of its substantive consequences (i.e. establishment of subjective rights and obligations) is conditional, which is by no means prohibited by the applicable laws (cf. Section 548 et seq. of

[210] Ibid., p. 400, marg. number 758.
[211] Ibid., p. 400, marg. number 758.
[212] In this respect, see DVOŘÁK, B. Námitka započtení [Plea of Set-off]. *Právní rozhledy*. 2012, No. 8, p. 271.

the Civil Code). The time limit for withdrawing from the settlement is thus also of a substantive nature. From the procedural viewpoint, it is however necessary that the court approve a conditional amicable settlement only after lapse of the time limit for withdrawal from the settlement.[213]

6.3.5 Defects of procedural acts of the parties

Macur correctly noted that the statutory provisions stipulating the requisites of procedural acts of the parties are substantially less detailed than those concerning the requisites of *(substantive)* legal acts.[214] The previous text reveals that the rules of procedure focus primarily on the requisites pertaining to the entities that perform procedural acts (the capacity to be a party to the proceedings; procedural capacity; and capacity to plead before the court), and also the requisites of procedural acts as manifestations of will of the parties (cf. the provisions stipulating the requisites of a pleading, action, appeal or application for appellate review); in this context, the legislation also stipulates how failure to meet the above requirements shall be remedied (cf. *sub* II.2 and II.3 above). Further, the law expressly provides for the aspect of conditional procedural acts of the parties (cf. *sub* II.4 above). Conversely, as far as the *requisites of will* or *the subject of procedural acts* of the parties are concerned, procedural law—not only in the Czech Republic—usually contains no express provisions in this respect.

It is therefore not surprising that opinions occurred, in particular in foreign civil procedure doctrine, to the effect that the provisions of substantive law on defects of legal acts need to be applied to procedural acts of the parties.[215] Following such opinions, it should be possible to ask the court to declare invalid a party's procedural act (e.g. an action) for example on the grounds that it was made by mistake, subterfuge or coercion, or that it violates good morals or the law.

In this context, it should be first noted that procedural law is a separate legal discipline, which provides specific means to remedy defective procedural acts.[216] Moreover, procedural law itself determines what is a defect of a procedural act of a party. Consequently, the requirements on legal conduct prescribed by substantive law cannot be automatically, by analogy, transferred to procedural matters, specifically to the

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213 In this sense, see DVOŘÁK, B. In: LAVICKÝ, P. et al. *Občanský soudní řád (§ 1 až 250l). Řízení sporné. Praktický komentář [Code of Civil Procedure (Sections 1 to 250l). Contentious Proceedings. Practical Commentary]*. Prague: Wolters Kluwer, 2016, p. 408, para. 10.

214 MACUR, J. Lze posuzovat procesní jednání stran podle ustanovení hmotného práva o vadách právních úkonů? [Are Substantive Legal Provisions on Defects of Legal Acts Applicable in Assessment of Procedural Acts of the Parties?]. *Právní rozhledy*. 1995, No. 11, p. 440.

215 In this sense, in particular ARENS, P. *Willensmängel bei Parteihandlungen im Zivilprozeß*. Bad Homburg, Berlin, Zurich: Gehlen, 1968, p. 29 et seq.

216 Similarly MACUR, J. Lze posuzovat procesní jednání stran podle ustanovení hmotného práva o vadách právních úkonů? [Are Substantive Legal Provisions on Defects of Legal Acts Applicable in Assessment of Procedural Acts of the Parties?]. *Právní rozhledy*. 1995, No. 11, p. 440.

requisites of procedural acts of the parties.[217] While the rules of civil procedure aim to protect actual subjective rights and justified interests of persons arising from substantive law, this purpose must be achieved exclusively by application of procedural concepts, which can differ from similar substantive-law concepts.[218]

As mentioned above (*sub* II.4), the meaning of the *manifestation of will* is decisive for interpretation of procedural acts of the parties under procedural law, which thereby avoids, for good reasons, the question as to whether or not the *actual (inner) will of the party* corresponds to its manifestation. Otherwise, there would be a risk that, within civil court proceedings, *secondary* disputes around the "validity" or effectiveness of a procedural act itself would be pursued in addition to the main dispute on enforcing a subjective (substantive) right. Such side disputes would unreasonably complicate and cause delays in the proceedings. Ergo, within pending proceedings, it is unacceptable to resolve, as a preliminary question, for example the effectiveness of the lodged action or even to permit the counterparty to claim, in a separate set of proceedings, that the action be declared "invalid".[219]

This certainly does not mean that procedural law automatically accepts procedural acts of the parties made by mistake or caused by someone else's subterfuge or coercion. The rules of civil procedure provide sufficient *safeguards* to prevent any such procedural acts of the parties and if, in exceptional cases, such procedural acts nonetheless occur, remedies are available under procedural law *other* than mere declaration of "invalidity" of such acts. In this respect, it is necessary to bear in mind that, unlike (substantive) legal acts, procedural acts of the parties are subject to immediate control by the judge,[220] who can ascertain any shortcomings of procedural acts through enquiries, advice or other appropriate measures and thus facilitate a remedy of any defects.

Further, it cannot be disregarded that a party can *revoke*[221] its procedural act, which is usually unilateral. The only cases where a procedural act of a party cannot be revoked involve procedural acts expressly designated as irrevocable, acts on which the court has already resolved or acts on the basis of which the counterparty has already acquired a procedural right.[222] Revocation of a procedural act made by

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[217] However, cf. a differing opinion of J. Macura concerning procedural agreements in MACUR, J. Důvody neplatnosti rozhodčí smlouvy [Grounds for Invalidity of Arbitration Agreement]. *Právní rozhledy*. 2001, No. 12, p. 582.

[218] Cf. FASCHING, H. W. *Lehrbuch des österreichischen Zivilprozeßrechts*. 2. Auflage. Wien: Manz, 1990, p. 402, marg. number 762.

[219] Such a claim for declaration of invalidity should be dismissed on the grounds of lack of urgent legal interest.

[220] Cf. MACUR, J. Důvody neplatnosti rozhodčí smlouvy [Grounds for Invalidity of Arbitration Agreement]. *Právní rozhledy*. 2001, No. 12, p. 582.

[221] From this perspective, the provisions of Section 41a (4) of the Code of Civil Procedure have to be assessed as misleading. Indeed, the courts in practice commonly accept revocation of procedural acts (e.g. undisputed assertions of facts).

[222] In this sense, see KODEK, G. E., MAYR, P. G. *Zivilprozessrecht*. 2. Auflage. Wien: Facultas, 2013, pp. 240–241, marg. number 603.

mistake or caused by subterfuge or coercion deprives the act of any effects. In addition, the rules of procedure allow a party to *amend* or *supplement* its procedural act.[223] This is another way how the shortcomings of a party's procedural act can be remedied.

Where a procedural act can no longer be revoked, amended or supplemented by the party (in particular because a final decision has already been issued on the basis of this act), the law provides the affected party with other remedies, specifically an action for a new trial or an action to declare a judgement null or, as appropriate, to reverse the effects of a decision issued on the basis of a defective procedural act. By way of example, we can imagine a situation where a party lodges an action to declare null a final judgement on acknowledgement on the grounds that the party was forced to acknowledge the disputed claim as a consequence of the judge's criminal offence [Section 229 (1)(g) of the Code of Civil Procedure].

Even procedural acts of a party violating *good morals* or the *sense and purpose of the law* cannot be simply considered "invalid". Such situations also need to be addressed pursuant to the rules of civil procedure (where the concept of invalidity is applied only exceptionally). Where a procedural act of a party *violates* the provisions of *procedural law*, it is the task of the court to either reject or disregard such an act, as appropriate (cf. Section 41a (3) of the Code of Civil Procedure). The court shall proceed similarly in cases where a procedural act of a party is at variance with the purpose of another, non-procedural law or is apparently *abusive*. In the latter case, applying the principle set out in Section 2 of the Code of Civil Procedure, the Czech courts do not rule on (they disregard) a party's motion to refer a case to another court for reasons of appropriateness[224] or dismiss a plaintiff's application for accession of a new party to the proceedings.[225] Despite the absence of an explicit provision to this effect, the general prohibition of deceitful or abusive procedural conduct can also be derived in civil procedure relationships.[226]

6.3.6 Can procedural acts of the parties have substantive effects?

(Substantive) legal acts are relevant for procedural law primarily in that they affect the contents of the decision *in rem*.[227] The judge resolving a civil dispute is bound by a valid private-law contract and the issued judgement therefore must not exceed the

[223] In the same sense, see FASCHING, H. W. *Lehrbuch des österreichischen Zivilprozeßrechts*. 2. Auflage. Wien: Manz, 1990, p. 402, marg. number 763.

[224] Resolution of the Supreme Court of the Czech Republic of 15 July 2008, File No. 29 Nd 201/2008.

[225] 228 Resolution of the Supreme Court of the Czech Republic of 27 November 2011, File. No. 29 Cdo 3013/2010, published under No. 46/2012 in the Collection of Court Rulings and Opinions.

[226] Cf. ZEISS, W. *Die arglistige Prozesspartei*. Berlin: Duncker & Humblot, 1967, p. 17 et seq.

[227] LEIPOLD, D. In: STEIN F., JONAS, M. *Kommentar zur Zivilprozessordnung. Band 2*. 21. Auflage. Tubingen: Mohr Siebeck, 1994, before Section 128, marg. number 254.

contractual framework.[228] In civil proceedings, the fact that a contract with certain contents has been concluded must first be invoked by a party in its submission, which has the nature of aprocedural act. Naturally, the above applies not only to a contract, but also to other legal facts relevant for the enforced claim. Based on active involvement of the parties, bringing factual material to the proceedings through their procedural acts, the judge learns the facts of the case, which he must review as to their existence and subsequently assess in legal terms.

In the framework of a submission of facts or some other procedural act, it is naturally possible not only to make assertions before the court concerning (substantive) legal acts that have already been performed, but also to directly perform substantive legal acts. The Czech legislation envisages such a possibility, where it provides for the effects of substantive legal acts performed by a party "before the court" (cf. Section 41 (3) of the Code of Civil Procedure), i.e. through a procedural act. This can involve, for example, a plea of set-off or conclusion of an amicable settlement[229], but also cases where delivery of an action to the defendant simultaneously represents the creditor's request for payment (Section 1958 (2) of the Civil Code) or where an action includes a notice of termination of lease of a flat[230], or other cases.[231]

In this context, it is universally accepted that procedural acts mean manifestations of will of the parties to a civil procedure aimed to establish, amend or terminate a civil procedure relationship; such acts thus generate *effects* in the area of procedural law.[232] Any substantive-law effects of such acts depend on whether substantive law attributes such effects to a certain procedural act; substantive effects cannot be derived from procedural regulations. This applies for example to suspension of a limitation period (Section 640 of the Civil Code).

In the aforementioned sense, it is possible that a procedural act can *simultaneously* correspond to the merits of a norm under substantive law, which attributes effects to such an act different from those following from procedural law. Accordingly, *acknowledgement of an enforced claim* by the defendant (Section 153a (1) of the Code of Civil Procedure) can simultaneously have the effects of *acknowledgementof a debt* by the debtor under substantive law (Section 2053 et seq. of the Code of

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228 DVOŘÁK, B. In: GERLOCH, A. *Viktor Knapp. Vědecké dílo v proměnách času [Evolution of Scientific Work]*. Plzeň: A. Čeněk, 2014, pp. 374–375.

229 In terms of substantive law, an amicable settlement usually takes the form of a settlement agreement (Section 1903 et seq. of the Civil Code).

230 Cf. resolution of the High Court in Prague of 28 February 1994, File. No. 2 Cdo 3/94, published under No. 26/1996 in the Collection of Court Rulings and Opinions.

231 As an example, we can imagine a situation where an assigned debtor is effectively notified by being served (as the defendant) with the plaintiff's application, remitted by the court, for accession of a procedural successor (the assignee) into the proceedings pursuant to Section 107a of the Code of Civil Procedure.

232 The so-called theory of legal effect *("Rechtsfolgetheorie")*. For more on the theory, see HOLZHAMMER, R. *Österreichisches Zivilprozeßrecht.* 2. Auflage. Wien, New York: Springer Verlag, 1976, p. 148; and also KODEK, G. E., MAYR, P. G. *Zivilprozessrecht*. 2. Auflage. Wien: Facultas, 2013, p. 240, marg. number 597; and in particular BAUMGÄRTEL, G. *Wesen und Begriff der Prozeßandlung einer Partei im Zivilprozeßrecht*. Berlin, Frankfurt am Main: Vahlen, 1957, p. 291.

Civil Procedure). In the above-mentioned context, civil procedure doctrine refers to double-function procedural acts *("doppelfunktionelle Prozesshandlungen")*, i.e. acts fulfilling both procedural and substantive-law functions. In addition to acknowledgement of a claim, *amicable settlement, waiver of a claim* and *plea of set-off* are usually classified under this category. The question nonetheless arises as to whether and if so, to what extent the two functions of such a procedural act are mutually dependent.

Two completely opposing conclusions have been derived in civil procedure jurisprudence. The first holds that ineffectiveness of the manifestation of will in one area of law does not preclude its effects in the other legal area. This approach is called a "doctrine of double merits" *("Doppeltatbestandslehre")*. According to the doctrine, a specific manifestation of will made by a party to the proceedings must be assessed separately from the viewpoint of the relevant merits under substantive law and procedural law respectively. In this respect, it is possible that an act not meeting the prerequisites stipulated by substantive-law regulations can meet the requirements set out by civil procedure norms, and *vice versa.* For example, a defendant might effectively acknowledge a claim enforced against him by the plaintiff (on the basis of which the court issues a judgement on acknowledgement), but the merits of acknowledgement of a debt will not be met because, in the specific case, the defendant cannot be sued (as actually, the defendant owes no money to the plaintiff).

Conversely, the doctrine on double nature of procedural acts *("Lehre von der Doppelnatur der Parteiprozesshandlungen")* holds that double-function procedural acts are only effective if they simultaneously meet the requirements prescribed by substantive law and those prescribed by procedural law. However, it is clear that neither the rules of civil procedure nor private law regulations stipulate any such condition. The latter doctrine therefore cannot conclusively explain why a belated plea of set-off—for example raised in the appellate proceedings—, which the judge must disregard, should have no effects under substantive law, provided that the prerequisites for set-off stipulated by substantive law regulations have been met. To the contrary, a plea of set-off raised by the defendant in due time need not be justified from the viewpoint of the substantive-law prerequisites; this will be true in particular if the defendant seeks set-off of an ineligible receivable (Section 1987 (2) of the Civil Code). In such a case, the plea will be assessed, but declared unfounded by the court.

Having regard to the above, we conclude that that certain procedural acts indeed can have effects under substantive law. Nonetheless, to give rise to such effects, the procedural act must meet the requirements stipulated by substantive law. On the other hand, it holds that a procedural act that is defective under procedural law can have effects in the area of substantive law. We therefore believe that the doctrine of double merits shall prevail.

6.3.7 Certain remarks on procedural agreements

Unlike in private law, the principle of *autonomy of will* (see *sub* I above) does not apply in civil procedure law, which falls in the area of public law. The trilateral nature of civil procedure relationships as such, as well as the interest in efficient resolution of disputes over rights, render the principle inapplicable.[233] In civil procedure, it is inconceivable that the parties should be allowed to autonomously adjust the rules of civil procedure[234] or even determine the scope of effects of a court ruling.[235] Put differently, the principle of contractual freedom does *not* apply in procedural law. An agreement between the parties to civil proceedings is permissible only where declared permissible by civil procedure norms.[236]

The Czech law thus allows conclusion of an effective prorogation, or forum-selection, agreement (Section 89a of the Code of Civil Procedure), amicable settlement (Section 99 of the Code of Civil Procedure) or arbitration agreement (Section 2 of the Arbitration Act), but not an agreement on acceptability or evaluation of evidence[237] or even an agreement on waiver of procedural safeguards.[238] In this context, it is clear that in terms of requirements, interpretation and defects, procedural agreements are in principle similar to other procedural acts of the parties. The fact that a procedural agreement—unlike other procedural acts—is bilateral in nature should in no way affect the assessment of its effects. Procedural law is decisive in this respect, as a rule.

Notwithstanding the above, *Macur* correctly noted in respect to an arbitration agreement that, for the purpose of ensuring adequate procedural protection of the parties, each party must be given the opportunity, before initiation of the arbitration proceedings, to challenge the arbitration agreement on account of defects of its contents that render such an agreement invalid on grounds which are not expressly stipulated in a procedural regulation, but follow from general headnotes *(case law)*.[239]

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233 Cf. LEIPOLD, D. In: STEIN F., JONAS, M. *Kommentar zur Zivilprozessordnung. Band 2*. 21. Auflage. Tubingen: Mohr Siebeck, 1994, before Section 128, marg. number 227.

234 SCHUMANN, E. In: STEIN, F., JONAS, M. *Kommentar zur Zivilprozeßordnung. Band 1*. 20th edition. Tübingen: J.C.B. Mohr (Paul Siebeck), Einleitung, marg. number 13, refers to a prohibition of "conventional civil proceedings". However, in respect of arbitration proceedings, cf. Section 19 (1) of Act No. 216/1994 Coll., the Arbitration Act.

235 In the opposite sense, see WAGNER, G. *Prozeßverträge. Privatautonomie im Verfahrensrecht*. Tübingen: Mohr Siebeck, 1998, p. 711 et seq.

236 In the same sense, see FASCHING, H. W. *Lehrbuch des österreichischen Zivilprozeßrechts*. 2. Auflage. Wien: Manz, 1990, p. 395, marg. number 749. Nonetheless, this opinion is not uniformly accepted; for example, Wagner, G. advocates wider acceptability of procedural agreements in WAGNER, G. *Prozeßverträge. Privatautonomie im Verfahrensrecht*. Tübingen: Mohr Siebeck, 1998, p. 209 et seq.

237 For more in this respect, see KODEK, G. E., MAYR, P. G. *Zivilprozessrecht*. 2. Auflage. Wien: Facultas, 2013, p. 283, marg. number 784.

238 The so called *pactum de non petendo*. However, Austrian jurist Holzhammer, R. considers it permissible, see HOLZHAMMER, R. *Österreichisches Zivilprozeßrecht.* 2. Auflage. Wien, New York: Springer Verlag, 1976, p. 3.

239 MACUR, J. Důvody neplatnosti rozhodčí smlouvy [Grounds for Invalidity of Arbitration Agreement]. *Právní rozhledy*. 2001, No. 12, pp. 582–583.

This is because an arbitration agreement, being undoubtedly of procedural nature, is concluded outside the *control* mechanisms available in civil procedure (sf. *sub* II.5 above), which fact substantially lowers the guarantees of correctness of such agreement and simultaneously limits the possibilities of remedying its defects during the proceedings.[240] This being the case, it is not permissible to exclude the right of the parties to challenge an arbitration agreement before initiation of the arbitration proceedings by lodging an action to declare the agreement null, where a defect of will in concluding the agreement can be successfully invoked as grounds for its invalidity.

We believe that—given the similarity of the discussed situations—the same must apply to a prorogation agreement, the conclusion of which is also not subject to court control. The above naturally need not concern only defects of will in making a procedural act, but also defects of its contents, which can render the act non-compliant with good morals or with the purpose of the law. Nonetheless, account needs to be taken of the fact that any disputes over the validity of a prorogation agreement become irrelevant once the court hears the case *in rem* (Section 105 (1) of the Code of Civil Procedure), whereupon any defects concerning local jurisdiction are remedied. After that, the plaintiff no longer has an urgent legal interest to have the prorogation agreement declared invalid.

Different from the aforementioned cases are situations where the parties agree to perform or, on the contrary, to refrain from making certain procedural act. In civil procedure, the parties may conclude agreements whereby one of them agrees to withdraw the action, waive an appellate remedy, enforce only part of a receivable, etc. Considering the above definition, such and similar agreements need to be considered impermissible because they are not envisaged by the rules of civil procedure. Consequently, fulfilment of such agreements cannot be enforced in pending proceedings; if a party lodges an appeal despite having agreed to waive an appellate remedy, this does not render the appeal impermissible. Notwithstanding the above, such contractual agreement can meet the requirements posed by substantive law, especially if it can be considered that such an agreement is not at variance with the purpose of the law or with good morals. In the given case, the injured party could claim from the counterparty compensation for damage incurred as a consequence of the breach of the concluded agreement.

Finally, in connection with procedural agreements, a question of passage or transfer of the rights and obligations following from procedural agreements to legal successors should be discussed. We believe that the legal provisions on universal (Section 107 of the Code of Civil Procedure) and singular (Section 107a of the Code of Civil Procedure) succession in civil procedure express the general idea that the legal successor of a party should also take over its procedural standing (cf. Section 107(4) and Section 107a (3) of the Code of Civil Procedure respectively). Consequently, in case of assignment of a receivable that is subject to a pending dispute, the legal

[240] Similarly LEIPOLD, D. In: STEIN F., JONAS, M. *Kommentar zur Zivilprozessordnung. Band 2*. 21. Aufgabe. Tubingen: Mohr Siebeck, 1994, before Section 128, marg. number 243.

successor of the original party (the assignee) is also bound by any valid prorogation or arbitration agreements (clauses) that applied to the assignor at the time of the succession.[241]

6.4 Specific aspects of procedural acts of juristic persons

From the perspective of procedural acts of juristic persons, the aspect of their *procedural capacity* is particularly relevant. As mentioned above (*sub* II.2), procedural capacity is considered to be one of the *requisites* of a procedural act. Where a party lacks procedural capacity, its procedural acts can have no effects; accordingly, procedural capacity is a prerequisite for effectiveness of the party's procedural acts.

In this context, the Czech Code of Civil Procedure stipulates in Section 20 (1) that *"Every person may perform independent legal acts before the court as a party (procedural capacity) to the extent to which (s)he enjoys legal capacity"*. However, legal persons are not vested with legal capacity under substantive law and therefore members of their governing bodies act on their behalf and replace their will (Section 151 (1) of the Civil Code). Some Czech jurists conclude on this basis that juristic persons lack procedural capacity and therefore can regularly perform procedural acts through their representatives, i.e. members of the governing bodies of a juristic person.[242] The aforementioned standpoint has nonetheless been criticized, which criticism we share.[243]

Primarily, we are of the opinion that the conclusion on the lack of procedural capacity of juristic persons disregards the fact that the provisions of Section 21–21b of the Code of Civil Procedure stipulate prerequisites under which juristic persons may perform procedural acts in the proceedings. The above-cited provisions thus contain *express* arrangements on procedural capacity of juristic persons; therefore, we believe that the provisions of Section 20 (1) of the Code of Civil Procedure apply only to procedural acts of natural persons.

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241 DVOŘÁK, B. In: HULMÁK, M. et al. *Občanský zákoník V. Závazkové právo. Obecná část (§ 1721–2054). Komentář [Civil Code V. The Law of Obligations. General Provisions (Sections 1721–2054). Commentary]*. Prague: C. H. Beck, 2014, Section 1879, marg. number 38, and Section 1880, marg. number 13.

242 In this sense, see in particular ŠÍNOVÁ, R. In: SVOBODA, K., SMOLÍK, P., LEVÝ, J., ŠÍNOVÁ, R. et al. *Občanský soudní řád. Komentář [Code of Civil Procedure. Commentary]*. Prague: C. H. Beck, 2013, p. 71, where the author argues as follows: *"In the framework of the new private law legislation, we cannot but conclude that a juristic person lacks procedural capacity as it does not enjoy legal capacity."* The author is less strict in her later work, where she describes procedural acts of juristic persons pursuant to Section 21 of the Code of Civil Procedure as *"a special concept, a sort of representation of a party sui generis"*, see ŠÍNOVÁ, R., JURÁŠ, M. *Účastenství v civilním soudním řízení [Parties to Civil Court Procedure]*. Prague: Leges, 2015, p. 130.

243 Cf. DVOŘÁK, B. K problematice procesního jednání právnických osob [On Procedural Acts of Juristic Persons]. *Právní rozhledy*. 2016, No. 19, p. 649–655.

It is indeed fully understandable that there should be special arrangements governing procedural capacity of juristic persons, different from those providing for the capacity of juristic persons to engage in legal conduct (enjoy legal capacity). As mentioned above (*sub* II.3), the requirements prescribed for (substantive) legal acts, on the one hand, and procedural acts, on the other hand, substantially differ. In civil procedure relationships, being based on the *"theory of manifestation (of will)"*, rather than the theory of (actual) will, it is irrelevant to assess the intellectual and volitional maturity of the parties. What is relevant is whether the parties are capable of making a specific and comprehensible manifestation of will (procedural act) meeting all the prescribed requisites. This can certainly be expected for juristic persons, but not for all minors or persons with limited legal capacity. The above also explains why the Czech legislation, as a rule, assumes procedural capacity of juristic persons, while for minors (and persons enjoying limited legal capacity), representation by a statutory representative is generally required.[244]

In contrast, if it were correct that juristic person as parties to proceedings are unable to take independent legal acts, the court would have to serve documents, not directly on the juristic person, but rather on its governing body as its representative, as follows from Section 50b (1) of the Code of Civil Procedure.[245] That would significantly complicate procedural communication with any party that is a juristic person.

At the same time, any costs incurred by a natural person acting under Section 21 of the Code of Civil Procedure would, in that case, have to be regarded, not as costs expended by the party, but rather as costs of its representative, and paid and compensated as such. This conclusion would, in turn, cause difficulties in terms of the provisions governing the payment of costs, as the costs incurred by such a representative would have to be documented and calculated.

Analogously, the thesis on representation of a juristic person under Section 21 of the Code of Civil Procedure is—as acknowledged even by those holding the opposite opinion[246]—in conflict with Section 126a of the Code of Civil Procedure, according to which members of the governing body are examined in proceedings as parties, rather than as witnesses. However, the general provisions are based on the principle that representatives of the parties are heard in proceedings as witnesses, and not as parties (cf. Section 131 of the Code of Civil Procedure).

Further, it should be pointed out that the Czech concept of representation based on a power of attorney envisages—similar to German law—that even a juristic person

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244 In judgement of the Constitutional Court of the Czech Republic of 4 December 2014, File No. I. ÚS 1041/14, the Constitutional Court of the Czech Republic held that *"[a]s far as minors are concerned, the rule should be that they do not enjoy full procedural capacity in the sense of Section 20 (1) of the Code of Civil Procedure, provided that it is possible to come to the opposite conclusion under specific, and absolutely exceptional, circumstances, which need to be properly justified in each case"*.

245 According to Section 50b (1) of the Code of Civil Procedure: *"If a party has a representative, documents shall be served only on the representative, unless the law lays down otherwise."*

246 ŠÍNOVÁ, R., JURÁŠ, M. *Účastenství v civilním soudním řízení [Parties to Civil Court Procedure]*. Prague: Leges, 201515, p. 130.

could be in the position of an attorney empowered by a party to proceedings under Sections 26 and 26a of the Code of Civil Procedure. The legislature would certainly not have chosen this option of procedural representation if it had followed the thesis on a lack of procedural capacity on the part of juristic persons. Indeed, even for representation by a natural person, the law requires that the person enjoy legal capacity, i.e. procedural capacity (Section 27 of the Code of Civil Procedure). The wording of the law is then absolutely clear in the case of representation by the state (Section 26a (1) of the Code of Civil Procedure); had the legislature deemed that the state, which is considered a legal person in private-law relations,[247] lacked procedural capacity, it would certainly not have provided for the option of representation by the state.

Moreover, we consider the provisions on legal conduct of juristic persons under substantive law (Section 151 et seq. of the Civil Code) to be inappropriate for civil procedure due to their *complexity*. This is because answering the question as to who shall act on behalf of a juristic person in procedural relations should not lead to additional *(secondary)* disputes in the framework of court proceedings. The statutory provisions need to be unambiguous and clear, which requirement is not fulfilled by the substantive-law regulation, as practice has shown[248]. This, in our opinion, is a relevant reason for the legislator to adopt special arrangements governing procedural acts of juristic persons, i.e. not referring to substantive law.

The requirement of *unambiguous* arrangements on procedural acts of juristic persons is also reflected in the rule that only *one* person, specifically a *natural* person, shall perform procedural acts in all cases [Section 21 (1)(a) of the Code of Civil Procedure]. Joint (simultaneous) procedural acts of several persons on behalf of a juristic person are prohibited, as is also confirmed by Czech case law.[249] Accordingly, even where the articles or memorandum of association of a limited liability company stipulate that the company is represented by several executive directors acting jointly, it must hold in procedural relations that each of the executive directors is authorised to act independently on behalf of the company.[250] Only such a rule can guarantee consistency of the procedural acts of a juristic person.

While we embrace the conclusion that the concept of procedural acts of juristic persons is not based on the principle of representation, it is naturally permissible for a juristic person to appoint its representative through a power of attorney (Section 24 et seq. of the Code of Civil Procedure). However, as confirmed by case law, the statutory body, or chairman of the statutory body, of a juristic person may not be

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247 Pursuant to Section 21 of the Civil Code: *"Within private law, the state is considered a juristic person. Another legal regulation provides for the manner in which the state makes legal acts."*

248 Cf. for example authorisation of a member of a statutory body to act *vis-à-vis* the employees of a juristic person pursuant to Section 164 (3) of the Civil Code; in this respect, cf. resolution of the Supreme Court of the Czech Republic of 30 September 2015, File No. 29 Cdo 880/2015, published under No. 20/2016 in the Collection of Court Rulings and Opinions.

249 Cf. resolution of the Supreme Court of the Czech Republic of 30 October 2001, File No. 20 Cdo 2474/99, published under No. 174 in the bulletin Soudní judikatura *(Case Law)*, volume 2005.

250 253 Resolution of the Supreme Court of the Czech Republic of 10 March 2005, File. No. 29 Odo 963/2003, published under No. 29/2006 in the Collection of Court Rulings and Opinions.

appointed as its representative.[251] It is also possible for the court to appoint—subject to fulfilment of the statutory preconditions (Section 29 (2) of the Code of Civil Procedure)—a guardian *ad litem* for a juristic person, as its representative.

We are convinced that the above considerations do not reveal any serious systemic shortcomings of having separate arrangements (independent of substantive law) governing procedural acts of legal persons. The fact that the special arrangements follow a different principle than that on which the conduct of juristic persons under private law is based does not mean that they cause legal uncertainty in procedural relations.[252] Quite to the contrary. For the reasons explained above, we believe that even after the effective date of the (new) Civil Code (1 January 2014), juristic persons have procedural capacity under Czech laws. This means, in particular, that juristic persons have the capacity to independently perform procedural acts in the proceedings.

6.5 Summary

The above considerations show that the legal provisions governing acts taken in procedural relations have numerous links to legal acts under Czech substantive law, but they nonetheless cannot be mutually equated. Procedural law provides differently not only for the very concept of entity, but also for its procedural acts, which are taken via steps made in proceedings—a notion dissimilar to *legal acts* regulated by substantive laws. The differences, which are apparent especially in terms of the requisites, construction and consequences of defects of procedural steps, are—in my opinion—affected by the very *function* of procedural law, which aims to provide protection to rights and legitimate interests established under substantive law that have been infringed or endangered. Therefore, the legal regulations governing procedure strive primarily to ensure *certainty* in procedural relations, and thus to prevent any *secondary disputes*, i.e. legal conflicts regarding procedural questions in the actual proceedings.

For that reason, Czech procedural law strictly rejects the possibility of *implicit* procedural steps, takes a negative standpoint on subjecting a procedural step to *conditions*, and lays down separately (and in a manner differing from substantive law) who acts *on behalf of* a juristic person in procedural relations. This concept also rebuffs the notion of possible *invalidity* of acts in procedural relations, as any defective procedural steps should already be cured during the proceedings as such, which take place under the control of a court or some other authoritative body. It is also important to note that the cornerstone of procedural law is a *unilateral* procedural

[251] Cf. judgement of the Supreme Court of the Czech Republic of 10 May 2005, File No. 29 Odo 560/2004, published under No. 140 in the bulletin Soudní judikatura *(Case Law)*, volume 2005.

[252] These concerns were expressed by JURÁŠ, M. Zastoupení právnické osoby v civilním právu – aktuální problémy [Representation of Juristic Persons—Current Issues]. *Právní rozhledy*. 2014, No. 12, p. 432.

step, whereby a party claims or even causes a change in a civil procedural relationship, while private-law relationships are founded on contracts.

I thus consider that the analysis proved, on the one hand, that procedural law cannot deny its *functional* links to substantive law,[253] but on the other hand, its different structure requires that it apply its own notions, resulting, *inter alia*, in an autonomous theory of procedural acts.

[253] MACUR, J. *Problémy vzájemného vztahu práva procesního a hmotného [Issues of Mutual Relationship between Substantive Law and Procedure].* Brno: Masaryk University, 1993, pp. 26–27.

CHAPTER SEVEN
JURISTIC PERSON AS A SUBJECT OF RESPONSIBILITY

Considering the above conclusion that a juristic person can never have the capacity to engage in its "own legal conduct", it follows that a juristic person cannot commit any illegal conduct that could be deemed "its own" either. Given that a juristic person cannot itself commit illegal conduct, the question ensues whether and if so, to what extent a juristic person can be a "subject of responsibility". And yet, is such a question even appropriate? After all, a juristic person has to be a "subject of responsibility". Given that a juristic person is authorised to **enter into contractual relations** through legal conduct that is imputed to the juristic person itself and not to the bodies acting on its behalf, the juristic person must also be responsible for fulfilment of its contractual obligations. It would indeed be absurd to conceive an entity—juristic person—with the capacity to assume obligations, but without the duty to fulfil them. Such an entity could not be functional. Recognising this fact, Savigny was fully convinced that a juristic person is responsible for its contractual obligations.[254] Legal personality of a juristic person therefore had to comprise, inseparably and inevitably, not only the capacity to acquire subjective rights, but also the capacity to assume subjective duties, including the duty to bear responsibility for the fulfilment of its contractual obligations.[255]

There is another explanation why contractual responsibility of juristic persons has never been doubted. In actuality, no "own legal conduct" of a juristic person is required for breach of an obligation, as a precondition for compensation for any damage incurred. Albeit similar to "legal conduct" in that it consists in human behaviour, fulfilment—*solutio*—of a contractual obligation needs to be distinguished from legal

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254 *"... in contractual relations of juristic persons, the intentions of the juristic persons are in fact irrelevant, in the same way as the intentions of a natural person whose proxy wilfully or negligently causes a wrong."* (SAVIGNY, F. C. *System des heutigen Römischen Rechts (Volume II).* Berlin: Veit, 1840, p. 317.)

255 Nonetheless, it should be noted in this context that (conversely to natural persons), the responsibility, or liability, of members of a juristic person is limited as a rule. This is one of the reasons why natural persons carry out their business activities through limited liability companies, which primarily serve to limit the liability of members for their business plans, often entailing great risks, rather than accumulating the equity required for the business operations.

conduct. Behaviour of a juristic person, as a debtor, in fulfilling a contractual obligation is, in fact, aimed at terminating, rather than establishing, an obligation.[256] From this perspective, the debtor's behaviour needs to be construed as pursuing the desired result, namely repayment of the debt and thus termination of the obligation. A juristic person does not undertake to strive to behave in a way prescribed by a contract, but rather to fulfil an obligation agreed in the contract; accordingly, it has an obligation of result. By the same token, default means a breach of the obligation to comply with the contract, i.e. a breach of the obligation to achieve the result envisaged in the contract. Consequently, a breach of a contractual obligation can be perceived as an illegal result, which by definition is substantially closer to an unlawful state of affairs than to illegal conduct. The above considerations imply that, in case of breach of a contractual obligation, it is irrelevant whether or not the default was caused by the wrongdoer's own illegal conduct as such default does not represent illegal conduct *stricto sensu*, but rather constitutes an unlawful state of affairs caused by a failure to comply with, or achieve, the contractually agreed "result".

7.1 Fault-based liability of juristic persons

An important finding ensues from the above: the capacity of a juristic person to bear "legal responsibility" is not conditional upon its capacity to commit its own illegal conduct. For juristic persons **to have capacity to bear legal responsibility**, just like natural persons**,** the only decisive aspect is whether such a capacity is attributed to them by law as **part of their legal personality.** As a practical illustration, we can refer to the provisions of Section 2920 (2) of the Civil Code, which reads as follows: *"If a minor who has not yet acquired full legal capacity or an individual who suffers from a mental disorder* ***was incapable of controlling his behaviour and assessing its consequences****, the victim is entitled to compensation for damage if this is fair with regard to the financial standing of the wrongdoer and victim."* The cited provision implies that even a person lacking reason and will, i.e. insane person, is responsible for the consequences of his "unconscious behaviour". This again proves that legal responsibility may arise regardless of whether or not the subject of responsibility is bestowed with reason and will of his own. Nonetheless, account has to be taken of the fact that even though one's "own illegal conduct" is not a precondition for arising

[256] Such a line of interpretation could be challenged by arguing that legal conduct, or legal act, has always been defined as a manifestation of will establishing, modifying or terminating (subjective) rights and obligations (in this respect, see Section 34 of the 1964 Civil Code). Legal conduct, for example waiver of a debt, can thus lead to termination of an obligation in a like manner as its fulfilment. There is nonetheless a difference between waiver of a debt and fulfilment of an obligation, consisting in the fact that the former involves termination of an unfulfilled obligation while the latter terminates an obligation by fulfilment. The causes of termination of an obligation are thus different in terms of quality, which means that legal conduct cannot be considered equal to termination of an obligation by its fulfilment.

of legal responsibility, reason and will must, in any case, be imputed to the person concerned, as the subject of responsibility, so that the duty arising from such legal responsibility can be fulfilled. In concrete terms, this means that the statutory representative or guardian of an insane person will be obligated to fulfil the latter's duty to compensate the damage caused by his unconscious behaviour. Circumstances are analogous in cases where a juristic person is liable to compensate damage arising from an unlawful state of affairs even though such a state might have been caused through no fault on the part of the juristic person (no-fault liability). This nonetheless applies only in case of "no-fault liability", arising from an unlawful state of affairs regardless of culpability, where law links legal responsibility (or liability) to unlawful effects of forces outside human control.

7.2 No-fault liability of juristic persons

The case is not as clear where we consider liability of juristic persons for a wrong, typically taking the form of **criminal liability**. At his time, Savigny was one of the authors who excluded criminal liability of juristic persons.[257] Savigny believed that the reason lay in the nature of criminal law, on the one hand, and the nature of juristic persons as such, on the other hand. As concerns criminal law, Savigny argued as follows: *"Criminal law deals with natural individuals as cogitative, purposeful and sensitive beings. A juristic person is nothing like that; conversely, it is merely a being which owns property and therefore remains outside the sphere of criminal law. The existence of a juristic person is, in reality, conditional upon the will of certain individuals, which is imputed to the juristic person as its own will by application of legal fiction; nonetheless, such representation deprived of its own will can only be respected in civil law and never in criminal law."*[258] By the same token, *"**any conduct considered a crime committed by a juristic person is still a crime committed by its members or officers, that is individuals, or natural persons**; whether or not their relation to the corporation was the reason for and purpose of the crime, is equally irrelevant. For example, an overly industrious municipal official who steals money to relieve a destitute national treasury is still a thief, as an individual. Punishing a crime committed by a juristic person would violate the basic principle of criminal law, namely that the offender and the punished must be one and the same person."*[259] The fundamental grounds for excluding criminal liability of juristic persons is

[257] Savigny asserts that all considerations concerning criminal liability of juristic persons apply equally to the capacity to commit a wrong under private law. Indeed, a wrong *stricto sensu* presupposes an intention or negligence accompanied with cognisance (Gesinnung) and imputability (Zurechnung) and is thus inconceivable in the case of juristic persons, in the like manner as in case of insane persons or persons suffering from a mental disorder (SAVIGNY, F. C. *System des heutigen Römischen Rechts (Volume II)*. Berlin: Veit, 1840, p. 317.)

[258] Ibid, p. 312.

[259] Ibid, p. 313.

associated with Savigny's analogy between juristic persons, on the one hand, and persons suffering from a mental disorder and insane persons. These two categories of persons are similar in that they both represent entities vested with legal capacity but naturally incapable of engaging in any conduct, wherefore they are represented by representatives who artificially form the will of such persons. In both cases, Savigny considers it justified to attribute to both of them an unlimited volitional capacity, which would mean that the person under guardianship would be punished for an offence, such as fraud or theft, committed by the guardian in the interests of the person in his charge.[260]

If we followed Savigny's arguments, we could claim in line with the currently applicable law that the reason why duties arising from subjective liability (criminal or civil) cannot be attributed to a juristic person lies in the "mental incapacity" of a juristic person. It is indeed true that where individuals—natural persons—are involved, criminal law requires that the offender have its "own" reason and will to be considered the perpetrator of a criminal offence and for duties envisaged by the Criminal Code to be imposed. The aforementioned precondition ensues from Section 26 of the Criminal Code, which stipulates: *"A person who, at the time of committing an offence, was incapable of recognising the illegality of his conduct and control it due to a mental disorder shall not be held criminally liable for the offence."* The cited provision implies *a contrario* that duties stipulated by criminal law are imputable to the offender if his mind exhibited both the cognitive component, allowing him to recognise the illegality of his conduct, and the volitional component, allowing him to control his conduct, provided that other preconditions for arising of criminal liability (such as the required age) are met. **In this line of interpretation, insanity is the opposite of legal capacity.** Legal capacity, in fact, represents the requirement of reason and will, which are indispensable for a person to engage in legal conduct. Conversely, mental incapacity, in the sense of a lack of reason and will, excludes "illegal conduct" on the part of the person concerned. Nonetheless, we have seen above that legal conduct may be imputed even to an insane person and that a natural person lacking mental capacity may be responsible for his behaviour. Savigny's considerations concerning incapacity of juristic persons to commit a wrong hence express his juristic and political beliefs, rather than suggesting how positive law could provide for this matter.

To illustrate this aspect, we can refer to *(Czech)* Act No. 418/2011 Coll., on corporate criminal liability and prosecution, as amended (hereinafter the Corporate Criminal Liability Act). The Corporate Criminal Liability Act abandoned the requirement that a juristic person, as a perpetrator of a criminal offence, must be bestowed with its "own" reason and will (as the notions of "one's own and someone else's will" are defined herein) to be considered *compos mentis* in the sense of imputability of duties envisaged by criminal law. This specifically follows from Section 8 (2), which defines the scope of criminal liability of juristic persons as follows:

[260] Ibid, p. 316.

(2) *The criminal offence specified in Section 7 is imputable to juristic persons if it was committed*

(a) *by conduct of bodies of the juristic person or persons specified in paragraph (1) (a) to (c); or*

(b) *by an employee specified in paragraph 1 (d) acting on the basis of a decision, approval or instruction given by bodies of the juristic person or persons specified in paragraph (1) (a) to (c); or due to a failure of bodies of the juristic person or persons specified in paragraph (1) (a) to (c) to adopt measures they were required to adopt under some other legal regulation or they can reasonably be expected to adopt, including, without limitation, by omitting to exert obligatory or necessary control over the activities of employees or other persons reporting to them; or due to a failure of the aforementioned persons to take necessary steps to prevent or avoid the consequences of the committed criminal offence.*

What the above-cited provision truly means is that **reason and will bestowed on an individual discharging the office of a juristic person's body** or an employee of a juristic person is imputed to the juristic person as the perpetrator of a criminal offence.

It should be reiterated in this context that, by definition, imputability of reason and will must be distinguished from **imputability of a duty applicable to a juristic person**. This merely means that the object of imputability must be distinguished. In line with the above, the provisions of Section 9 (1) of the Corporate Criminal Liability Act, stipulating that *"[a] juristic person to which a violation or infringement of an interest protected by criminal law in a manner specified in this Act is imputable is the perpetrator of the criminal offence"* sets only a precondition for imposing on the juristic person the duties (and also sanctions if the duties are breached) envisaged by the Criminal Code. The above further implies that where a juristic person has committed conduct deemed to be a criminal offence before the effective date of the Corporate Criminal Liability Act, no duties envisaged by the Criminal Code could have been imposed on the juristic person as no such duty could be imputed to it as a perpetrator of a criminal offence. Conversely, where such conduct has been committed after the effective date of the Corporate Criminal Liability Act, the relevant duties are imputable and the legal person thus "could" bear "criminal liability". The expression "could" nonetheless poses some problems. Indeed, if the law merely stipulated that duties envisaged by criminal law "can" be imposed on a juristic person, while omitting to specify whose illegal conduct is deemed illegal conduct of a juristic person and hence failing to determine imputablity of reason and will, which is necessary for both legal and illegal conduct, a juristic person could never "commit" a criminal offence. Accordingly, both the said conditions must be met simultaneously to give rise to criminal liability of a juristic person. Where one of the preconditions is absent, there is either "nobody" to whom the relevant conduct be imputed or "nothing" to impute.

7.3 Capacity of jurisic persons to bear legal responsibility (liability)

In conclusion, two preconditions must be met for a juristic person to become a subject of responsibility. The first precondition requires that legal personality of a juristic person comprise the capacity to bear legal responsibility in some way. In actuality, a sovereign legislator is free to determine whether and to what extent a juristic person and the persons representing it shall bear responsibility. Accordingly, from the perspective of normative analysis, positive law may, but need not, provide for criminal liability of juristic persons. The introduction of criminal liability of juristic persons (i.e. corporate criminal liability) proves that the scope of the capacity to bear legal responsibility (be liable) must be derived from positive law and cannot be invoked from juristic and political considerations.

However, the fact alone that a juristic person is considered a subject of responsibility does not suffice for the juristic person to be capable of causing and fulfilling a duty arising from such responsibility. In this context, no-fault liability and liability based on fault (culpability) need to be distinguished. Where **no-fault liability** is concerned, it is irrelevant whether the damage in question was caused by the juristic person's own conduct. In such a case, the damage is an illegal result, irrespective of whether it was caused by illegal conduct of a juristic person that we consider its own or someone else's. Consequently, reason and will of a juristic person are relevant in terms of no-fault liability (whether contractual or for a wrong) only for the fulfilment of a duty arising from such liability and not for the arising of such liability. By way of contrast, the situation is more complex where **liability based on fault (culpability)** is concerned. In such a case, positive law must define what conduct is deemed illegal conduct of a juristic person giving rise to its legal responsibility. Having regard to the above, such illegal conduct can never be perceived as the juristic person's own illegal conduct because a juristic person necessarily acts through specific individuals, who are simultaneously natural persons. From this perspective, such conduct must represent "someone else's illegal conduct". This, however, in no way prevents law from establishing legal responsibility of a juristic person for such conduct, if considered desirable by the legislator.

7.4 Summary

Given that a juristic person cannot itself commit illegal conduct, the question ensues whether and if so, to what extent a juristic person can be a "subject of responsibility". Whatever the case, the capacity of a juristic person, just like the capacity of a natural person, to commit illegal conduct is irrelevant for its **capacity to bear legal responsibility**. What is relevant is whether the legislation vests such capacity in the person as **part of its (or his) legal personality**, regardless of its "mental capacity" or "mental

incapacity". In actuality, a sovereign legislator is free to determine whether and to what extent a juristic person and the persons representing it shall bear responsibility. However, the fact alone that a juristic person is considered a subject of responsibility does not suffice for the juristic person to be capable of causing and fulfilling a duty arising from such responsibility. In this context, no-fault liability and liability based on fault (culpability) need to be distinguished. Where **no-fault liability** is concerned, it is irrelevant whether the damage in question was caused by the juristic person's own conduct. In such a case, the damage is an illegal result, irrespective of whether it was caused by illegal conduct of a juristic person that we consider its own or someone else's. Consequently, the reason and will of a juristic person are relevant in terms of no-fault liability (whether contractual or for a wrong) only for the fulfilment of a duty arising from such liability and not for the arising of such liability. By way of contrast, the situation is more complex where **liability based on fault (culpability)** is concerned. In such a case, positive law must define what conduct is deemed illegal conduct of a juristic person giving rise to its legal responsibility. Having regard to the above, such illegal conduct can never be perceived as the juristic person's own illegal conduct because a juristic person necessarily acts through specific individuals, who are simultaneously natural persons. From this perspective, such conduct must represent "someone else's illegal conduct". This, however, in no way prevents law from establishing legal responsibility of a juristic person for such conduct, if considered desirable by the legislator.

CHAPTER EIGHT
NO-FAULT LIABILITY OF JURISTIC PERSONS

8.1 Introduction

No-fault liability is increasingly becoming the dominant liability relationship in private law despite the declared primacy of liability based on fault. This is not development in recent years, but rather a long-term trend in tort law. European countries (France, Germany, Austria, Italy, Poland, Spain, the Netherlands and others) have witnessed recurring discussions on the various models of introducing "stricter" civil liability for damage. The main motivation lies in fair allocation of risks and consistent protection of the aggrieved parties. However, the regulation of no-fault liability should not paralyse desirable social, technical and technological progress. It is thus necessary that the debates strike a balance among these social interests. The title itself or, more precisely, the characteristics of liability as no-fault liability—as opposed to liability based on fault (culpability)—is just one of many theoretical approaches that usually describe situations where someone bears the burden of liability regardless of his culpability. In addition, the doctrine also uses the following notions: liability for result, liability without fault (culpability), strict liability, and liability for increased risk or hazard. In the Czech context, the notion of no-fault liability must be scrutinised in relation to legal entities. Is liability of legal entities truly identical to liability of natural persons in these cases? Who is to benefit from the existence of grounds for exoneration? How can legal entities prove that they exercised all the care that can be reasonably required? How are harmful consequences caused by operation imputed to legal entities? What are the limits of no-fault liability?

8.2 Introduction: characteristics of no-fault liability—its function and purpose in contemporary tort law

The new concept of legal entities in Czech law evokes the question of liability of a legal entity for damage caused by the entity's activities or, if applicable, in the course of its activities (or due to omission, as applicable). The position of legal entities under the regime of liability based on fault (culpability) is covered by another chapter (see above); this section deals only with no-fault liability for damage, especially as regards imputability of harmful consequences of various operational activities to a legal entity itself. Therefore, I will examine the prerequisites and limits of liability *ex delicto* (or a quasi-delict liability) in contemporary private law.

No-fault liability has been emerging, under various names, with increasing frequency in the private law of European countries since approximately the late 19th century. The concept has gradually been developing, as the idea was gaining ground that someone should be held liable for certain damage (the aspect of equity), even though the owner or beneficiary of the source of increased risk or hazard did not neglect anything, committed no mistake or committed no other breach of the recognised rules of social contact. This reflects the maxim that he who benefits from such (hazardous, risky) activities should, as a rule, also bear the risk of any damage incurred *(cuius commoda, eius incommoda)*.

The name itself or, more precisely, the characteristics of this type of liability as no-fault liability—as opposed to the principle of liability based on fault (culpability)—is just one of the many theoretical approaches that usually describe situations where someone bears the burden of liability regardless of his culpability. The Czech and Slovak languages use the expressions *"objektivní"* and *"objektívna"*, meaning literally "objective" (liability). [261] In addition, the doctrine also uses the following notions: liability for result, liability without fault (culpability), strict liability, and liability for increased risk or hazard. The above terms are usually used interchangeably even though they do not always express the same thing [in particular, the term "strict liability" does not entirely correspond to the Czech notion of *"objektivní odpovědnost" (no-fault liability)*]. Moreover, foreign authors [262] tend to use the term strict liability in cases which could also be labelled as a "stricter" liability based on fault (e.g. a higher standard of the care required, reversal of the burden of proof, etc.).

[261] Cf. e.g. ŠVESTKA, J., DVOŘÁK, J., FIALA, J. et al. *Občanský zákoník. Komentář. Svazek VI [Civil Code. Commentary. Volume VI]*. Prague: Wolters Kluwer, 2014; HULMÁK, M. et al. *Občanský zákoník VI. Závazkové právo. Zvláštní část (§ 2014). Komentář [The Civil Code VI. Law of Obligations. Special Part (Section 2014). Commentary]*. Prague: C. H. Beck, 2014; PETROV, J., VÝTISK, M., BERAN, V. et al. *Občanský zákoník. Komentář [The Civil Code. Commentary]*. Prague: C. H. Beck, 2017.

[262] KOCH, B. A., KOZIOL, H. (eds.) *Unification of tort law: Strict liability*. Alpheen van Rijn: Kluwer Law International, 2002.

The main purpose of no-fault liability in contemporary private law lies especially in fair allocation of risks following from many—socially otherwise desirable (beneficial)—activities and operations in which the risk of occurrence of damage is inherent. The use of escalators, having a haircut at hairdresser's or barber's, riding rented boats, having dental calculus removed using a dentist's drill, preparing pharmaceuticals based on a prescription, driving on roads, going up in a balloon over a town, riding a merry-go-round and other amusement rides—all that has become a normal part of the lives of many people, routine perhaps and, still, even very serious damage may be incurred in such activities despite the fact that no one may have breached his legal obligation or have been culpable of causing the harmful consequence in the specific case. No-fault liability in such a situation aims, on the one hand, at ensuring more consistent protection of the aggrieved party and, on the other, at motivating operators to proceed as carefully as possible in the performance of their activities and to seek to eliminate the risk of hazardous situations as far as possible. For most cases of no-fault liability, the Czech laws recognise and define (a) ground(s) for exoneration, which can—if proven properly—relieve the obliged party of his liability to pay damages. However, in a few exceptional cases of absolute liability defined by law, the social interest in indemnifying damage (i.e. providing compensation to the aggrieved party) prevails over investigating whether an operator has done everything that can be reasonably required of him, or whether or not he exercised due care in relation to a given thing or operation. Nevertheless, the applicable Czech legislation shows that the boundary between simple no-fault liability and absolute liability can be quite blurred in some cases. [263] Part 4 of this Chapter outlines the various possible solutions to this problem.

Indeed, the system of presumed culpability within civil liability based on fault can be regarded, to some extent, as a stricter regime of liability in the Czech environment. Once anyone breaches a statutory duty, the laws presume that the wrongdoer was also culpable of the given breach, even if by negligence (Section 2911).

8.3 No-fault liability from comparative perspective—various approaches

The legislation of European countries we refer to for inspiration and advice reflect the specific development of the given country, the specific development of the country's legislation and its reflection in case-law. However, as discussed below, the starting point of the Czech legislator is quite different in view of the legislation on torts (civil wrongs) contained in the Civil Codes of 1950 and 1964.

The **French legislation** on civil liability, similar to other countries whose civil codes were adopted in the 19th century, originally consistently followed the principle

[263] Cf. the conclusions and opinions published in literature (commentaries) to date. See previous footnote.

of liability based on fault *(responsabilité pour faute)*, with two exceptions only (liability for damage caused by an animal under Article 1385, and liability for damage caused by a dilapidated house under Article 1386 of the Civil Code). The approach changed radically only in the late 19th century and the first quarter of the 20th century. The process of sidelining the *"faute"* and expanding the statutory definition of cases involving no-fault liability or, more precisely, the forms of liability regardless of fault (culpability) is characteristic of the years that followed. As new approaches were gradually adopted by the doctrine and judiciary, the *"faute"* itself, as the basic element of culpability, was shifting towards the no-fault liability principle. Despite being so exceptional at the beginning, liability regardless of fault (culpability) became absolutely common in tort law (both in theory and practice); the degree of its expansion reached a level where such liability prevailed over liability for negligence in the area of compensation for personal injury and death. [264] It should be recalled that French (and other) courts themselves would adopt various forms of "strict" and "stricter" liability. Initially, they construed Art. 1384 (1) of the Civil Code as a general principle governing damage caused by a thing under one's control and, from the very outset, conceived such a type of liability as liability for result. In addition, the courts developed other mechanisms to impose "stricter" liability on wrongdoers even in cases of liability where culpability is taken into consideration. Such mechanisms include especially the concept of "increased duty of care" where wrongdoers have certain special skills, abilities, etc. (i.e. professionals), as well as *ad hoc* "reversal" or shift of the burden of proof. As regards persons who are unable to assess the consequences of their own unlawful conduct (children and persons suffering from mental disorders), the unlawful conduct itself suffices to create civil liability; culpability—as the inner mental relationship of the wrongdoer to the conduct and its consequences—is not required.

The approach of **German civil law** is very similar in this respect. Civil liability is governed by the principle of liability based on fault, i.e. liability for culpability *("Verschuldensprinzip")*. No-fault liability or strict liability, as applicable, is still perceived as an exception; no-fault liability is solely defined by the legislator (rather than case-law, as opposed to France and the like) and is, in most cases, regulated by special laws, rather than by the Civil Code. Moreover, the distinction between liability based on fault (culpability) and no-fault liability or, more precisely, the emphasis on the aspect of culpability is also reflected in compensation for personal injury, especially in the remedy of its non-material (intangible) aspects. As a rule, compensation for pain and suffering *(pretium doloris)* presumes culpability (whether by negligence or intent) on the part of the wrongdoer also in cases assessed under the cited special laws, i.e. under the regime of no-fault liability. No-fault liability itself, expressed as the individual cases defined in law, does not automatically constitute the duty to compensate intangible damage. The law allows two exceptions: liability for damage

[264] GALAND-CARVAL, S. In: KOCH, B. A., KOZIOL, H. (eds.) *Unification of tort law: Strict liability*. Alpheen van Rijn: Kluwer Law International, 2002, p. 127.

caused by animals not serving for employment or other gainful activities ("luxury animals"—see the first sentence of Section 833 of the BGB (the German Civil Code)); and liability for damage caused by military aircraft under a special law. [265]

Equally, **Austrian** tort law is governed by the principle of liability based on fault, i.e. culpability is considered, even in contractual liability—cf. Section 1295 (1) of the ABGB (the Civil Code of Austria). The hazardous nature or, more precisely, the risk of damage is critical when imposing "stricter" liability rules in each specific case. In other words, the greater the risk of personal injury and death, the greater the degree of due care required of potential wrongdoers. In many cases, behaviour entailing an increased risk of damage is prohibited by protective norms (e.g. traffic rules) of Austrian law due to the possibility—even if abstract only—of the occurrence of such damage. Therefore, a specific risk of occurrence of damage is not required for civil liability. [266]

The **Italian codification** of 1942 also provides an interesting example of the later developments. In the same fashion as its predecessors and foreign examples, Italian tort law follows, as a rule, the principle of liability based on fault, i.e. civil liability requires culpability. Nevertheless, the later reflections made by the doctrine and the opinions expressed in case-law did find their way to the attention of the Italian legislator, who in many cases opted for liability based on fault; however, the presumptions of culpability reversing the burden of proof to wrongdoers were very strong, making such liability rather a strict liability, since culpability is not proven in these cases. The approach adopted with respect to no-fault liability by the Italian theorists over the past 50 years can be summarised in the two following theses: even in case of usual risks, i.e. risks that are foreseeable and, to some extent, also avoidable, liability is shifting towards no-fault liability; and the duty to compensate damage is imposed on entities that are expected to be able to bear the consequences of civil liability in economic terms. At present, no-fault liability applies to entrepreneurs; owners of animals, buildings and vehicles (Articles 2052 to 2054 of the *Codice civile* (the Civil Code)); parents (Article 2048 of the *Codice civile*); and persons having control over a thing (source of damage) (Article 2051 of the *Codice civile*). To date, however, no-fault liability has not been recognised as a general principle of Italian tort law with an equal position as liability based on fault. For the time being, here, too, no-fault liability thus continues to be perceived as an exception to the above principle of liability based on fault and, therefore, may not be inferred by analogy. [267]

The **Dutch code** and doctrine following from the Code are far more modern since they regard both no-fault liability and liability based on fault as alternatives, i.e. as complementary equivalent principles. Further, they classify three basic types of liability regardless of culpability. The risk (hazard) of damage is the common attribute

[265] FEDTKE, J., MAGNUS, U. In: KOCH, B. A., KOZIOL, H. (eds.) *Unification of tort law: Strict liability*. Alpheen van Rijn: Kluwer Law International, 2002, p. 147.

[266] KOCH, B. A., KOZIOL, H. (eds.) *Unification of tort law: Strict liability*. Alpheen van Rijn: Kluwer Law International, 2002, p. 9.

[267] BUSNELLI, F. D., COMANDÉ, G. In: KOCH, B. A., KOZIOL, H. (eds.) *Unification of tort law: Strict liability*. Alpheen van Rijn: Kluwer Law International, 2002, p. 207.

of all three of them. The first group includes cases where the wrongdoer's behaviour is assessed under the objective standard of care (categorised by some as liability based on fault), rather than subjective standard of care. The second group comprises situations where unlawfulness itself is a sufficient prerequisite for liability (i.e. imputability is not required). The third group encompasses cases where civil liability arises based on the mere existence of materialised risk (unlawfulness is not required) unless external circumstances exist that exonerate the obliged party from his duty to compensate damage. [268]

In terms of history and politics, the **Polish code** was close to the Czech Civil Code (of 1964) given the period of its creation and the ideas on which it was based. Under the Polish civil law, no-fault liability became—especially in terms of the practical aspect of compensation for damage (especially given its frequency)—a completely equivalent form of civil liability. [269] It is similar to Czech legislation in that the degree of due care is irrelevant under no-fault liability, and the burden of proof is not shifted to wrongdoers, i.e. the aggrieved party must always prove all the prerequisites for no-fault liability. In Poland, as in Germany, Austria and the Czech Republic, no-fault liability is defined by law (the Civil Code and other special laws), rather than being the outcome of the practice of the courts.

In **Spain**, however, the courts play a decisive role in applying no-fault liability since they are the ones who set out significantly "stricter" conditions for liability which is otherwise based on fault; however, the courts have been consistently declaring that liability based on fault remains the basic principle of civil liability for damage. The shift towards no-fault liability through judicial decision-making lies in the fact that courts have been systematically rejecting the possibility of rebutting the presumption of culpability in cases of liability based on fault, making it thus very difficult for a putative wrongdoer to prove that he did not neglect the due standard of care—this can only be proven to a limited extent. Cases of liability of parents for damage caused by their minor children and cases of liability of employers for damage caused (both by acts and omissions) by their employees are typical examples of this tendency. [270] Moreover, no-fault liability is mainly set out in special laws (air transport, nuclear energy, hunting, operation of motor vehicles, defective products, etc.); the Civil Code defines only four torts (damage caused by an animal; damage caused by a thing being thrown or falling out of a room; damage caused by harmful vapours; and damage caused by falling trees). [271]

The contemporary **Czech legislation** governing civil liability relies exclusively on the principle of liability based on fault, i.e., as a rule, a wrongdoer is liable to

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[268] VAN BOOM, W. H., DU PERRON, E. In: KOCH, B. A., KOZIOL, H. (eds.) *Unification of tort law: Strict liability.* Alpheen van Rijn: Kluwer Law International, 2002, p. 227.

[269] NESTEROWICZ, M., BAGINSKA, E. In: KOCH, B. A., KOZIOL, H. (eds.) *Unification of tort law: Strict liability*. Alpheen van Rijn: Kluwer Law International, 2002, p. 257.

[270] MARTÍN-CASALS, M., RIBOT, J., SOLÉ, J. In: KOCH, B. A., KOZIOL, H. (eds.) *Unification of tort law: Strict liability*. Alpheen van Rijn: Kluwer Law International, 2002, p. 28.

[271] Cf. Articles 1905, 1910 and 1908 of the Spanish Civil Code.

compensate damage with regard to his culpability. Wrongdoers are required to compensate damage regardless of their culpability, i.e. under the principle of no-fault liability, only where specifically stipulated by law (cf. Section 2895), i.e. directly by the Civil Code (e.g. in case of operational damage, damage caused by the operation of means of transport, damage caused by a particularly hazardous operation, etc.), or by special laws (such as the Nuclear Damage Act, the Mining Act, the Water Act, the Waste Act, the Environment Act, the State Liability Damage Act, the Police Act, the Hunting Act, etc.). Therefore, Czech law also does not allow expansion of the possible cases of no-fault liability by mere analogy. As opposed to certain laws adopted abroad later, the two principles are not equivalent under Czech law, and the Civil Code of 2012 adopted the approaches embraced by the original earlier codifications (*Code civil*, the BGB, the ABGB). As regards general civil liability for damage, the principle of liability based on fault continues to prevail and applies both to liability for breach of good morals (Section 2909) [272] and to liability for breach of a duty stipulated by law (Section 2910). The principle of liability based on fault is suppressed in cases of breach of a contractual obligation (unlike under Austrian law and the like), where the no-fault principle is consistently reflected (Section 2913) with only a single ground for exoneration (an extraordinary unforeseeable and insurmountable obstacle arising independently of the obliged party's will). Subject to only a few exceptions, the special cases of duty (liability) to compensate damage are approached as cases of no-fault liability, which results—as in other legal systems, for that matter—from a special interest in protecting certain values against sources of increased hazard and from the need for socially acceptable allocation of possible losses and risks. Indeed, cases of damage caused by a source of increased hazard constitute the most abundant group of cases of no-fault liability in Czech legislation. Nevertheless, the difference in the legislative approach to the individual cases of civil liability is crucial. Whereas liability based on fault requires wrongdoer's unlawful conduct (by act or omission) or culpable breach of legal duty, as applicable, this is not the case under no-fault liability. No-fault liability arises upon the mere occurrence of an event which is defined by law as giving rise to strict liability. By law, the obliged party's only option is to invoke certain grounds for exoneration from liability to pay damages. However, the existence of any such grounds for exoneration must by proven by the liable party.

8.4 Liability of legal entities—imputation of consequences

The theoretical assessment of liability of legal entities is easier in cases of no-fault liability than in cases of liability based on fault, where consideration needs to be taken of whether any grounds exist for a legal entity to be held liable for an unlawful

[272] In this case, it is even in its qualified form of intentional breach.

act committed by a specific natural person in the performance of his responsibilities (cf. Section 167 of the Civil Code). Liability regardless of culpability does not require an unlawful act, but an event defined (qualified) by law and inflicting damage (operational damage, damage caused by a source of increased hazard, damage caused by the special nature of operation of means of transport, etc.). Liability for such damage is then imputed to the originator or, more specifically, the owner of the process (operation of a thing) based on a causal link; the owner of the process is also generally defined by law. In this case, the laws are equally applicable both to natural persons and legal entities. This means that, in cases of no-fault liability for damage, the given legal entity is liable *vis-à-vis* the aggrieved party directly (without any intermediary). However, in terms of tort law (also in the matter of application of grounds for exoneration and the like) and right of recourse, if applicable, it is necessary to further analyse the modalities of participation (or interference) of natural persons in inflicting (causing) damage. Two basic situations are conceivable in view of the applicable laws.

A **legal entity's employee**[273] can cause (i.e. be culpable of, inflict or otherwise participate in the occurrence of) damage by culpably (intentionally, or by negligence) breaching a legal duty, and even by inducing otherwise accidental damage due to his own fault (Section 2904) especially by violating an order or damaging equipment that is supposed to prevent accidental damage. Any harmful consequences or, more precisely, liability for any harmful consequences will be imputed to the legal entity that acts as the employer in the given case. The employee himself will not be liable (*vis-à-vis* the aggrieved party); his liability *vis-à-vis* the employer is governed by the labour-law regulations (in particular, the Labour Code—cf. Section 250 et seq.) and the recourse provided for therein. Damage can also be caused by a **proxy** or **another auxiliary**, i.e. a person not employed. Damage (or rather liability) is also imputed directly to the given legal entity where the legal entity uses the proxy or some other auxiliary in the performance of its activities. However, any right of recourse available to the legal entity *vis-à-vis* the proxy or another auxiliary is governed by the Civil Code (Section 2917).

The above-described situations need to be distinguished from cases where damage is caused by a **third party** (i.e. a person other than an employee, proxy or another auxiliary) due to his unavoidable conduct in relation to operation. [274] In terms of the operation (operational activities) itself (themselves), such cases constitute events of *force majeure* and, as such, they are subject to liability solely in the defined cases of absolute liability or, if applicable, where expressly stipulated (damage to things taken over, deposited and brought in). Where the legal entity was liable to compensate damage caused by another person, the right of recourse is in no way prejudiced.

[273] Section 2948 reads as follows: *a person who works in the operation*. The Civil Code provides no further specifications as regards the basis for the specific labour-law relationship.

[274] See the grounds for exoneration in cases of liability for damage caused by a particularly hazardous operation (Section 2925 (1)).

In case of avoidable conduct by a third party not prevented by the operator (e.g. due to the operator's own negligence[275]), the Civil Code applies solidary liability, rather than a right of recourse.

I have disregarded any cases of damage incurred as a result of **circumstances imputed to the aggrieved party** (fully or partially). Therefore, liability of legal entities or, more precisely, the scope of the duty to compensate damage can be reduced *pro rata* with regard to the circumstances of the damage incurred that are imputed to the aggrieved party (cf. Section 2918).

Contractual liability *(ex contractu)*, i.e. liability other than liability *ex delicto* (non-contractual liability) or quasi-delict liability, constitutes another type of civil liability of legal entities and individual liability. However, such liability requires unlawful conduct by a wrongdoer (breaching party) consisting in a breach of a contractually stipulated (agreed) obligation; this is a common feature with liability based on fault. Indeed, the latter also requires unlawful conduct, as opposed to other cases of no-fault liability under civil law. The difference lies in the fact that liability for breach of a contractual obligation is a no-fault liability—culpability on the part of the breaching party is irrelevant. Nevertheless, such liability is not absolute; in general, the laws stipulate (a single) ground for exoneration consisting precisely in the existence of a certain event envisaged by law (*force majeure*, i.e. an extraordinary unforeseeable and insurmountable obstacle arising independently of the breaching party's will—cf. Section 2913). This prominent feature distinguishes such liability from the other cases of no-fault liability for damage (operational liability, damage caused by a thing *per se*), where no breach of legal duty is required for civil liability to arise. In terms of the scope of liability and exoneration, contractual liability resembles simple no-fault liability *ex delicto*, where one is also liable for *casus minor* only (rather than for *force majeure*, as is the case of absolute liability *ex delicto*).

The capacity of specific natural persons to be liable *ex delicto* in case of no-fault liability need not be examined (such capacity would only be relevant if a right of recourse was exercised); the capacity of a legal entity to be liable to compensate damage arises upon the creation of such a legal entity (and ceases to exist upon the legal entity's termination) and forms part of its legal personality. Thus, both legal entities and natural persons can be directly liable (equivalently, under the same assumptions) if such a person is the operator of an increased risk or source of hazard. There is no doubt that both natural persons (e.g. independent entrepreneurs performing their gainful activities) and legal entities operating their enterprise (such as corporations) are liable for operational damage pursuant to Section 2924.

[275] Cf. Section 2929 in cases of wilful removal of a means of transport in repair.

8.5 Selected cases of no-fault liability of legal entities

This paper does not and cannot consider all the special cases of civil liability. Vicarious liability (liability for employees, auxiliaries, proxies, authorised persons, etc.) is discussed in another chapter; at this point, we will look into other cases of no-fault liability, which can be categorised into two basic groups. The first group encompasses **liability for activities** (with diverse statutory definitions), the second one includes cases of **liability for damage caused by a thing**. Differentiating between the two groups might not always be consistent at the level of the individual merits. E.g. operational liability mixes the two types of liability. Is liability of legal entities truly identical to liability of natural persons in these cases? Who is to benefit from the existence of grounds for exoneration? How can legal entities prove that they exercised all the care that can be reasonably required?

8.5.1 Liability for activities

8.5.1.1 Operational damage (Section 2924)

The Civil Code defines the merits of no-fault liability for damage caused to another person through the performance (operation) of certain activities. In this case, the operational activities are common operational activities, rather than particularly hazardous activities. No-fault liability for damage caused by operational activities requires the following: an **event ensuing from operational activities, damage, and a causal link** between the two. Operational activities should be understood broadly as continuous activities related to an operation managed or influenced in one way or another by natural persons or legal entities. It is irrelevant in this context whether the damage was inflicted by the operator himself or by the operator's employees or other persons authorised by the operator. Typical operational activities are all entrepreneurial (e.g. activities performed under a trade licence), commercial, co-operative, agricultural and other activities. The notion of damage (or event) induced by operational activities is also defined by law. This means damage caused by operational activities or a thing used in the performance of such activities, as well as damage caused by the physical, chemical or biological impacts of the given operation upon its environs (these are either impacts not permitted by authorities, or impacts permitted by authorities as such, but exceeding the scope of the relevant permission, e.g. increased levels of emissions, etc.). The above definition, however, does not apply to operations and operational activities which are subject to special provisions, such as a particularly hazardous operation (Section 2925), operation of means of transport (Section 2927 et seq.) and operations related to bringing in, placing and leaving things (Section 2945et seq.). As such, it has the nature of general (subsidiary) operational liability.

It is approached as no-fault liability, i.e. the obliged party is liable for an event induced by operational activities if such activities cause damage; however, this is simple no-fault liability permitting **exoneration** (relief of liability). The general ground for exoneration will apply primarily in these situations, i.e. that the damage occurred as a result of conduct of the aggrieved party (parties) (their culpability or contributory conduct leading to the occurrence of damage). However, the operator will be relieved of the obligation to compensate damage especially if he proves that he exercised all the care that can be reasonably expected. [276] Do legal entities possess the faculty of reason? What can be reasonably expected of legal entities in situations where they are to effectively prevent the occurrence of any damage? It is very hard to seek reason in something that is no more than an artificial artefact, merely a legislator's utilitarian creation. Nevertheless, after due examination and assessment, we can state that a certain procedure (approach, process) adopted by a legal entity was, or was not, reasonable in the given situation, with regard to the prevention of damage. Indeed, it will be possible to assess *ex post* whether the preventive measures adopted at the level of personal (including managers), technical, production, security and other management were rational in view of all the risks following from the specific operation. The individual operations—despite great resemblance—exhibit their own greater or lesser specifics (the operation of a hospital, school, swimming pool, restaurant), which should be considered when assessing the existence of a ground for exoneration. Above all, each legal entity can be reasonably required to comply with all the duties stipulated by the laws (including secondary laws), obligations agreed in contracts, duties following from good practice and habitual practice of private life, as well as other principles following from rational functioning of the given operation. The wording chosen—despite laying down the exoneration prerequisites in an objective manner ("can be expected")—should not render the requirements on operations excessive.

8.5.1.2 Damage caused by a particularly hazardous operation (Section 2925)

Certain operations involve a risk that exceeds the scope of common operational risk (mines, metallurgical works, quarries, power plants, gasworks, operations handling toxins, ammunition, explosives, etc.). Consequently, liability for damage caused by particularly hazardous operations has its own special legal regulation. This liability is subject to the following prerequisites: an **event induced by the source of increased hazard, damage, and a causal link** between the event induced by the source of increased hazard and this damage (explosion, landslide, outburst of water, noxious emissions, etc.). **Particularly hazardous operations are those** where the possibility

[276] The previous legislation (the Civil Code of 1964) placed stricter requirements on operators in this respect, since the only ground for exoneration lay in the fact that the damage in question was caused by an unavoidable event not originating in the operations (typically, natural disasters, *force majeure*). Unavoidability was assessed in objective terms, i.e. no event is unavoidable if it could have been prevented (Section 415 of the 1964 Civil Code) or averted (Section 417 of the 1964 Civil Code).

of occurrence of serious damage cannot be reasonably eliminated in advance even when exercising due care (cf. Section 2925). [277] This means that, under the regime of usual operational liability, an operator would be relieved of the obligation to compensate damage if he exercised all due care. Such a result, however, would not be desirable in the mentioned cases since this would significantly weaken the position of the aggrieved party (parties) and the damage incurred would be left without compensation in many cases.

The operator (whether a natural person or legal entity), operating his activities in a factory-like manner, finds himself in a difficult position in terms of court proceedings, since it is presumed that the operator is an operator of a particularly hazardous operation. He would have to rebut the presumption, i.e. prove that the possibility of occurrence of serious damage can be reasonably eliminated in his operation in advance by exercising due care. An operator whose operation uses or trades in explosives and similarly hazardous substances is in the same position. Simultaneously, we need to acknowledge that no-fault liability for damage caused by a particularly hazardous operation covers only damage originating in the source of the increased hazard (landslides, mine caving, increased noxious emissions, explosions, etc.), i.e. the stricter prerequisites for exoneration will not apply to cases of damage that is classified as damage caused by normal operational activities (e.g. slipping on a wet floor in an establishment).

As far as the individual prerequisites for this type of no-fault liability are concerned, no breach of duty, whether or not culpable, by the operator is obviously required. As regards causation[278], the Czech legislator—inspired by Art. 3:103 (1) of the PETL—introduced the need to take into account multiple causes of damage, where each of them alone would have been sufficient to cause the harmful consequence for which compensation is exacted, but it remains uncertain which one in fact caused it. In such a case, the Czech courts should regard each cause within the set of multiple causes as a cause of the harmful consequence to the extent corresponding to the likelihood that it may have caused the aggrieved party's damage. For the purposes of the obligation to provide compensation for damage caused by a particularly hazardous operation, this means that—if circumstances clearly indicate that the operation has significantly increased the risk of damage, although it can be legitimately referred to other possible causes, the court shall order the operator to provide compensation for damage to the extent that corresponds to the **likelihood that the damage was caused** by the operation. Despite the increased risk of occurrence of serious damage, liability for damage caused by a particularly hazardous operation is not approached as absolute liability since the law stipulates an exhaustive list of three grounds for

[277] This means an operation organised by humans and using such production and technical processes, substances, tools, means and powers that cannot be entirely controlled even by exercising professional care, resulting in imminent risk of personal injury and death, damage to property, nature and the environment (as outlined in the explanatory memorandum).

[278] ELISCHER, D. Contribution on causation in Czech Republic. In: INFANTINO, M., ZERVOGIANNI, E. *Causation in European Tort Law*. Cambridge: Cambridge University Press, 2017, 726 p.

exoneration. The operator will be relieved of the obligation to provide compensation for damage if the given harmful event defined by law was induced by an unavoidable conduct of a third party, *force majeure*, or the act of the aggrieved party himself. In conclusion, we need to point out that, although operations employing nuclear reactors in nuclear power plants and other operations entailing ionising radiation can, indeed, be labelled as particularly hazardous operations, they are regulated by special laws (Act No. 18/1997 Coll., on the peaceful use of nuclear energy and ionising radiation, the Atomic Act).

8.5.1.3 Damage caused by other operational activities

Besides operational activities that can be characterised as particularly hazardous, an array of operations exists that do not entail such a high risk of causing serious damage; they nonetheless need to be highlighted as they are quite specific and frequent in practice. The specifics of the individual operations require regular enactment of special laws and regulations. This includes, without limitation, liability for damage caused by the operation of means of transport (Section 2927 et seq.); liability for damage to things taken over, deposited and brought in (Section 2944 et seq.); liability for damage to real property (Section 2926); and liability for damage caused by information or advice (Section 2950).

Section 2944 stipulates no-fault liability for **damage to a thing taken over** if the thing is to be covered by an obligation of a person (natural person or legal entity) who is taking over the thing. From the viewpoint of legal entities, it is irrelevant which natural person took over the thing if the latter has any qualified relationship with the legal entity (typically employees, authorised persons, directors, etc.). Employees of legal entities exercise their authority to represent the legal entity insofar as this is usual with regard to their position (e.g. a salesperson) or office (e.g. a sales director); in case of doubt (or dispute, for that matter), it is decisive how the situation is perceived by third parties (i.e. the public, cf. Section 166). However, liability is always borne by the person who took over the thing or on whose behalf the thing was taken over, rather than the specific employee (his internal liability, i.e. labour-law liability, is not prejudiced by the above).

Such no-fault liability requires especially the following: the takeover of a movable thing (having a suit dry cleaned, jewellery repaired at a jeweller's) or real property (such as a residential building for reconstruction, including the individual residential units) as the subject of contractual obligation (e.g. work, custody), as well as the existence of a contractual relationship (or, more precisely, an obligation); an event qualified by law that occurred between the time of takeover of the given thing and the time when the thing should have been returned, and that caused the damage to the thing, including its loss or destruction. Another prerequisite is thus the actual existence of damage, including loss or destruction. A causal link between the event qualified by law and the occurrence of damage is also required as a *conditio sine qua non*. The operator will be relieved of his liability only if he proves that the damage

would have occurred in any case, i.e. without any relationship to the event qualified by law for which the operator is liable. [279] Potential grounds for exoneration include internal causes (perishable subject of the obligation), as well as external causes *(force majeure)* or, more precisely, *force majeure* events which could not have been avoided or foreseen in spite of exerting all effort. Even if not expressly listed, the grounds for exoneration surely include contributory conduct of the aggrieved party, either fully (exclusive culpability on the part of the aggrieved party), or partially (partial culpability on the part of the aggrieved party).

As indicated above, liability for damage stipulated by Section 2944 of the Civil Code forms the basis of liability for **damage caused to things brought in or deposited** (Section 2945 et seq.); three groups of liable entities exist under this type of liability. Both cases constitute an expansion or specification of the usual operational liability (Section 2924); the usual operational liability will thus not apply to such cases.

Primarily, an **operator providing accommodation services** is liable for damage to things brought in by or for the guests—natural persons, or directly taken over by the accommodation provider for these purposes. Operator means a person who operates hotels, motels, spa resorts, guest houses, chalets, student dorms, boarding houses, etc., rather than landlords letting their flats, houses or parts thereof, and landlords letting facilities intended for permanent residence. The liability of a landlord is subject to the given contractual obligation. This type of no-fault liability is conditional on the fact that the aggrieved party's thing(s) are brought into premises reserved for accommodation or depositing things, i.e. the existence of a contractual obligation (accommodation), the event causing damage to the thing (including loss or destruction), and a causal link between bringing in the thing and its damage. The operator's liability is not conceived as absolute liability; the law permits two grounds for exoneration. The operator of an establishment providing accommodation will be exonerated if he succeeds in proving that the damage would have occurred in any case (Section 2946 (2)). As regards internal and external causes, the same applies *mutatis mutandis* as in the case of liability for damage to things taken over. The second ground for exoneration reflects situations where damage to a thing brought in was caused by the aggrieved party himself or a person accompanying the aggrieved party. The list of grounds for exoneration is exhaustive: it is impossible to make an agreement on additional grounds, or exclude or reduce the grounds stipulated by

[279] Where a confectioner has taken over from a customer some ingredients for making pastry goods and cakes and the ingredients have spoiled due to an electricity outage in the area where both the contractor and the customer are situated, it is obvious that the ingredients would have spoiled even if they had not been handed over to the confectioner. For more details, see KOBLIHA, I., ELISCHER, D., HOCHMAN, J., HUNJAN KOBLIHOVÁ, R., TULÁČEK, J. *Náhrada škody podle občanského a obchodního zákoníku, zákoníku práce, v oblasti průmyslového vlastnictví a podle autorského zákona. Praktická příručka [Compensation for Damage Under the Civil Code and Commercial Code, Under the Labour Code, Under Industrial Property and Under the Copyright Act. A Manual]*. Prague: Leges, 2012, 390 p.

law; such a contractual arrangement would only be ostensible (i.e. null and void). Vehicles, things left in a vehicle, and living animals are not considered to be a thing brought in; under certain circumstances, vehicles may constitute a deposited thing. Accommodation providers would be liable for damage to such things only if they accepted the things into custody, i.e. an individualised custody obligation would arise. In case of compensation for damage caused to things brought in to such premises, the legislator opted for an unusual solution of limiting the amount of compensation. The principle of full compensation will not apply: compensation for property damage is capped at the level of 100 times the price of accommodation per day. This establishes an apparent correlation between the price of accommodation and the scope of liability of the accommodation provider. Such an approach reflects the idea that the higher the accommodation price per night, the higher the upper limit of compensation to be provided by the accommodation provider. Higher accommodation prices indicate that the accommodation provider should be capable of ensuring a higher standard of care and protection of things against damage. However, the limit will not apply, i.e. damage will have to be fully compensated (in the actual amount), where the given thing was accepted into custody, if the accommodation provider unlawfully refused to accept a thing into custody, or if the damage was caused by the accommodation provider or a person working in the accommodation provider's establishment. The manner of enforcing the right to compensation for damage is quite specific in this type of liability. Primarily, the aggrieved party is required to enforce his right directly with the operator and to do so without undue delay, not later than within 15 days of the date when he must have learnt of the damage (however, the right does not terminate by prescription upon expiry of that deadline to no effect). Otherwise, the court will not award any damages if the operator objects that the right was not asserted in time. Nevertheless, with the aim of protecting the aggrieved party, there are no limits as regards the time and persons who may enforce the right, where an accommodation provider accepted the given thing into custody, unlawfully refused to accept a thing into custody, or damage was caused by the accommodation provider or a person working in the accommodation provider's establishment.

Where the operation of certain activities usually encompasses depositing of things, typically the operation of restaurants, cafés, bars, surgeries, discotheques, saunas, theatres, cinemas, museums, hairdresser's, libraries, clubs, swimming pools, sports stadiums, gyms, as well as schools, after-school groups and canteens, etc., the person (natural person or legal entity) operating the above is liable *vis-à-vis* everyone for damage to things deposited at a place designated for this purpose or at a place where such things are usually deposited. Traditionally, our legislation approached such liability on a no-fault basis, while permitting possible exoneration ("unless the damage would have occurred in any case"). The current Civil Code provides no ground for exoneration in this context nor does it stipulate that a wrongdoer would be obliged to compensate damage irrespective of his fault (culpability). Therefore, the nature of such liability is unclear, raising doubts when it comes to interpretation. In view of the existing legislation, the judgement of the Supreme Court of the Czech Republic

of 20 October 2016, File No. 25 Cdo 5758/2015, as well as the arguments used in teleological and systematic interpretation, one should infer that **liability for damage to things deposited** is a no-fault civil liability. Given the lack of any special grounds for exoneration, this liability could also be considered absolute. Such a conclusion does not seem quite logical, since no objective reasons exist in this respect to differentiate between liability for damage to things brought in and taken over, and liability for damage to deposited things. The person who deposited the thing, or the owner of the deposited thing, as the case may be, is primarily the one entitled to damages. The same liability also applies to operators of guarded parking garages and similar facilities (i.e. parking lots, camping sites, bicycle and boat storage facilities, etc.) with respect to the means of transport deposited there and their accessories. Thus, items occasionally left in a car (clothes, shopping, consumer equipment, etc.) lie beyond the scope of protection. The person entitled to damages is the one who entered into an agreement on parking—and in fact parked—a means of transport in a guarded parking garage or in similar facility, or the owner of the means of transport, as the case may be. Similarly, in the case of liability for damage to things brought in, there is also a specific regime for asserting damages in respect of deposited things. Primarily, the aggrieved party should assert his right directly with the operator without undue delay, not later than within 15 days of the date when he must have learnt of the damage (however, the right does not terminate by prescription upon expiry of that deadline to no effect [280]). Otherwise, the court will not award any damages if the operator objects that the right was not asserted in time.

8.5.1.4 Damage caused by operation of means of transport

No-fault liability for damage caused by the operation of means of transport constitutes another special type of operational liability. The specific character of the operation of means of transport and the risk of damage necessitates a special regulation. This type of liability is conditional on the existence of damage, a harmful event induced by the special nature of the operation of transport or a means of transport, and a causal link between the two. Therefore, this liability is no-fault liability for damage without any culpable breach of duty by the operator and, in fact, without any breach of duty whatsoever. Only two grounds for exoneration exist under this liability of an operator, arising irrespective of fault. The primary ground lies in contributory conduct of the aggrieved party. The second one then pertains to cases where the operator proves that damage could not have been avoided in spite of exerting all effort that could be required. However, even this ground for exoneration is not applicable if damage was caused by circumstances originating in the operation (Section 2927 (2) of the Civil Code), since this type of liability is absolute. The Czech courts regard driving speed, equipment failure, driver indisposition, etc., as circumstances inherent to the operation of a means of transport.

[280] Unlike the approach in the 1964 Civil Code.

The obliged parties are natural persons and **legal entities operating transport** (road, rail, air and water transport; lifts, escalators; motor, non-motor, public and private transport) as their entrepreneurial or other gainful activities; the applicable Civil Code (unlike the 1964 Civil Code) clearly emphasises the special nature of transport operation, rather than the nature of a means of transport itself. In addition to the above (i.e. irrespective of whether and how they operate transport), liability is also borne by all other operators of any vehicle, vessel or aircraft unless such a means of transport is driven by human power. In the sense as outlined above, **operator** means any person (natural person or legal entity) entitled to handle the means of transport, i.e. responsible for the operation, repairs and maintenance of such a means of transport, pay any expenses for repairs and maintenance, as well as fuel, insurance, etc. In some cases, the operator need not be also the owner and *vice versa* (e.g. in the case of a car acquired on the basis of a lease). Where the operator cannot be unambiguously identified, a non-rebuttable presumption stipulates that the owner of a means of transport is its operator (Section 2930). However, the Civil Code does take into account a few special circumstances where the liability for such a tort can be modified in a certain way. Especially where a means of transport is being repaired, the person who has taken over the means of transport for repair (such as a repair shop) is deemed to be its operator (in other words, the liable party). In case of unauthorised use of a means of transport, i.e. where a third party uses a means of transport without the operator's knowledge or against the operator's will, liability of the operator is excluded, as it is borne by the third party itself. The operator would be liable to pay damages (together with the third party on a solidary basis) only if the operator allowed the unauthorised use of the means of transport by the third party through his own negligence. However, if the operator were a legal entity in the given case, culpability in the form of negligence would only be examined with respect to the natural persons who performed certain activities for the operator at the given time and place as the operator's employees, authorised persons or other auxiliaries.

8.5.1.5 Damage caused in exercise of public authority

Liability of the State and other public-law corporations for damage caused in the exercise of public authority is governed by a special law. The genesis of the relevant legislation has been quite complex.[281] The matter is currently governed by **Act No. 82/1998 Coll., on liability for damage caused during the exercise of public authority by a decision or malpractice.** Various amendments have been adopted

[281] The original version of the Civil Code of 1964 included liability for damage caused by an unlawful decision by governmental authorities (Section 426). For any further details, however, the Civil Code referred to a special law, namely Act No. 58/1969 Coll., on liability of the State for damage caused by a decision of a governmental authority or malpractice, i.e. on liability of the State for damage caused during the exercise of public authority. The changes introduced after 1990, consisting especially in the adoption of new special laws (the Act on the Police of the Czech Republic, the Security Intelligence Service Act) and the constitution of local and regional governments, rendered the existing regulation unsuitable.

to this Act, where one of them has proven to be fundamental, as it introduced the concept of compensation for intangible damage also for this type of liability (Act No. 160/2006 Coll.).[282]

Given the specifics of this liability (in terms of both its prerequisites and liable parties), as well as in view of the special position of the State (as a legal entity *sui generis*) in legal relationships, it is certainly disputable whether this type of liability can be included among other (standard) types of liability under private law. This conclusion can be based on the fact that it is always a private entity (whether a natural person or legal entity) who is deemed to have incurred damage to his property or personal sphere, where this concerns elements protected primarily by civil law (personality, natural rights, property), as well as based on the fact that the relevant claims are heard and settled before civil courts in contentious proceedings.

Legal regulation of such liability is based on various general uniform principles. Above all, this type of liability is **no-fault liability** and, therefore, culpability is not examined as a prerequisite for its application. Nevertheless, other prerequisites must be properly proven. The burden of proof is borne by the aggrieved party, who must prove both the unlawful conduct and the damage, as well as a causal link between the two. The nature of this special liability is conceived as **absolute**, since the legislator provides no grounds for exoneration. However, the general grounds for exoneration, i.e. the existence of contributory conduct of the aggrieved party, may apply even in these cases.

The law details **three groups of entities** whose activities can result in liability of the State pursuant to Act No. 82/1998 Coll., specifically: governmental authorities,[283] public officials[284] and bodies of local and regional governments while exercising delegated competence.[285]

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[282] The most recent of amendments stipulated more specific amounts of compensation for lost profits. Lost profits are compensated in demonstrated amounts; where this is not possible, the aggrieved party is entitled to CZK 170 as compensation for lost profits for each, even incomplete, day of being held on remand, in prison, under security detention or for protective treatment (Act No. 41/2009 Coll.).

[283] Governmental authorities comprise all authorities established by the State to perform the functions of the State and, therefore, endowed by the State with certain powers and competence to decide on the subjective rights and obligations of entities not subject to such authorities. They include primarily executive and judicial bodies; as a rule, legislative bodies do not perform any of the activities that can be subsumed under Section 5 of the cited Act (i.e. unlawful decisions or malpractice).

[284] Public officials are natural persons and legal entities other than the State who, however, perform State administration at some level based on law; the damage must be caused during the exercise of the thus defined State administration. To avoid any interpretation predicaments, the law expressly stipulates that certain activities pursued by notaries and court enforcement officers also constitute an official procedure. In such cases, the State has the right of recourse *vis-à-vis* the relevant notary and the notary may have further right of recourse *vis-à-vis* his notary trainees, notary candidates or other employees involved in the malpractice.

[285] As to the bodies of local and regional governments exercising delegated competence, the State is responsible only for those activities that have been delegated by the State to the bodies of local and regional governments provided that these bodies substitute for the State in its role. The State has the right of recourse *vis-à-vis* the relevant local and regional government if the State itself has compensated the aggrieved party for damage.

The existence of **liability for damage** caused during the exercise of public authority is subject to the following **prerequisites**: the existence of an unlawful decision or malpractice.

An **unlawful decision** is a decision issued by a governmental authority where the authority applies a legal norm to a case under its assessment and, thus, decides on the rights and obligations of specific entities, and does so contrary to law. This includes any act of application of law, including any decisions of a procedural nature issued during proceedings, whether a decision *in rem*, or only a decision of a procedural nature. Law itself specifies the procedural regulations and proceedings where the liability of the State arises.

Malpractice is practice or procedure contrary to law, i.e. a breach of rules prescribed by legal norms applicable to the procedure of a governmental authority in the performance of its activities. This is a procedure that was not immediately reflected in the content of a decision issued or else this would constitute an unlawful decision (such as a breach of the obligation to perform an act or make a decision within a prescribed or reasonable deadline). [286] The State is liable for damage caused by malpractice, which also includes a breach of the obligation to perform an act or issue a decision within a deadline laid down by law.

The State—the Czech Republic, rather than the relevant governmental authority, public official or local and regional government performing delegated competence, is the **obliged party**. The State acts in this context as a legal entity and exercises its procedural rights and obligations through its organisational components—as defined by a special law (Act No. 219/2000 Coll., on the property of the Czech Republic and acts thereof in legal relations). An organisational component authorised by law acts on behalf of the State—the courts are obliged to identify and deal with the competent organisational component regardless of the component indicated by the plaintiff in his action. The above include ministries and other central administrative authorities; any claim for damages needs to be lodged with the given authority.

An **aggrieved natural person or legal entity** who was party to the proceedings in which the relevant unlawful decision was issued (including foreigners and foreign legal entities) has a standing *(locus standi)*. The aggrieved party must raise his claim for compensation for damage caused by an unlawful decision or malpractice with the competent authority, i.e. a ministry or another central administrative authority (**preliminary hearing of the claim**). The aim is to settle any dispute concerning the

[286] In practice, the above may include a myriad—that is hard to encompass by any legal definition—of ways in which such a procedure can constitute malpractice (R 35/1977): e.g. a police body fails to take or cause another party to take sufficient care of the assets of a person remanded in custody by the police body; a governmental authority, as a guardian of a minor child, failed to sufficiently perform its function and thus caused the minor child to lose his alimony; a correctional facility proceeded incorrectly when performing deductions from salary under court enforcement of a decision; a convicted person is imprisoned for a period of time exceeding the period of imprisonment determined by a judgement; a convicted person was imprisoned, although he was subject to amnesty, etc. (Report of the Plenum of the Supreme Court of the Czechoslovak Socialist Republic of 30 November 1977, File No. Plsf 3/77).

entitlement to damages in an informal manner (no procedural rules are laid down) and prevent any pointless litigation. However, such a procedure represents a prerequisite for raising any claim for compensation in court. If the competent authority awards damages, this must be paid within 6 months of the assertion of the claim. After that, the State is in delay, which results in the State having the obligation to also pay default interest.

8.5.1.6 Damage to real property

Natural persons as well as legal entities under both private and public law (i.e. municipalities, regions, the State) can also be liable for damage caused to real property [287] (damage to stucco, structural damage, loss of support, etc., as well as damage in the form of preventing or hindering the possession of real property). The person who performs or provides for the work (albeit lawfully, i.e. legally, having the relevant public- or private-law permit) is the liable party. Formerly (in the 1964 Civil Code), these cases of liability formed part of operational liability, providing for possible exoneration on a ground pertaining to that type of no-fault liability. Nevertheless, the applicable legislation indicates that the liability in question is absolute liability requiring no more than a harmful event, the existence of damage and a causal link between the two. It does not require culpability or any breach of legal duty; after all, damage is incurred mostly as a result of permitted (approved) activities by the wrongdoer.

8.5.2 Liability for damage caused by a thing

8.5.2.1 Damage caused by a thing

A second type of no-fault liability of legal entities pertains to cases where liability for damage is imputed to legal entities if caused by a thing that is vitiated by a defect, or by a thing *per se*, or by a thing as a product.

Similarly, regardless of a breach of any legal obligation, liability for damage is stipulated in cases of **damage caused by a thing vitiated by a defect** if that thing was used for the performance of an obligation (Section 2936). Unlike under the previous legislation, the scope of the duty to compensate damage was reduced solely to cases where the damage was caused by a defect of the thing used for the given performance. The duty to compensate damage is conditional on the existence of an obligation (or, more precisely, an obligation to perform) between the party obliged

[287] Under the Civil Code of 2012, real properties include plots of land, underground structures with a separate intended purpose, as well as rights *in rem* associated therewith, rights declared by law to be real property (right of superficies), residential units, structures under the regime of the 1964 Civil Code that did not become a component part of a plot of land, as well as other things that are not a component part of a plot of land and cannot be transferred from place to place without violating their substance.

to provide compensation and the aggrieved party. Such an obligation will primarily follow from contracts (e.g. a healthcare agreement); however, it may also be established otherwise, e.g. by law or by a decision issued by a governmental authority. Another prerequisite lies in the existence of a harmful event originating in the failure or a defect of a thing (an x-ray machine, a dentist's drill, an injection needle, etc.) that was used in the performance of the given obligations. However, Section 2936 of the Civil Code does not apply to **medical malpractice** (by a physician, a veterinary, etc.); it applies only to defects originating in the nature of the things or devices used. [288] Under these laws, liability to pay damages arises only where the obligation in question was being performed with the use of a thing, i.e. liability of this type does not arise where an obligation is being performed only manually, without the use of any additional things (devices and tools). However, we may note that, despite using the expression "thing", damage can also originate from a certain technological procedure where the given thing (device) is conducive to or instrumental in the completion of the procedure. In addition to devices (such as an electricity meter), this can also apply to a more complex set of machines and equipment (such as a refinery, wastewater treatment plant, power plant), assembled machines, assembled equipment and structures (a mining excavator, radio or television transmitter, production and storage halls), etc. The thing may be used, not only by the person performing his obligation (statutory or contractual), but also by the person accepting the relevant performance (placing items in a shopping basket in a supermarket), or the two persons concurrently (as in the case of electricity meters mentioned above). Further prerequisites for application of this type of liability comprise the existence of damage and of a causal link between the harmful event, originating in the defective thing used, and the damage incurred. This liability is **absolute** and the wrongdoer cannot exonerate himself.[289] Full or partial exoneration from such liability is possible exclusively where damage was caused through the fault of or contributory conduct by the aggrieved party. Such regulation of liability to pay damages also applies to the provision of healthcare, social, veterinary and other biological services.

Unlike in the situations described above where damage is caused by a thing vitiated by a defect, the applicable Czech legislation defines certain cases where **damage is caused by a thing itself (i.e. *per se*)**. This includes damage caused by internal features of the given thing, conditional on the characteristics and features of the given thing (material, shape, colour, resistance, ductility, construction and structural attributes, fragility, etc.). As a rule, liability to pay damages is borne by

[288] Liability for damage caused by medical malpractice is either assessed pursuant to Section 2910 of the Civil Code (liability based on fault for breach of a statutory duty), where no contract exists on the provision of the specific type of healthcare, or as a contractual no-fault liability, where care or medical intervention is being provided under a healthcare agreement. For more details see ŠUSTEK, P., HOLČAPEK, T. et al. *Zdravotnické právo [Medical Law]*. Prague: Wolters Kluwer ČR, 2016, 850 p.

[289] For the characteristics of absolute liability and the problematic nature of its definition, see SVOBODA, K. Absolutní objektivní odpovědnost za škodu. Existuje vůbec? [Absolute Liability for Damage. Is There Any Such Thing?]. *Právní rozhledy.* 2007, No. 23, p. 864 et seq.

the person who should have been supervising the thing or, if such a person cannot be identified, always the owner of the thing. The person who should have been supervising the thing means anyone who had the thing under his control on any legal ground (such as a depositary, grantee, borrower, lessee, tenant, etc.) or due to unlawful conduct (a perpetrator of a criminal offence) when the damage occurred spontaneously. Liability for damage caused by a thing *per se* constitutes another example of simple no-fault liability, permitting exoneration of the obliged party if the obliged party proves not to have neglected due supervision. The expression "did not neglect" evokes culpability or, more precisely, its lower form (degree), i.e. negligence, which could mislead to a conclusion that the liability in question is based on fault, with possible exculpation of the obliged party. In case of true liability based on fault (breach of a statutory duty), a wrongdoer would have to exculpate himself by pointing out that, in the given situation, he acted as could be expected of a person of average characteristics in private relations (a general, the usual standard). Or, if applicable, he would have to prove that, in the given case, he did apply the special knowledge, skill or care that he, as a wrongdoer, had shown or to which he had agreed (a stricter standard applied to experts, professionals). However, this is supposed to be a ground for exoneration in case of liability for damage caused by a thing *per se* ("exonerate"); what exactly is due supervision should be examined on a case-by-case basis. The assessment will differ, depending on the type of entity. When exerting due supervision over a thing, a normal entity has to proceed with the reason of an average human being, with usual care and diligence (Section 4 (1)), while professionals are subject to stricter demands in the form of a higher standard of care (i.e. professional care, cf. Section 5 (1)). Consequently, both situations (exculpation and exoneration) approach one another in this case in terms of the position of the wrongdoer. However, since the ground for exoneration is defined in Section 2937 (1), the obliged party's behaviour becomes more closely specified, compared to the general definition of negligence pursuant to Section 2912, and requires due supervision, thus rendering the other activities of the obliged party irrelevant.

Following the example of certain approaches adopted abroad, Czech law independently defines two special cases of damage caused by a thing *per se*; special merits of liability are thus defined. The first group covers **damage caused by a thing falling or being thrown out of a room** or other similar place. The rationale behind this special regulation is to provide a derogation from the manner of determining the group of obliged entities. Once again, damage is primarily compensated by the person who should have been supervising the thing, but jointly and severally (a solidary obligation) with **a person using this place** (a tenant, lessee, grantee, borrower, etc.). Subsidiarily, i.e. only if such a person cannot be identified, the owner of the real property could be held liable. To date, the doctrine has not adopted a uniform position on whether this is absolute or simple no-fault liability, given the fact that the law does not stipulate any special grounds for exoneration in this case. It may be argued that this is a case of absolute liability and, thus, differentiate the special merits

(Section 2937 (2)) from the general merits (Section 2937 (1));[290] however, the same logical and systematic methods can be employed to uphold a similar solution as in the case of general merits, i.e. allow the same possibility of exoneration in this case as well.[291] The latter conclusion seems more convincing, since it does not distinguish, in terms of exoneration, between a person who should have been supervising the thing and a person who simply used the given place.

Finally, a separate (special) case (or merits, in the terminology used above) consists in damage **caused by a collapsing building or its separated part**. Liability for damage is conditional on the fact that the building is vitiated by a defect or suffers from inadequate maintenance. It is primarily the owner of the building who is held liable in this case. However, a solidary obligation ensuing from a tort could be established where the damage in question is rooted in a shortcoming arising during the term of ownership by the previous owner, who moreover failed to inform the new owner of the shortcoming and **damage occurred within 1 year of the termination of his ownership title (cumulatively)**. The obligation of the previous owner will not be created only where the shortcoming must have been known to the new owner (i.e. successor). Again, this is open to discussion as far as the character of the liability is concerned. Nevertheless, I believe that this is no-fault liability without any possibility of exoneration (i.e. absolute liability). The only ground for exoneration lies in the behaviour of the aggrieved party himself which was capable of causing damage (fully or partially). Stricter no-fault liability should apply in cases where the owner of a building neglects his property, ignores existing defects, i.e. fails to maintain the building properly, and, thus, exposes other entities to an increased risk of damage, including fatal damage.

8.5.2.2 Damage caused by a product defect

In addition to liability for damage caused by a defective thing, the Civil Code specifically stipulates liability for damage caused by a product defect (product liability[292]). Despite the similarities in the terminology, distinction should be made between the two cases. While the first case concerns a thing (literally anything, not necessarily a product) used by someone in the performance of his obligation (contractual, statutory, based on a decision issued by a governmental authority) *vis-à-vis* some other party, the second case pertains to damage caused by a defect of a movable thing that is intended for marketing as a product for the purposes of sale, lease or other

[290] VOJTEK, P. In: ŠVESTKA, J., DVOŘÁK, J., FIALA, J. et al. *Občanský zákoník. Komentář. Svazek VI [The Civil Code. Commentary. Volume VI]*. Prague: Wolters Kluwer, 2014, pp. 1042 et seq.

[291] PAŠEK, M. In: PETROV, J., VÝTISK, M., BERAN, V. et al. *Občanský zákoník. Komentář [The Civil Code. Commentary]*. Prague: C. H. Beck, 2017, pp. 2871 et seq.

[292] This is transposition of Directive No 85/374/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products. Formerly, the matter of liability for damage caused by defective products was regulated by a special law (Act No. 59/1998 Coll.); this is now incorporated in the Civil Code as a special case of no-fault liability for damage.

use. Therefore, the definition of a product is narrower than the definition of a thing. Liability for damage is borne primarily by the **manufacturer**, i.e. the person who manufactured, extracted, grew or otherwise acquired the product or a component part thereof. Both natural persons and legal entities can be manufacturers. In order to provide extra protection to the aggrieved party, the Civil Code (in accordance with its European example) extends the sphere of liable entities. Also, the person who put his name or trademark on, or otherwise designated, the product or its part, as well as the person who imported the product for the purposes of its marketing in the course of his business activities (i.e. an **importer**) is liable to pay damages together with the manufacturer on a solidary basis. This is a case of solidary liability arising *ex lege*. Subsidiarily, (i.e. if the person liable to pay damages cannot be identified when proceeding as described above), compensation for damage is also to be provided by any **supplier** if, within one month, the supplier fails to inform the aggrieved party, when the aggrieved party asserts the right to compensation for damage, of the identity of the manufacturer or the person who supplied the product to the supplier.[293]

Further, the two cases of liability also differ from each other in terms of the statutory limitation of the scope of compensation for damage to a thing (i.e. property damage). While the principle of full compensation for damage (without any limitation) applies to liability for damage caused by a defective thing (Section 2936), there is a certain threshold in the case of product liability. Under the provisions on product liability, damage to a thing is solely compensated in an amount exceeding the equivalent of EUR 500 calculated on the basis of the exchange market rate published by the Czech National Bank (the CNB). The limitation does not affect harm to the natural rights of a human being (health, life and other personal attributes). In this context, Jiří Hrádek states that, in case of damage that is less than EUR 500, the aggrieved party has no other remedy but to pursue proceedings concerned with compensation for damage under the general provisions on liability *ex delicto* or liability of a manufacturer based on a contract for the benefit of a third party, as applicable.[294]

The two cases of liability also differ in that, for the purposes of product liability, the legislator provides a legal definition of a defect or, more precisely, of a product being vitiated by a defect. A product is deemed to be defective if it is not as safe as it can reasonably be expected to be, considering all the circumstances, including, without limitation, the manner in which a product is marketed or offered, the intended purpose of the product, as well as considering the time when the product was placed on the market. However, simple imperfection is not a defect, i.e. a product cannot be considered defective only because a more advanced product is later placed on the market.

Finally, the concepts of liability and grounds for exoneration differ as well. While, in the case of damage caused by a thing pursuant to Section 2936, the obliged party

[293] In the case of an imported product, compensation for damage is to be paid by the supplier even where the manufacturer is known, if the former fails to inform the aggrieved party within a specified deadline of the identity of the importer.

[294] HRÁDEK, J. In: ŠVESTKA, J., DVOŘÁK, J., FIALA, J. et al. *Občanský zákoník. Komentář. Svazek VI [Civil Code. Commentary. Volume VI]*. Prague: Wolters Kluwer, 2014, p. 1053.

is liable in absolute terms, product liability is simple no-fault liability where the law (following the example of the Directive) stipulates quite a broad range of grounds for exoneration.[295]

Further, the two approaches also differ in the scope of application (or, more precisely, the focus of protection provided), since compensation for damage caused by a defective product does not apply to cases where the defect caused harm to a defective product or harm to a thing primarily intended and used for business purposes.

8.6 Summary

The above analysis of the concept of legal entities in relation to their liability under private law and the analysis of selected (main) cases of torts (civil wrongs) suggest, *inter alia*, the following findings:

The duty to compensate damage, whether under liability based on fault or under no-fault liability, is a duty that **is *ipso facto* compatible with the legal nature of a legal entity** (cf. the second sentence of Section 20 of the Civil Code) and, therefore, the duty can be directly imposed on the legal entity itself. Therefore, the duty to compensate any damage **forms part of the legal personality of a legal entity**. However, an answer to the question of whether a legal entity will be held liable in a specific case depends on the individual cases defined by law. Since cases of no-fault liability (meaning the designated civil wrongs or quasi-delicts, if applicable) are limited in number *(numerus clausus)*, the following basic types of a liability relationship can be considered (albeit certain generalisation and simplification cannot be avoided):

If liability requires the existence of a harmful event defined by law (damage occurring as a result of one's own operational activities, through the impact of one's activities on his environs, damage caused by a source of increased hazard, damage caused by performing or arranging work, damage induced by the special nature of the operation of a means of transport, etc.), where the harmful event creates an unlawful state of affairs (a harmful consequence), no unlawful conduct by a natural person is needed. In other words, the capacity of specific natural persons to commit a tort need not be examined; any harmful consequence is imputed to the given legal entity based on the fact alone that the harmful consequence ensued causally in relation to the legal

[295] These include cases where damage was caused by the aggrieved party or a person for whose acts the aggrieved party is liable, as well as where the obliged party proves that: (a) the given product was not placed on the market by the obliged party; (b) no defect existed at the time when the product was placed on the market, or that the defect occurred later; (c) the obliged party did not manufacture the product for sale or other manner of use for business purposes or that he did not manufacture or distribute the product in the course of his business activities; (d) the defect of the product is a consequence of complying with binding laws; (e) the state of scientific and technical knowledge at the time when the obliged party placed the product on market was not such as to enable the existence of the defect to be discovered; (f) the defect was caused by the product's structure into which the component was incorporated, or that the defect was caused by the product user manual (Section 2942).

entity's activities or operation, as applicable. Where these cases also involve, as one of the causes (even though as the only relevant one), culpable unlawful conduct by a specific natural person, this in no way prejudices the liability of a legal entity under private law as far as the aggrieved party is concerned. In this case, the legal entity could exercise its right of recourse *vis-à-vis* the specific natural person who caused the damage by breaching a legal duty.

A distinction needs to be made from cases where damage is caused in relation to the operation by a third party (i.e. a person other than the legal entity's employee, proxy or another auxiliary) due to his unavoidable conduct. In terms of the operation (operational activities) itself (themselves), such cases constitute events of *force majeure* and, as such, they are subject to liability solely in the defined cases of absolute liability or, if applicable, where expressly stipulated (damage to things taken over, deposited and brought in). Again, the legal entity's right of recourse is in no way prejudiced. However, in case of avoidable conduct by a third party not prevented by the operator (e.g. due to the operator's own negligence), the Civil Code applies solidary liability, rather than a right of recourse.

Circumstances imputed directly to the aggrieved party (fully or partially) can lead to nothing more than modification of the scope of the legal entity's liability to pay damages.

CHAPTER NINE
LIABILITY OF JURISTIC PERSONS BASED ON FAULT

9.1 Introduction

Czech law differentiates unambiguously between two types of liability based on the subjective attitude of the wrongdoer to the harmful event and the damage caused. In principle, we can thus distinguish between "liability based on fault" (or rather culpability) and "no-fault liability".

It holds in the context of Czech private law that liability for a wrong based on fault (culpability) represents the basic and principal type of liability *ex delicto.* This fact reflects the civil law tradition which was fundamentally influenced by the Austrian General Civil Code (ABGB) effective from 1811, which also served as the foundation for recent recodification of Czech civil law and, thus, as a model for the currently applicable Civil Code (Act No. 89/2012 Coll.). However, the part of the Civil Code dealing with wrongs was influenced not only by ABGB, but also predominantly by the German BGB and its Sections 823 *et seq.*, in particular.

Liability based on fault i.e. on the existence of the wrongdoer's culpability represents the primary situation where compensation for damage is required, i.e. where the obliged person is liable for his conduct which he could and should have controlled and, above all, which he should have identified as conduct dangerous to goods protected by law. Consequently, in case of liability based on fault, it is the wrongdoer's conduct, whether consisting specifically in action or omission, that constitutes the basic prerequisite for the creation of a relationship ensuing from liability.

The principal role played by this type of liability then warrants the unambiguous conclusion that all other types of liability represent individually defined cases of *lex specialis*. By adopting this approach, the legislature showed its preference for the German solution[296] and, unlike under the Austrian concept[297], prohibited any extension of no-fault liability *per analogiam* (Section 2895). The jurisprudence[298] has therefore

[296] e.g. CANARIS C. W. *Grundstrukturen des deutschen Deliktsrechts*. VersR: 2005, 577, 584; BGHZ 54, 336.

[297] KOZIOL, H., APATHY, P., KOCH, B. A. *Österreichisches Haftpflichtrecht. Band III.* 3. Auflage. Wien: Jan Sramek Verlag, 2014, chap. A 10.; KOZIOL, H. *Grundfragen des Schadensersatzrechts*. Wien: Jan Sramek Verlag, 2010, Rn. 6/145.

[298] HRÁDEK, J. In: ŠVESTKA, J., DVOŘÁK, J., FIALA, J. et al. *Občanský zákoník. Komentář. Svazek VI [Civil Code. Commentary. Volume VI]*. Prague: Wolters Kluwer, 2014, § 2895 (Section 2895).

opted to follow this approach—it thus does not treat any of the specific cases of no-fault liability as a general clause, as was the case with Section 421 of the former Civil Code.

This approach clearly reflects the concept of no-fault liability as an exceptional type of legal responsibility associated with the existence of a certain risk, where neither the capacity of the wrongdoer to be liable for a wrong nor the unlawful nature of his conduct is being examined. Indeed, strict liability should apply in those cases where the interest of society in protecting the aggrieved party goes beyond mere regulation of extra-contractual relationships between the wrongdoer and the aggrieved party. All cases of no-fault liability should therefore have in common that they reflect a situation where the usual degree of risk is exceeded, thus requiring special protection of aggrieved persons.[299]

While it can seem that, in view of Section 2895[300] and the prohibition of analogy, the boundary between cases of liability based on fault and special strict or no-fault liability is clearly drawn, this is not quite so. Although commentaries speak about cases of special liability (Section 2920 et seq.) and classify these cases as no-fault liability, it is a matter of dispute whether they can actually be qualified as such.

Indeed, in a number of cases, exoneration is based on subjective aspects of the wrongdoer's conduct, which undermines not only the idea of no-fault liability, but also its entire structure.[301] Such situations can thus rather be considered to be cases of liability based on fault with a shift of the burden of proof, where the wrongdoer will be released (or exonerated) if he can prove that he took a certain specific course of action, typically exerted all due care, that there has been a failure to provide for proper supervision, etc. The former legislation unambiguously classified these situations as cases of liability based on fault with a shift of the burden of proof.

For further discourse, we refer to Chapter Eight authored by D. Elischer.

9.2 Identification of liability based on fault

The principal role in identifying the individual cases of liability in the Civil Code (their "merits"), and thus distinguishing between "liability based on fault" and "no-fault

299 TICHÝ, L., HRÁDEK, J. *Deliktní právo [Tort Law].* Prague: C. H. Beck, 2016, p. 45.

300 The wrongdoer has the duty to compensate damage regardless of his culpability in cases specifically provided in law.

301 E.g. Section 2924—Damage Caused by Operational Activity: A person who operates a business or other facility with the aim of making a profit shall compensate damage resulting from the operation, regardless of whether it is caused by the operational activity itself, by a thing used for it or by the effect of the activity on its surroundings. The duty shall not apply if the person proves that he made all reasonable efforts to prevent the occurrence of damage. Similarly: Sec. 2927—Damage Caused by Operation of a Means of Transport: An operator cannot be exempted from the duty to compensate damage if the damage was caused by circumstances that have their origin in the operation. Otherwise he shall be exempted from liability if he proves that he could not prevent the damage, even by exercising all due care (HRÁDEK, J., BELL, A. Compensation for Damage in the New Czech Civil Code: Selected Provisions in Translation. *Journal of European Tort Law*. 2016, No. 3, 308 et seq.).

liability", is played by the relevant linguistic construction. The choice of liability based on fault is undoubtedly indicated by the notions used in relation to this type of liability for a wrong. This will be true primarily of the very word "fault" ("culpability") and derived terms.

Liability based on fault will also apply if certain words associated with "fault" (i.e. "culpability") are used (such as "knowingly"). Although the use of the words "care" and "diligence" might also point towards the concept of unlawfulness, this is, in fact, exactly why they indicate liability based on fault. Indeed, unlawfulness is also in no way relevant in the case of liability for a result. What is relevant in this respect is the existence of grounds for exculpation or exoneration, which can be distinguished by the use of the aforesaid words.[302]

The civil jurisprudence discusses in general which provisions of the Civil Code can be considered a definition of a specific case ("merits") of a wrong. There is a consensus that this is definitely true of Sections 2909 and 2910.

However, opinions have also been voiced by some[303] that another specific case is defined in Section 2904[304] and that the merits of a wrong can also be found in the basic provision on preventive responsibility enshrined in Section 2900.[305] However, these individual cases (merits) will not be mentioned in our further analysis of liability based on fault, and the relevant conduct will only be assessed based on Sections 2909 and 2910.

9.3 Approach in foreign laws

From among the legal systems that served as vital inspiration for the Czech legislature in drafting the Civil Code, the legislature eventually chose the German and Austrian legislations as points of reference.

The German system is now clearly reflected in the structure of liability for a wrong enshrined in the Civil Code based on very consistent transposition of Section 823 BGB. Further to the tradition originating in times when the Austrian General Civil Code (ABGB) was directly applicable in the Czech lands, norms of Austrian law were then used to complement the transposed German regulation and they serve as a "residual" basis for the present legislation.

To better understand the current Czech legislation and its basic principles and limits, we shall refer to the key provisions of ABGB and BGB in terms of the concept

302 TICHÝ, L., HRÁDEK, J. *Deliktní právo [Tort Law].* Prague: C. H. Beck, 2016, pp. 313–314.

303 HRÁDEK, J. In: ŠVESTKA, J., DVOŘÁK, J., FIALA, J. et al. *Občanský zákoník. Komentář. Svazek VI [Civil Code. Commentary. Volume VI]*. Prague: Wolters Kluwer, 2014, § 2904 (Section 2904).

304 Damage caused by an accident is to be compensated by the person who was at fault for inducing the accident, in particular by breaching a mandate or causing damage to a device intended to prevent accidental damage.

305 If required by the circumstances of the case or the usages of private life, everyone has the duty to act so as to prevent unreasonable harm to freedom, harm to life, bodily harm or harm to the property of another person.

of culpability and negligence, and assessment of the perpetrator's conduct, as well as the question of due care and unlawfulness.

9.3.1 German law

The duty to compensate damage (harm) in the German Civil Code (BGB) is based on definition of three basic cases of liability (their "merits"). These are enshrined in Sections 823 (1), 823 (2) and 826 BGB.[306] It follows from the above that the German concept of general liability for a wrong regularly requires a subjective aspect—culpability in the form of either intention or negligence. This liability is then "based on fault".

However, BGB does not define the concept of culpability (fault)—its provisions defining the individual cases (merits) merely indicate that the existence of liability is conditional on the presence of culpability in one of its forms, i.e. either intention or negligence. Similar to culpability, the law does not define the notion of "intention" either. The answer to the question of what constitutes intention is thus left to jurisprudence. The latter then assumes that intention means either direct knowledge and conscious commission of harmful conduct *(dolus directus)* or at least acknowledgement of damage as a consequence of one's own action or omission *(dolus eventualis)*. In contrast, negligence is defined in Section 276 (2) BGB as "neglect of the necessary care in usual activities".[307]

Due care which forms the criterion for establishing negligence (in case of non-compliance) is based on an objectivised concept. Consequently, in terms of due care, it is thus relevant how a careful person of average capabilities and intellect would act in the same situation with a view to avoiding imminent damage. However, this is not purely objective assessment, but rather a highly individualised concept of an objective criterion.

The aspect of unlawfulness constitutes another element that is significant in terms of the duty to compensate damage. Unlawfulness as a legal notion refers to objective violation of law, especially legal goods subject to absolute protection *(Theorie des Erfolgsunrechts)*. Unlawful conduct is thus related to its impact on the legally protected sphere of another person where such impact is not legally accepted. In contrast, culpability is based on the relationship of the wrongdoer to his conduct,

[306] § 823 (1) Wer vorsätzlich oder fahrlässig das Leben, den Körper, die Gesundheit, die Freiheit, das Eigentum oder ein sonstiges Recht eines anderen widerrechtlich verletzt, ist dem anderen zum Ersatz des daraus entstehenden Schadens verpflichtet. (2) Die gleiche Verpflichtung trifft denjenigen, welcher gegen ein den Schutz eines anderen bezweckendes Gesetz verstößt. Ist nach dem Inhalt des Gesetzes ein Verstoß gegen dieses auch ohne Verschulden möglich, so tritt die Ersatzpflicht nur im Falle des Verschuldens ein.

§ 826 Sittenwidrige vorsätzliche Schädigung: Wer in einer gegen die guten Sitten verstoßenden Weise einem anderen vorsätzlich Schaden zufügt, ist dem anderen zum Ersatz des Schadens verpflichtet.

[307] § 276 Verantwortlichkeit des Schuldners: (2) Fahrlässig handelt, wer die im Verkehr erforderliche Sorgfalt außer Acht lässt.

and thus represents the subjective aspect of his conduct. It should be admitted in this respect, however, that a constantly increasing number of legal theorists tend to prefer the opposite approach to unlawfulness, i.e. the theory of unlawful conduct *(Theorie des Handlungsunrechts)*.[308] The advocates of this approach believe that infringement of legal goods can only be unlawful if the wrongdoer has breached his duty of care. Culpability then lies in the question of whether the wrongdoer can invoke an excusable fact, i.e. a ground for exculpation, such as mental incapacity, etc.[309]

9.3.2 Austrian law

In the Austrian Civil Code (ABGB), the duty to compensate damage (harm) follows from the general clause comprised in Section 1295 ABGB.[310] The clause provides for wrongdoer's liability based on fault for violating both a contractual obligation and a non-contractual, i.e. statutory duty. Unlike under the Czech legislation, culpability is thus required not only in the case of violation of a statutory duty, but also in the case of breach of a contractual obligation. The notion of culpability is then defined directly in Section 1294 ABGB. It holds that *"spontaneous damage can be based on bad faith if the damage was caused knowingly and by volition, and also on neglect if caused by culpable ignorance or a lack of due attention or due care. Both of the above are considered culpability"*.[311] The ABGB thus explicitly states that culpability may consist either in intention or in negligence, and defines both these concepts in general.

Negligence is specified in further detail in Section 1297 ABGB, according to which *"... everyone who is sane is capable of such a degree of diligence and attention that can be used with usual capabilities. Anyone who fails to use such diligence or attention in acts infringing the rights of others is guilty of neglect."*[312] Consequently, similar to BGB, negligence is thus defined as failure to use the necessary care in usual

[308] See ELISCHER, D. Wrongfulness as a Prerequisite Giving Rise to Civil Liability in European Tort Systems. *Common Law Review*. 2017, No. 14, pp. 3–12.

[309] MAGNUS, U., SEHER, G. Fault under German Law. In: WIDMER, P. (ed.) *Unification of Tort Law: Fault*. Alphen van Rijn: Kluwer Law International, 2005, s. 105.

[310] § 1295 ABGB (1) Jedermann ist berechtigt, von dem Beschädiger den Ersatz des Schadens, welchen dieser ihm aus Verschulden zugefügt hat, zu fordern; der Schade mag durch Übertretung einer Vertragspflicht oder ohne Beziehung auf einen Vertrag verursacht worden sein.

[311] § 1294 ABGB Der Schade entspringt entweder aus einer widerrechtlichen Handlung, oder Unterlassung eines Anderen; oder aus einem Zufalle. Die widerrechtliche Beschädigung wird entweder willkührlich, oder unwillkührlich zugefügt. Die willkührliche Beschädigung aber gründet sich theils in einer bösen Absicht, wenn der Schade mit Wissen und Willen; theils in einem Versehen, wenn er aus schuldbarer Unwissenheit, oder aus Mangel der gehörigen Aufmerksamkeit, oder des gehörigen Fleißes verursachet worden ist. Beydes wird ein Verschulden genannt.

[312] § 1297 ABGB Es wird aber auch vermuthet, daß jeder welcher den Verstandesgebrauch besitzt, eines solchen Grades des Fleißes und der Aufmerksamkeit fähig sey, welcher bey gewöhnlichen Fähigkeiten angewendet werden kann. Wer bey Handlungen, woraus eine Verkürzung der Rechte eines Anderen entsteht, diesen Grad des Fleißes oder der Aufmerksamkeit unterläßt, macht sich eines Versehens schuldig.

activities; however, in contrast to intentional conduct, in this case the wrongdoer does not approve of the occurrence of damage.

The aspect of unlawfulness plays an even more important role in Austrian private law than in Germany. Indeed, Austrian theory strictly distinguishes between culpability and unlawfulness. This is based especially on the fact that culpability is conceived subjectively, i.e. as a defect of will expressed by a specific person. This is why the subjective capabilities of the wrongdoer must also be evaluated, in contrast to assessing unlawfulness, where solely objective facts are decisive.

Since it is assessed, in terms of culpability, whether the wrongdoer could have taken a different course of action, unlawfulness must be seen as a prerequisite for culpability—this unambiguously follows from the text of Section 1295 (1) ABGB. Austrian theory thus considers that unlawfulness can only be inferred from conduct *("Theorie des Handlungsunrechts")* because violation of legal goods may only be unlawful if the wrongdoer has violated his duty of care. Culpability and unlawfulness complement each other, as each of these concepts sets different criteria for the wrongdoer's conduct and its consequences.

9.4 Liability based on fault under valid regulation

9.4.1 Conditions for establishing liability based on fault

The basic preconditions for the creation of the duty to compensate damage under fault-based liability are: (i) the perpetrator's unlawful conduct consisting in breach of an obligation imposed by the law; (ii) the occurrence of damage in a causal link with the unlawful conduct; and (iii) culpability.[313]

Unlawful conduct is defined in its basic forms in Sections 2909 and 2910, reflecting the current approach where the Civil Code has abandoned the theory of uniform wrong, originally inspired by the Austrian and French laws. The individual wrongs are thus defined differently in terms of contractual and non-contractual duty to compensate damage, but are also specified depending on violation of individual rights (absolute and relative) and forms of culpability (intent and negligence).

Damage is defined in Section 2894 as harm to property, where the notion of property must be construed in terms of Section 495 as the aggregate of assets and debts of the given person. This therefore corresponds to the definition conceived by the Supreme Court based on the original legislation, i.e. that damage means harm arising (manifested) in the aggrieved party's property sphere which can be objectively expressed in a general equivalent, i.e. money, and is thus repairable by providing a property performance, especially by providing money to reinstate the original state

[313] HRÁDEK, J. In: ŠVESTKA, J., DVOŘÁK, J., FIALA, J. et al. *Občanský zákoník. Komentář. Svazek VI [Civil Code. Commentary. Volume VI]*. Prague: Wolters Kluwer, 2014, § 2909, Rn. 6.

of affairs.[314] Any other, or different, harm than damage is then subject to the duty of indemnification only if this has been agreed between the parties or if so laid down by the law, which however is not true of Sections 2909 and 2010.[315]

Cuplability in the form of negligence is defined in Section 2911 *et seq*., although there is no specific definition of culpability as such. Section 2911 is merely a provision laying down the assumption of negligence in the Civil Code, which is then complemented by Section 2912, defining one form of negligence.[316] This is, specifically, negligence defined as a breach of due care that can be justifiably required of a person of average skills in private relationships. Negligence always relates to conduct which is insufficiently careful with respect to consequences it might cause. However, it does not apply primarily to a consequence, but rather to such conduct.[317]

One of the preconditions not generally defined by the law is the "casual link", although in cases listed in Section 2915, the law provides certain specific solutions regarding liability shared by several persons.

9.4.2 Section 2909—Breach of good morals

The first case significant in terms of its position in the structure of the Civil Code is Section 2909, stipulating liability for breach of good morals. The main reason for defining this wrong also lay in expressing the need for protecting the basic social relationships under circumstances where a given standard of conduct is not enshrined in any specific legal rule, but rather only follows from good morals.

Based on Section 545, good morals[318] as a source of law are thus considered equivalent to legal rules and are provided with protection like any other legal rule. Section 2909 is thus a provision which creates a basis for qualitative evaluation of the parties' conduct as it tests their conduct against good morals, i.e. extra-legal values of society which find themselves at a certain stage of development and are

[314] Opinion of the Supreme Court of Czechoslovakia, R 55/1971, s. 151.

[315] Ibid, § 2894, Rn. 6–7.

[316] BERAN, K., HRÁDEK, J. K čemu se vztahuje a co zahrnuje nedbalost v soukromém právu [What Belongs to Negligence and What is Covered by the Concept of Negligence in Private Law]. *Jurisprudence*. 2017, No. 1, p. 17.

[317] Similar to the Theorie des Handlungsunrecht acknowledged in Austrian law.

[318] According to the judgement of the Supreme Court of the Czech Republic of 27 February 2007, File No. 33 Odo 236/2005, good morals do not create a social normative system, but are rather a measure of ethical valuation of specific situations, corresponding to the generally recognised rules of decency, honest conduct, etc. Good morals are interpreted as the sum of social, cultural and moral rules that have shown a degree of constancy in historical development, express substantial historical tendencies, are shared by a critical part of society and have the nature of fundamental rules. The Constitutional Court has defined good morals as a set of ethical, generally recognised and observed principles that are also enforced in many cases by legal rules in order to ensure that all acts comply with general moral principles under the rule of law. This general horizon, whose moral contents also develop in space and time with the evolvement of society, must also be assessed in a specific case in respect of the given time, the given place and the mutual conduct of the parties to a legal relationship.

conceived as an unquestionable minimum of decency among all fairly thinking individuals.[319]

The current regulation is based on the original wording of Section 424 of the 1964 Civil Code and also on the case-law of the Supreme Court, which considers liability for breach of good morals as one of the pillars of Czech tort law. One can refer, for example, to judgement of the Supreme Court of the Czech Republic of 31 January 2007, File No. 25 Cdo 874/2005, where the Court summarised that liability for a breach of good morals includes both conduct not regulated by law and cases where a right is being exercised legitimately, but with the aim to harm another person, where such conduct is not directly in contradiction with the law and does not attain the intensity of unlawful conduct, but is nevertheless in contradiction with good morals. Precisely such an understanding is necessary in the case of conduct that is not *a priori* unlawful, but can be considered vexatious and should therefore not be granted protection.

Liability under Section 2909 can thus be borne by anyone who engages in conduct that contradicts good morals and has the capacity to be liable for a wrong. When the duty to compensate damage is considered, the assessment will thus cover not only the capacity to commit a wrong, which enables the wrongdoer to evaluate his conduct and control it, but also his subjective understanding of the conduct in terms of culpability, or the existence of an intention.

9.4.3 Section 2910—General liability based on fault

Section 2910 defines the basic requirements on the establishment of the duty to compensate damage in respect of a breach of an obligation that is not based on a contract, as it lays down the duty to compensate all damage caused culpably as a result of breach of a statutory duty. The obvious inspiration for the Czech legislator was Section 823 BGB in its entirety.

Consequently, Section 2910 lays down two basic cases (merits) reflecting the character of the infringed rights and the manner of their protection. The duty to compensate damage under Section 2910 arises for a person who:

- by virtue of culpable unlawful conduct, infringes the absolute rights and legal goods of another person (the aggrieved party), which can be defined as life, physical integrity, health, freedom or ownership; or
- by virtue of culpable unlawful conduct, infringes the other (relative) rights of another person (the aggrieved party) which are protected by a special regulation.

Thus, Section 2910 protects both "absolute" and "relative" rights. Absolute rights are rights that are vested in the aggrieved party by the law and act against everyone, and thus give rise, *inter alia*, also to the duty of third parties to refrain from any

[319] HRÁDEK, J. In: ŠVESTKA, J., DVOŘÁK, J., FIALA, J. et al. *Občanský zákoník. Komentář. Svazek VI [Civil Code. Commentary. Volume VI]*. Prague: Wolters Kluwer, 2014, § 2909, Rn. 4 (Section 2909, marg. No. 4).

interference that would affect the subject of absolute rights in their exercise. The relevant provisions were inspired by Section 823 BGB and must therefore also be construed in this sense. They thus protect life, physical integrity, health, freedom and ownership, as well as "other rights".

Other rights as defined in the second case will include all the rights that do not fall under the definition of absolute rights. These will be rights that are vested in the aggrieved party by the law and act against a specific person *(inter partes)*, and thus also give rise, *inter alia*, to the duty of the latter person to refrain from any interference that would affect the subject of such other rights in their exercise.

As regards the breach of relative rights consisting in breaching a statutory duty established to protect such a right, this is a reflection in the Civil Code of the German doctrine of protective rule, as laid down in Section 823 (2) BGB. Consequently, if the law protects certain goods, damages may also include pure economic loss.

Where the law requires the existence and breach of a protective rule, this must be a rule laid down in generally binding legal acts providing for protection of third-party rights. It also follows from this that an individual administrative act or other rules of conduct that do not follow from a generally binding legal regulation cannot be considered a protective rule. Only damage falling within the protective scope of the rule can be compensated. It is therefore assessed whether the aggrieved party is covered by the personal protective scope, whether the goods in question fall under the material scope of the rule and, finally, whether the harmful conduct belongs to the modal/functional scope of the rule.

9.5 Imputability of natural person's conduct

The Civil Code does not differentiate whether a wrong, regardless of whether under Section 2009 or 2910, was committed by a natural or juristic person. However, the particular elements that need to be present to establish liability *ex delicto* have to be imputed to an individual.

Imputability as a general legal notion designates a certain legal ground based on which damage incurred by the aggrieved party can be attributed to another person, primarily the direct wrongdoer. Imputability exists, in principle, only in relation to the conduct of a specific person.[320]

When one deals with the question of liability of juristic persons based on fault (culpability), then the key criterion in the entire assessment exercise must be the "imputability" (or "attributability") of a natural person's conduct to a juristic person. One must therefore ask what factors affect the juristic person's liability for conduct which must be objectively pursued by a certain third party in the position of a representative, since imputation exists, in principle, only in relation to a person's conduct. The duty to compensate follows from imputation to a particular individual and his actions.

[320] TICHÝ, L., HRÁDEK, J. *Deliktní právo [Tort Law].* Prague: C. H. Beck, 2016, p. 147.

Therefore, if we try to identify the decisive facts for establishing liability of a juristic person within the framework of existing "merits" set forth by the Civil Code, i.e. based on Section 2909 and 2910, we must emphasise the objective quality of care of which the person in charge must exert as well as his capacity to act unlawfully, i.e. capacity to commit a wrong *(ex delicto)*.

However, it will be essential to determine how a third party assesses the representative's conduct which may be deemed lawful or unlawful. Thus, we will either prioritise the point of view and the requirements for the person acting *de facto*, or we will conceive the juristic person as an entity that will be treated independently of the acting persons.

9.5.1 General rule (Section 167)

The general rule for imputing the conduct of a natural person (representative) to a juristic person is laid down in Section 167 which sets the basic criterion of imputation of an unlawful act of an individual to a juristic person. Section 167 lays down the principle that a juristic person is liable for an unlawful act committed in the performance of its duties by a member of an elected body, employee or another representative against a third person. This approach is relatively logical as if a certain person has the authority to represent, the person represented must be bound both by lawful and by unlawful conduct.

The Civil Code lists persons who are authorised to represent a company in a non-exhaustive manner, as it mentions a member of an elected body, employee and/or another person. However, a certain condition for performing any conduct is bound to each of the aforesaid groups and the conduct must be transparent for third parties. In particular, if a juristic person has employees, they are its legal representatives, where the scope of their authority to represent is subject to limitation that is usual in view of their job and function.[321]

Consequently, if any of the aforesaid persons commits unlawful conduct, such conduct is considered fully imputable to the juristic person. At the same time, the phrasing of the given provision implies that in such a case, the juristic person itself will be the one liable, and the specific person undertaking the relevant conduct will not be liable for the unlawful act in relation to the aggrieved party unless that person exceeds the relevant limits.

However, the scope of application of the relevant provision is disputable and, in particular, it is unclear what relation it has to Section 2914,[322] which stipulates respon-

[321] Cf. the explanatory memorandum.

[322] A person who uses an agent, employee or another assistant in his activities shall provide compensation for any damage caused by such a person as if he caused it himself. However, if in the case of a performance provided by another person, someone has undertaken to carry out a particular activity independently, he is not considered to be an assistant; nonetheless, if such other person has chosen him carelessly or exercised inadequate supervision over him, that other person is liable as a surety for the performance of his duty to provide compensation for damage.

sibility for "assistant persons" when performing an existing duty. The provision lays down, in particular, that anyone who uses an agent, employee or another assistant in his activities shall compensate any damage caused by such a person as if he caused it himself. If we consider the two provisions as rules providing for imputability of third-party conduct, then their material scope is identical that of Section 2914 and one could even consider Section 2914 no longer relevant.

The starting point of this dilemma is the distinction between the two provisions in terms of specialty, i.e. the understanding of Section 2914 as a general provision for imputing a wrong, and Section 167 as a general provision governing imputation within the personality of a juristic person, with Section 2914 and also Section 1935 (establishing similar imputability for a representative fulfilling a contractual obligation) being in the position of *lex generalis*. However, this approach does not appear suitable in terms of systematics alone, as Section 167 is included among general provisions and should, by its very nature, form the basis of the legal regulation, being supplemented by the "special" provision of Section 2914. The above-proposed approach would thus lead to an illogical reversal of these relationships. In addition, based on linguistic interpretation, Section 167 is broader in terms of any unlawful act taken by a representative of a juristic person, in particular not only an unlawful act as a wrong but also as a delay in performance, defect in performance etc.

The second solution lies in interpretation based on linguistic interpretation. Section 167, which can be regarded as a basic clause on imputability, states that a juristic person is bound based on an offence committed by its representative in the performance of his duties. An "unlawful act" must be understood to mean both commissive and ommissive behaviour of a representative, as a result of any unlawful consequence. This will not only be a wrong in the narrow sense as an act of negligence, but any act whereby any person breaches his legal obligation, whether contractual or non-contractual.

I am convinced that the outcome of the dilemma related to the coexistence of Sections 167 and 2914, or 1935, must be based on the second option, namely that Section 167 has to be construed as a provision establishing the imputation of any unlawful act of a natural person to a juristic person, i.e. a provision on imputing a third party's conduct, while Section 2914 provides for imputing a breach of duty within non-contractual liability, specifically within the scope of conduct of an assistant. The same applies to Section 1935 in relation to the performance of a contractual obligation by an assistant. In the case of liability for a wrong based on Section 2909 or 2910, where both competing provisions could apply, Section 2914 (Section 1935) is in a position of *lex specialis* to Section 167

9.5.2 Assistant person (Section 2914)

The key provision in terms of imputing third-party conduct to a legal entity is abovementioned Section 2914, which deals with situations where a juristic or natural person uses a third party to fulfil an existing duty to perform or arrange a certain matter. The

basic rationale behind the principal's liability for damage caused by his assistant to a third party lies in protection of the aggrieved party. Indeed, the principal is the one who used the assistant to fulfil his duty and made him part of his own legal sphere with a view to pursuing his own interests.

Until recently, it was opined that liability of a juristic person should be conceived as liability for a third party (vicarious liability). The basic argument lays in the conviction that a wrong may be committed only by a natural person and a juristic person therefore cannot have any capacity in this respect.

9.5.2.1 Scope of application

The Civil Code binds the application of a rule concerning the use of a third party to the wrongdoer's own activity. Within this activity, this will pertain to arranging any matter of the principal, and Section 2914 thus corresponds, in principle, to the original regulation enshrined in the Civil Code applicable until 2013, which used the term "activities" in its Section 420 (2).

If a person uses a third party as an assistant for a certain activity, then the conduct of such a party is imputed to the debtor (the principal) and the debtor is obliged to compensate any damage thus caused as if the debtor caused it himself. However, the debtor may also invoke those circumstances that would release the assistant from the duty to compensate damage if the latter were liable for the compensation directly. Such an approach, where the assistant is released from liability in the pursuit of an activity, is substantiated by the primary choice made by the debtor (the principal) in the selection of his assistant.

However, the principal will not be liable in all cases where the assistant causes damage. The most crucial limitation in terms of the duty to compensate damage lies in the fact that the assistant person must cause the damage in connection with the performance of a duty that has been delegated to him. Consequently, the cause of the damage also may not lie in an accidental fact imputable to the aggrieved party or in an excess of limits in the performance of the specific duty, where the law would qualify such conduct as an action entirely imputable to the acting person. For both the above reasons, it is crucial that the principal sufficiently define the relevant task because it is precisely such a definition that represents the limits to the assistant's conduct on the grounds of his position in relation to the principal, even if no contractual relationship has been established between them. The damage must arise in a causal link with the activity performed by the assistant, and there must exist a direct relation of cause and effect between the activity arranged by the assistant person—in terms of its manner and purpose—and the harmful conduct (BGB, NJW 71, 31).

9.5.2.2 Notion of assistant

The wording of Section 2914 is problematic in terms of definition of the notion of assistant. The position of the relevant provision, its wording and relationships to other provisions within the regulation of the duty to compensate damage give the

impression that the provision in question merely lays down the duty to compensate damage for assistant persons in the case of breach of a contractual obligation.

While such an opinion can clearly be inferred from the wording, we believe that such an approach was not the aim of the legislature, as the legislature intended merely to lay down general provisions on (vicarious) liability for assistant persons.

One can also argue by reference to Section 1935, which is considered in legal theory to form the basis for the concept of assistant within a contractual relationship. The latter provision states that if a debtor performs an obligation through another person, the debtor is liable in the same way as if he performed the obligation himself. Czech law thus reaches the same conclusion as can be found in Sections 1313a and 1315 ABGB, i.e. a differentiation between an assistant in the performance of a contractual obligation and the same concept within a relationship other than contractual. The German regulation is based on the assumption that in case of liability for *Erfüllungsgehilfen*, the debtor is liable as if he performed himself, while in case of *Verrichtungsgehilfen*, he is only liable if he failed to choose his assistant with care, i.e. for *culpa in eligendo*.

It is purposeful to distinguish between the duty to compensate damage in the event of a breach of an obligation, on the one hand, and a breach of a non-contractual duty, on the other hand, as this enables setting various parameters for exclusion of liability (exculpation). Precisely for these reasons, the decisive role is played by the activity pursued by the given juristic person, which is limited under the Czech laws by its definition in the person's founding documents.

If a relationship arises on the basis of liability *ex delicto* and the debtor is liable for a harmful consequence caused by an assistant person, the debtor may exculpate himself by referring to a lack of culpability on the part of the assistant and, thus, also on his own part. The reasons that the debtor may invoke in this respect must pertain both to his conduct or harmful event imputable to him, and to the assistant's conduct. Although this rule is not explicitly laid down in the Civil Code, the mentioned principle is an expression of the idea of transfer of risks from the assistant person to the debtor.

9.5.2.3 Scope of principal's liability

A breach of the duty to properly choose or supervise the assistant will not result in the debtor's liability for damage caused by the assistant in an activity that the assistant pursues independently, i.e. not as an assistant in fact, but rather in the creation of "suretyship" in respect of the performance of the relevant obligation by the person primarily liable. Consequently, liability for obligations of a subcontractor in the form of "suretyship" will be subsidiary and dependent on the existence of the primary obligation, and the debtor will not be obliged to perform until the subcontractor fails to perform his due obligation.

A fundamental question in terms of liability for assistant persons is the question of the scope of liability that is also borne by these persons. Unfortunately, the current

Civil Code did not adopt the original wording of Section 420 (2) of Act No. 40/1964 Coll. and does not explicitly state that the principal enters into all the rights and obligations of the assistant and is thus the one liable.

Two groups of jurisdictions can be distinguished in terms of the approach they take to assistant's liability—while one transfers such liability entirely to the principal, the other provides for solidary liability of both parties.

The first approach, which is used by a majority of legal systems, rejects liability of an assistant for damage caused by minor or normal negligence, and infers its existence only in cases of gross negligence or intention, i.e. in cases that have been historically understood by Czech laws as an excess. The second approach permits full liability of an assistant person regardless of the degree of culpability; however, this position is complemented by the right of recourse against the principal, again in cases of minor or normal negligence.[323] Moreover, there are certain jurisdictions where the assistant's liability is linked with a higher degree of negligence, which must go beyond minor negligence.[324]

Although it cannot be clearly established from the current wording of the Civil Code which option the Czech legislator prefers, we believe that it is possible to infer from the valid legal regulation the existence of an assistant's liability which is parallel to liability borne by the principal.[325] This conclusion follows from these arguments:

- Liability for damage caused by a third party arises only in cases where the assistant is personally liable for a breach of due care within the meaning of Section 2912. Thus, there must be an act on the part of the assistant that gives rise to the duty to pay damages under Sections 2909 or 2910 in the context of liability *ex delicto*. Moreover, unlike the original text of Section 420 (2) of the 1964 Civil Code, there is no longer any provision that would explicitly exclude the duty to compensate.[326]
- Section 257 (2) of the Labour Code, which limits the duty to pay damages between an employee and his employer to four and a half times the average salary, cannot be deemed a provision excluding liability of an assistant, either. Although some authors understand this provision as a legal exemption[327], such views should be

[323] HRÁDEK, J. In: ŠVESTKA, J., DVOŘÁK, J., FIALA, J. et al. *Občanský zákoník. Komentář. Svazek VI [Civil Code. Commentary. Volume VI]*. Prague: Wolters Kluwer, 2014, § 2912, Rn. 18 (Section 2912, marg. No. 18).

[324] GALAND-CARVAL, S. Comparative Report. In: SPIER, J. *Liability for Damage Caused by Others*. Den Haag: Kluwer Law International, 2003.

[325] ČECH, P., FLÍDR, J. Odpovědnost člena statutárního orgánu za škodu způsobenou při výkonu funkce třetí osobě [Liability of a Member of the Governing Body for Damage Incurred by a Third Party in the Discharge of Office]. *Soukromé právo*. 2017, No. 6, p. 2 et seq.

[326] ČECH, P., FLÍDR, J. Odpovídá zaměstnanec třetí osobě za škodu, kterou jí způsobí při plnění pracovních úkolů? [Should an Employee be Held Liable for Damage Caused to a Third Party in the Performance of Working Tasks?]. *Rekodifikace a praxe*. 2015, No. 2, p. 15 et seq.

[327] BEZOUŠKA, P. In: HULMÁK, M. et al. *Občanský zákoník VI. Závazkové právo. Zvláštní část (§ 2055–3014). Komentář [The Civil Code VI. Law of Obligations. Special Part (Sections 2055–3014). Commentary]*. Prague: C. H. Beck, 2014, § 2914 (Section 2914).

rejected. The provisions of the Labour Code were fully in place at the time when the Civil Code was adopted, and the legislator could thus have created a similar exemption if required.

- Section 2915 (2) is based on the assumption that a court cannot decide on proportional compensation for damage to be provided by several persons in cases where the damage was caused by an assistant and where the latter is also obliged to provide such compensation. In these cases, liability will be borne jointly and severally, and the assistant will benefit from the stronger position of the principal. Within their internal relationship, the assistant and the principal shall settle based on their participation in the infliction of damage. If an employee is in an employment relationship within the meaning of the Labour Code, his liability will be limited according to Section 257 thereof. Such a situation will occur quite frequently because, if an assistant exceeds his authorisation, the principal will generally not be liable. It can therefore be assumed that the legislator wished to regulate situations where an assistant is liable *ex delicto* to the aggrieved party alongside the principal.
- The rights of the victim will be fully preserved as the assistant's and principal's liability will not be based on a single legal ground, but rather each of them will be liable for a different wrong. The principal may be either in breach of contract or of a non-contractual obligation, both within the meaning of Sections 2909 and 2910, and the assistant will be liable for damage solely on the grounds of breach of a non-contractual obligation.

No matter how unambiguous these conclusions appear, it is a fact that the legislator itself in no way comments on this change in the paradigms, which is more than peculiar in view of the radical change in the approach and modification of rights, especially of employees. It cannot be overlooked that other material changes compared to the former regulation are at least mentioned in the explanatory memorandum. In contrast, the explanatory memorandum states: "Breach of a legal obligation by the debtor's assistant is to be imputed to the debtor and the debtor is obliged to compensate the ensuing damage as if the debtor caused it himself. This means that the debtor can also invoke, for his benefit, those circumstances which would release the assistant from the duty to compensate damage as if the debtor was liable directly." It can thus be implicitly inferred from the text that there is no duty to compensate damage on the part of the assistant.

It is not easy to derive an unambiguous conclusion regarding parallel duties to compensate damage on the part of both the principal and of the assistant based on the text above. Nonetheless, I believe that arguments in favour of the assistant's liaiblity will prevail over those pointing towards its transfer to the principal within the meaning of Section 420 (2) of the 1964 Civil Code (Act No. 40/1964 Coll.).

Thus, it should be concluded that the assistant shall be held liable in addition to the principal, who used him as an instrument to carry out the given activity. However, in order to balance the positions of the assistant and of the principal, it has to be ensured that, within the meaning of Sections 2915 and 2916, the assistant can assert

his right of recourse against the principal and settle with him. In terms of the extent of a assistant's duty to compensate, I believe that a proposition according to which an assistant is liable to third parties under Section 2915 (1) jointly and severally with the other wrongdoers only up to the limit stipulated in the Labour Code cannot stand. If we should accept the assumption that the legislator did not want to reduce assistant's liability towards the aggrieved person, we cannot find any justification for the limitation under the Labour Code. Where an assistant is an employee, the limitation and hence the right of recourse against the employer may be invoked as soon as they settle their mutual rights.

9.6 Culpability

If one examines the issue of imputability of the conduct of a natural person, whether a representative or an assistant, within the concept of liability based on fault, the key notion is that of "culpable conduct", i.e. conduct that is at variance with the duty of proper care following from a statutory duty.

The Supreme Court defined the notion of culpability under the former legislation in its judgement 25 Cdo 3550/2009 as an inner, psychological relationship of the one who pursues certain unlawful conduct to such conduct and to the result of such conduct. This is based, on the one hand, on the element of cognition, consisting in the knowledge and prediction of a certain result, and on the other hand, in the element of will (volition), consisting in the fact that an entity expresses its will by wanting something, as well as by acknowledging something. An "objective measure" is used to examine culpability, taking into consideration the specific circumstances of the given case, and also the position and situation of the potential wrongdoer. However, the starting point should always be the behaviour and conduct of a diligent and reasonable person.

Culpability should therefore be understood as a basic concept that serves as a basis for imputation of damage to the conduct of a specific person, similar to BGB and ABGB as described above. The approach chosen by the authors of the Civil Code in Section 2912,[328] which defines negligent conduct, is in fact less common in a European context, as the laws of many jurisdictions do not define negligence, and the notion of culpability as such, including the requirement for a certain standard of conduct, is defined by legal theory.[329]

In this Chapter, we shall not deal with the notion of culpability or negligence, but rather with the particular elements of imputability. One of the most fundamental questions that pertain to the issue of culpability is the character of assessing the conduct of a wrongdoer in relation to the standard of conduct, i.e. due care as defined in Section 2912. At the same time, assessment of culpability can be broken down to the

[328] If a wrongdoer acts in a manner different from what can be justifiably expected in private dealings from a person of average qualities, he is presumed to be acting negligently.

[329] Especialy Section 276 BGB.

viewpoint of the wrongdoer's personal qualities, including the capacity to be liable for a wrong, and the understanding of due care to which the wrongdoer is obliged under the law.

9.6.1 Capacity to be liable for a wrong

The capacity to be liable for a wrong, as conceived in Czech law, markedly influences the concept of culpability as the subjective understanding of a wrong by the wrongdoer. Culpability, as a certain aspect of the wrongdoer's conduct at variance with the required standard of conduct, thus requires that the wrongdoer be aware of his conduct and be capable of not only assessing his conduct, but also controlling it and setting limits to it.

9.6.1.1 Capacity of a natural person to be liable for a wrong

The Civil Code defines the capacity of a natural person to be liable for a wrong in Section 24. This provision states that every individual is responsible for his own actions if he is able to assess and control them. It thus adopts the former regulation according to which the capacity to be liable for a wrong required the presence of two components, specifically the ability to control one's conduct and the ability to assess its consequences. The presence of only one of these components has not been and is still not considered sufficient and does not result in the creation of liability for a wrong. Nonetheless, there has been a marked shift also in the concept of liability for a wrong, as the new Civil Code does not lay down any specific age limit and, at least implicitly, a lower limit of 18 years has not been set for full capacity of the wrongdoer.

In view of the above, a lack of capacity or limited capacity to be liable for a wrong might be relevant in the case of a minor person within the meaning of Section 2920 or in the case of mentally ill persons or persons who, in view of their condition, are unable to assess the impact of their conduct and control it. In each individual case, the assessment must focus on the individual capabilities of the person against whom damage has been invoked and, consequently, in respect of whom culpability will be evaluated.[330]

[330] The Civil Code also recognises certain cases of liability where the wrongdoer lacks the capacity to be liable for a wrong. However, this is an exemption that is based on the court's authority to decide that a minor person or a person suffering from a mental disorder is obliged to compensate harm if this is justified by the circumstances of the compensation or the wrongdoer. Analogous provisions can be found, e.g., in Section 829 BGB, Section 1310 ABGB, as well as in Belgian, Swiss and Portuguese laws. Section 2920 is based on the same principles, when it states that if a minor who has not yet acquired full legal capacity or an individual who suffers from a mental disorder was incapable of controlling his conduct and assessing its consequences, the aggrieved party is entitled to compensation for damage if this is fair with regard to the financial standing of the wrongdoer and aggrieved party.

9.6.1.2 Capacity of a juristic person to be liable for a wrong (delictual capacity)

The capacity of a juristic person to be liable for a wrong is not explicitly regulated in the Civil Code, in contrast to the capacity laid down in Section 24. This is because, from the viewpoint of the Civil Code, a juristic person in itself does not have delictual capacity; rather, negligence on the part of a (third) natural person can be imputed to a juristic person. The conduct of a natural person forms the substance of will of a juristic person—without it, no actual will could be established *vis-à-vis* third parties. This also follows from the wording of Section 151 (1), according to which only the founding act determines to what extent and in what way the members of company bodies make decisions and replace its will.[331]

These facts should serve as a basis for an analogous concept of delictual capacity of a juristic person, i.e. the creation of a certain category of imputation of a natural person's conduct to a juristic person. This is not any specific and novel concept unknown to the Czech legal system. Indeed, there exist certain provisions, for example in the Criminal Liability of Juristic Persons Act, which establish a juristic person's capacity to commit a criminal offence based on the conduct of a particular person. In that Act, this is a completely artificial construct without any connection to the actual acts or will of a juristic person. Without it, however, the concept of a juristic person as the perpetrator of a culpable criminal offence is unthinkable.

In particular, with the adoption of Criminal Liability of Juristic Persons Act, it has become increasingly popular to try and vest in a juristic person the capacity to commit a wrong, even though such conclusions are inferred from the regime of criminal liability. For example, Dědič and Šámal[332] establish a legal capacity to commit unlawful acts in both civil and administrative matters.[333]

The adoption of the Criminal Liability of Juristic Persons Act warrants completely new arguments for the establishment of a capacity of juristic persons to commit a wrong. The concept of criminal liability is absolutely at odds with the theory of legal fiction, on which the present juristic person is undoubtedly built. Section 20 of the Civil Code confers personality on a juristic person, but does not admit its legal capacity. Members of the governing bodies do not act on behalf of the company, as was

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331 JANEČEK, V. Nerovná subjektivní odpovědnost [Unequal Fault-Based Liability]. *Jurisprudence*. 2016, No. 5, p. 17.

332 In particular, Dědič and Šamal state: *"Legal persons are actually able to act, both in accordance with the order of the legal norm and in contradiction with it. However, it is not possible to conclude that just due to the fact that on behalf of the juristic person always act a natural person, the legal capacity of legal persons to commit the act is excluded, since according to sociological research, juristic persons as groups of persons have a will different from those who make them."* (ŠÁMAL, P. et al. *Trestní odpovědnost právnických osob. Komentář [Criminal Liability of Juristic Persons. Commentary]*. 2nd edition. Prague: C. H. Beck, 2018, § 8, p. 169.)

333 BERAN, K. Trestní odpovědnost právnických osob z hlediska teorie právnických osob [Criminal Liability of Juristic Persons from the Point of View of the Theory of Juristic Persons]. In: GERLOCH, A., BERAN, K. et al. *Funkce a místo právní odpovědnosti v recentním právním řádu [Function and Place of Legal Responsibility in Recent Law]*. Prague: Leges, 2014, p. 77.

the case, for example, under Section 191 of the former Commercial Code, but rather represent it, which is also true of persons under Section 151. From the viewpoint of the Criminal Liability of Juristic Persons Act, it must be concluded that if we do not regard unlawful conduct of a representative as an act of the given juristic person, it can never be assumed that an offence is committed on behalf of the juristic person.[334] Similar provisions can also be found in administrative law.

This automatically leads to potential implications for the understanding of the legal capacity of juristic persons, since in the context of the unity of law and the possibility of prosecuting civil wrongs within criminal procedure, a different concept of culpable conduct appears problematic. In terms of systematics, we therefore need to unify both approaches.[335]

9.6.1.3 Analogous concept of delictual capacity of a juristic person

I therefore believe that, by analogy, the capacity of natural persons to commit a wrong, which stems from Section 24 and is an actual reflection of the existence of a human being possessing reason and will, can be used as a basis for conceiving the same capacity on the part of a juristic person, where acts of a particular individual are imputed to that person.

The basis for these entirely new considerations lies in the fact that a juristic person has a personality within the meaning of Section 118. This means that, under Section 15, a juristic person has the capacity to have rights and obligations based on the law. However, such obligations must be clearly based on the merits of fault-based and no-fault liability in the law.

These considerations are also confirmed by the wording of Section 17, according to which an obligation can only be imposed on a person, whether natural or juristic, and only a person can be subject to the enforcement of obligations. Where an obligation is imposed on a "non-person", it will be imputed to a person with personality rights who has the closest relationship to that "non-person". Therefore, if only a juristic person and a natural person can bear rights and obligations that arise in the outside world, we must conclude that the relevant duties are borne by the juristic person.

The concept of analogous capacity to commit a wrong completely differs from legal capacity as the ability to take legal acts for oneself and to assume obligations, i.e. to engage in legal conduct. We do not aim to establish legal capacity of a juristic person, i.e. a juristic person based on the theory of legal fiction, but rather to impute

[334] BERAN, K. Trestní odpovědnost právnických osob z pohledu nového občanského zákoníku [Criminal Liability of Juristic Persons from the Point of View of the New Civil Code]. *Trestněprávní revue*. 2004, No. 7–8, p. 179 et seq.

[335] Any strong conclusions are denied by Šámal and Eliáš in ŠÁMAL, P., ELIÁŠ, K. Několik poznámek k článku „Trestní odpovědnost právnických osob z pohledu nového občanského zákoníku" [Remarks on Article about "Criminal Liability of Juristic Persons from the Point of View of the New Civil Code"]. *Trestněprávní revue*. 2015, No. 3, p. 59 et seq.

the consequences of an act taken by a natural person to a juristic person and to draw consequences for the juristic person.[336]

Within the aforesaid analogical capacity of juristic persons to commit a wrong, we therefore clearly impute foreign reason and will within the meaning of Section 24 in conjunction with Section 151, and such reason and will are considered the content of the juristic person's conduct. From a comparative and historical point of view, this approach corresponds to tendencies appearing in Germany where third-party liability served as a basis for establishing liability of juristic persons. In England, this concept was based on "vicarious liability", which subsequently changed to direct liability of the juristic person.

Based on the above, the regulation of capacity of a juristic person to commit a wrong is inferred from Section 118, in conjunction with Section 167,[337] which states that a juristic person is bound by an offence committed against a third person by a member of an elected body, employee or other representative within the performance of his duties. In this broad definition, the legislator reveals the ideal character of a juristic person and provides that a juristic person cannot commit a wrong itself, as there always has to be mediation in the form of an act taken by a natural person—a human being. Austrian and German laws are based on the same assumption, although each imputes conduct based on different facts and provisions.[338]

9.6.1.4 Gaps in the concept of imputation

There is also another argument which speaks for the concept of analogous delictual liability and which closes the gap in Section 167 as a provision on imputation of an act or omission of one of the representatives of the juristic person. These might, however, not always be present, although acts of a natural person are the key for imputing a manifestation of will to a juristic person.

Due to neglection (omission) of a specific obligation to act, a juristic person can be considered to cause damage imputed to it, even if such an omission was not caused by its representative within the meaning of Section 167. If a company has no representative, even a statutory one, it is very difficult to find any specific person on whose part the omission would exist. In most cases, such a single person (or group of persons) would be a shareholder, whose failure to act in the capacity of an elected body can, however, hardly be qualified as a direct cause of the omission. Although the reason for

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336 Hurdík comes to a similar conclusion when he states that while the legal capacity and delictual capacity of an individual is an expression of his intellectual and volitional capacities, the Civil Code denies the possibility of a juristic person to act for itself and establishes legal capacity and delictual capacity as a result of attributing legally relevant conduct of natural persons in a particular relationship to a juristic person. Hurdík assumes the "delictual capacity" from Section 167. (HURDÍK, J. In: ŠVESTKA, J., DVOŘÁK, J., FIALA, J. *Občanský zákoník. Komentář. Svazek I [Civil Code. Commentary. Volume I]*. Prague: Wolters Kluwer, 2014, § 15).

337 Ibid.

338 KLEINDIEK, D. *Deliktshaftung und juristische Person: zugleich zur Eigenhaftung von Unternehmensleitern*. Tübingen: Mohr, 1997, p. 167 et seq.

imputation is understood to lie in the conduct of a natural person, it is still necessary to consider a juristic person an independent person with an independent personality and property, where a shareholder, unlike the persons listed in Section 167, is not primarily responsible for breaching that person's obligations.

Even in such cases, however, liability should be imputed. The capacity of a juristic person to bear liability based on fault should therefore be established even if the provisions of Section 167 do not apply explicitly as the person whose conduct can be imputed to a juristic person is behind the notion of a shareholder. As the law does not provide any other basis for deduction, analogous application of Sections 118 and 167 must be based on the principle of the imputability of third parties' conduct.

9.6.2 Viewpoint for assessing culpability

Negligence (culpability) can relate to one's own conduct, to what this conduct has caused (the result), and to the lawfully protected values that have been affected by the conduct (object). Negligence must therefore always relate to the conduct of the wrongdoer, because where there is no consequence of the wrongdoer's conduct (i.e. also non-action), it would make no sense to consider negligence in relation to the consequence or object that caused the result. The result has to be understood from the viewpoint of culpability, not as an unlawful interference with values protected by law, but rather as the goal of the given act. In the case of negligence, the wrongdoer did not intend to cause the ensuing result but knew that it could occur and assumed that it would not occur (although it was imaginable for him), or did not know it could occur, but had to imagine it might.[339]

Therefore, two fundamental questions have to be answered within assessment of negligence:

(i) whether a person objectively acted in the way he "was supposed to" and therefore exerted due care, to which he is legally bound; and
(ii) whether the person in question was subjectively qualified in terms of a rational and volitional capacity, and "could" exert due care.

9.6.2.1 Assessing culpability of natural persons

The laws of a majority of jurisdictions in Western Europe approach both the wrongdoer's capacity and the scope of the duty of care in objective terms. However, two entirely contradictory regimes can be found in these legislations. Especially in jurisdictions influenced by the French Code Civil, culpability tends to be connected with unlawfulness and it is a matter of course in this concept that unlawfulness cannot be confused with a wrongdoer's subjective perception, and the evaluation must therefore

[339] BERAN, K., HRÁDEK, J. K čemu se vztahuje a co zahrnuje nedbalost v soukromém právu [What Belongs to Negligence and What is Covered by the Concept of Negligence in Private Law]. *Jurisprudence*. 2017, No. 1, p. 17.

be objective. Those jurisdictions that distinguish between these two concepts may, however, choose either a subjective or an objective basis for evaluation. If the objective criterion is chosen, then the given legislation usually uses an objectivised concept of negligence, i.e. assessment of due care as it would have been exerted in the same situation by a diligent person of average capabilities and intellect with a view to avoiding imminent damage. If the subjective viewpoint is chosen, the law examines whether the specific wrongdoer was capable, in view of his capabilities, of realising the possible damage and unlawful nature of his conduct, and act accordingly.

However, the subjective and objective approaches are coming ever closer to each other as advocates of objective evaluation tend to compare capabilities and diligence less and less against the conduct of *pater familias* as the general principle, and rather refer to tasks in the specific area of life or business as the comparator. Professional literature then speaks about "categorisation" or "narrowing down" of the objective standard. Capabilities are thus not evaluated with reference to an average driver or doctor, but rather to a driver of a certain type of vehicle or the position of a doctor during surgery.

It is disputable in the Czech Republic whether the viewpoint used in the assessment of individual capabilities should follow from the subjective capabilities of a specific person or whether capacity should be evaluated in objective terms, and thus in relation to an ideal person in the same position, having the same experience and being of the same age. While the first approach unambiguously protects the potential wrongdoer, objective assessment, in contrast, tends to protect the aggrieved party as the latter can refer to his own experience and need not take the specific abilities of the wrongdoer into account.

The Civil Code does not explicitly state which viewpoint should be decisive. An important argument can lie in the fact that a majority of jurisdictions use the objective approach and the Czech laws should thus follow the general trend. However, it can be inferred, based on systematic and logical interpretation, that the subjective viewpoint should be taken into account on the basis of the combined effect of the conditions laid down in Sections 2911 and 2912 since culpability unambiguously reflects the capability of the acting person to determine the consequences of his conduct and control them.[340]

Even though interpretation of Sections 2911 and 2912 is unambiguous, the existence of these provisions can have relatively serious consequences. Above all, it can be stated that the Civil Code, unlike the 1964 Civil Code, does not refer to culpability as such, but similarly to Section 276 BGB directly to one of its forms, specifically negligence. Conduct is negligent regardless of what the wrongdoer subjectively "could have known", but rather based on "the way he acted", i.e. whether he acted as he was supposed to.

[340] Cf. HRÁDEK, J. In: ŠVESTKA, J., DVOŘÁK, J., FIALA, J. et al. *Občanský zákoník. Komentář. Svazek VI [Civil Code. Commentary. Volume VI]*. Prague: Wolters Kluwer, 2014, § 2912, Rn. 8 et seq. (Section 2912, marg. No. 8 et seq.).

As regards Section 2911, this provision has to be interpreted only as a presumption of negligence, i.e. only in that it defines what is negligent *de facto*, without defining the meaning of the notion of negligence. In particular, the provision states that "wrongfulness" (or unlawfulness) results from a breach of a legal duty and does not refer to "culpability" in any way (unlawfulness and culpability remain separate presumptions). Thus, the specification of unlawfulness follows from Section 2912.

It cannot be neglected in this line of argument that until 2013 legal theory preferred the objective viewpoint[341], but this approach was based on a specific and differentiated objective measure of understanding by the relevant person, resulting in atomisation of the requirement for culpability. Specific conditions in the given situation under which the unlawful conduct and the consequent damage occurred were thus taken into account when inferring culpability, and account also had to be taken of the position of the given person in society. However, such an assessment was so casuistic that, in principle, it pertained to each specific wrongdoer.[342]

Defence of the objective approach is undoubtedly based on Section 4, which lays down the presumption that "every person having legal capacity is presumed to have the intellect of an average individual and the ability to use it with ordinary care and caution, and anybody can reasonably expect every such person to act in this way in legal transactions". Objective understanding of the capacity to be liable for a wrong thus follows primarily from the concept of a reasonable person enshrined in Section 4 of the Civil Code. However, it must be taken into consideration that this is merely a rebuttable legal assumption which allows proof of the opposite and thus results in a shift of the burden of allegation and burden of proof.

The viewpoint of protection of the aggrieved party, which is considered a key argument by those who advocate the objective approach, is unquestionably important. However, we are convinced that the aggrieved party is already sufficiently protected by the presumption of negligence, which must be disproved by the wrongdoer, where the latter is thus forced to present sufficient arguments attesting as to why it was discernible to the aggrieved party that the wrongdoer lacked sufficient volitional and intellectual qualities.

The condition of subjective evaluation can be inferred from the very wording of Section 24, which lays down an exemption from incapacity to be liable for a wrong in those cases where the wrongdoer brings himself into a condition in which he otherwise would not be liable for his conduct. The mentioned provision is a manifestation of imputability of conduct preceding actual damage—bringing oneself into a condition that would otherwise render the given person not liable.

If one considers culpability to be the inner relationship of the wrongdoer to the relevant conduct at variance with the objective standard of conduct and to the

341 KNAPPOVÁ, M., ŠVESTKA, J. et al. *Občanské právo hmotné. Díl 2 [Substantive Civil Law. Part 2]*. Prague: ASPI, 2002, p. 465.

342 Ibid., p. 466–467.

consequence, then culpability is not based only on the volitional and decision-making capabilities of the wrongdoer where, in terms of Section 24 alone, culpability cannot be inferred if any component is missing. Indeed, Section 24 requires sufficient mental and volitional development for a minor or a person suffering from a mental disorder to bear liability. Account is thus taken of the intellectual, emotional as well as physical capabilities of the acting person. Therefore, the wrongdoer's will may only be assessed with reference to a specific person who would be capable of assessing his own conduct and its consequences, and of choosing a different course of action in view of such a conclusion. Culpability is thus based on a defect of the wrongdoer's will (*Willensmangel*, blameworthy will).[343]

Although legal theory in the Czech Republic also inclines towards objective assessment,[344] based on the arguments presented above, we are convinced that this tendency is not correct. Objective assessment of the wrongdoer's capabilities does not reflect the requirement of his volitional and intellectual maturity and, in consequence, would mean that culpability would be understood as an objective element of the relationship based on liability. Culpability would thus not differ from the other conditions of liability, which are also objective in their nature, and liability based on fault (culpability) would thus come dangerously close to no-fault liability.

The authors of this monograph hold the opinion that although the viewpoint of the aggrieved party is certainly important and must not be underestimated, the aggrieved party is already sufficiently protected by other concepts of tort law, including especially the presumption of culpability in Section 2911. Indeed, the latter shifts the burden of proof to the wrongdoer, who must assert, conversely, that within the relevant scope of his conduct, he was unable to determine the consequences of his conduct or control them.

While protection of the victim, which is considered a key argument by advocates of the objective approach, is undeniably important, I am nonetheless convinced that the aggrieved party is already adequately protected by the presumption of negligence, which has to be rebutted by the wrongdoer, who must present sufficient arguments as to why the aggrieved party could have recognised that the wrongdoer lacks sufficient intellectual or volitional qualities.

Subjectivisation of culpability also has its rationale in connection with the duty to compensate damage regardless of culpability (fault) and the individual grounds for exoneration, which are based on an objective standard of care. If culpability did not take into account the subjective abilities of the wrongdoer, both culpability and exoneration (e.g. Sections 2920, 2927 and others) would be based on an objective approach to the standard of care.

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343 Cf. HRÁDEK, J. In: ŠVESTKA, J., DVOŘÁK, J., FIALA, J. et al. *Občanský zákoník. Komentář. Svazek VI [Civil Code. Commentary. Volume VI]*. Prague: Wolters Kluwer, 2014, § 2911, Rn. 31 (Section 2911, marg. No. 31).

344 TICHÝ, L., HRÁDEK, J. *Deliktní právo [Tort Law]*. Prague: C. H. Beck, 2016, p. 174 et seq.

However, while considering subjectivisation of the wrongdoer's approach to the unlawful conduct, the viewpoint of due care is and remains entirely clearly objective, as Section 2912 permits no other interpretation. Therefore, rather than the subjective nature of culpability, it is necessary to speak about its subjectivisation, where all the subjective pleas must be asserted and proven by the wrongdoer.

9.6.3 Viewpoint of culpability of juristic persons

When we ask ourselves whether a juristic person has negligently breached an obligation laid down by law, we must first clarify whether we will conceive a juristic person in the same way as a natural person. This is particularly questionable as regards the subjective criterion of negligence.

Objective assessment of culpability follows from the expectation of a normal course of events, or a course of events corresponding to the circumstances existing at the given place and time. In contrast, the purpose of subjectivisation of the wrongdoer's unlawful conduct is to protect a person who need not exhibit all the decisive qualities required for inferring his capacity to be liable for a wrong, i.e. both volitional and intellectual qualities.

It is the last mentioned argument that is decisive for the conclusion on whether subjectivisation should be applied. Indeed, human behaviour serves only as a medium for the purposes of assessing culpability on the part of a juristic person—while a representative uses his will and acts reasonably within the scope of his capabilities, these are fully imputed to the juristic person. What is decisive in respect of a third person is not the capability of the representative, but rather of the juristic person as the subject of rights and obligations.

Only the latter argument is decisive for determining whether a subjective approach should be used. When assessing negligence on the part of a juristic person, human conduct serves as a mediating legal fact. While a representative acts reasonably to the extent of his capabilities, such conduct is fully imputed to the juristic person. However, only the capacity of the juristic person as an entity bearing rights and obligations is decisive from the viewpoint of a third party.

Therefore, there is no legal ground for taking the limited rational or volitional capacity of the person who actually performs the relevant acts under Section 24 into consideration when assessing negligence on the part of a juristic person. On the other hand, it has to be concluded that assessment of a juristic person's conduct in terms of negligence must be conceived objectively, with reference to another average juristic person as a benchmark.

However, even among juristic persons, it is possible and even reasonable to make some distinctions. A community of flat owners or a small foundation without any substantial human backup, financial and legal facilities will be in a totally different position than a multinational group of companies with large administrative staff.

Thus, the relevant standard can be distinguished on the basis of the activity, size and other activities of the juristic person, i.e. a consideration can be made of the juristic person's "outlook" with regard to its staffing, structure and/or focus.

An argument in favour of objective evaluation of the capacity of a juristic person lies in protection of aggrieved party against abuse of the subjective approach. Should one admit that only the conduct of a natural person can be decisive, it would be possible to lower the standard of conduct to any level, which would undoubtedly result in abuse of such a position of the representative both in respect of representatives as such under Section 167 and of assistants under Section 2914. The solution would thus be to measure the conduct, not in terms what the representative "could have", but exclusively what he objectively "should have" done.

9.6.4 Standard of conduct

Section 2912 is again the provision decisive for setting the required standard of conduct. It lays down the basic precondition for the existence of culpability in connection with the definition of this notion, or rather of negligence—the precondition lies in violation of the general standard of care which must be complied with every individual juristic person. In the event of its breach, the given entity commits an unlawful act; liability is borne for such an act by an entity having the capacity to be liable for a wrong.

The Civil Code does not use the notion of a standard of conduct and rather prefers the concept of "conduct usual in private dealings" (Section 2912) inspired by the German BGB. By this terminological approach, the legislature attempted to set the rules for conduct that are to be met by everyone in view of his duties in private-law relationships. At the same time, the Civil Code establishes a clear distinction between the terms "culpability" and "wrongfulness", which, despite the inspiration by the BGB, brings Czech civil law closer to the Austrian approach.

9.6.4.1 Setting the standard of conduct for natural persons

The basic definition of the standard of conduct in Section 2912 must be based on the nature of the protected interest. The higher its value, the precision of its definition and its obviousness, the more extensive is its protection. The highest level of protection is therefore logically afforded to such goods as life and health; material values will follow.

A similar approach is taken by the Principles of European Tort Law[345], which define the conduct of a reasonable person in the circumstances, depending on the nature and value of the protected interest involved, the dangerousness of the activity, the expertise to be expected of a person carrying it on, the foreseeability of the damage, the relationship of proximity or special reliance between those involved, as well as the availability and the costs of precautionary or alternative methods. The above standard

[345] Principles of European Tort Law (PETL), Article 4:102.

may be adjusted when due to age, mental or physical disability or due to extraordinary circumstances the person cannot be expected to conform to it.

One of the pillars of determining and identifying "due care" is Section 4, which lays down the presumption that *"every person having legal capacity is presumed to have the intellect of an average individual and the ability to use it with ordinary care and caution, and anybody can reasonably expect every such person to act in that way in legal transactions"*. In conjunction with Section 2912, it can then be inferred that the criterion of diligent conduct should probably be based only on an objective standard of care (diligence) which should be complied with by a duly behaving person. If the wrongdoer shows specific knowledge, skill or diligence, he thus automatically assumes a higher standard of his conduct.[346]

The standard of conduct must be qualified strictly objectively as objectivity forms a basis for protection of each person in everyday life. The standard of conduct thus entails requirements on an average person, usually in the position of a wrongdoer, whether in terms of professional or leisure activities, depending on the specific situation. The ability and knowledge that can be expected from an average person, rather than the knowledge of the given person or his experience, will thus be decisive. The benchmark will thus not be set by the best student in the class, but rather by a normal student in the relevant school; similarly, one has to refer to a doctor with standard knowledge rather than to a top surgeon with specific expertise.

Deviations from this standard are permitted only by Section 2912 (2), which however makes stricter objectivisation of the standard of conduct conditional on certain declarations and statements made by the wrongdoer, who thus increases, by his clear declaration, the expectations of third parties in respect of his standard of conduct. Based on the said provision, everyone has to use the skill, diligence and attention that would be used by a person with average qualities, where the required skill, diligence and attention are based on the special position that has been assumed by the person pursuing the relevant conduct in the given case. Any declared abilities lead to specification of the degree of care, but not in the sense of subjectivising the required care, but rather in terms of certain fragmentation of the standard of care regarding the scope of persons to whom the wrongdoer referred in his statements.

The standard of care can also be decreased, depending on objective criteria related to the prerequisites set out in Sections 4 and 5, as the general standards for setting proper care.

9.6.4.2 Setting the standard of conduct for juristic persons

Assessment of the standard of conduct for a juristic person must be based, just like for a natural person, on Section 2912 and Sections 4 and 5. However, there are certain fundamental differences following from the fictitious nature of a juristic person, based

[346] BERAN, K., HRÁDEK, J. K čemu se vztahuje a co zahrnuje nedbalost v soukromém právu [What Belongs to Negligence and What is Covered by the Concept of Negligence in Private Law]. *Jurisprudence.* 2017, No. 1, p. 15.

on which it can be inferred, *inter alia*, that the scope of liability based on fault will often be greater for juristic persons than for natural persons.[347]

Section 2912 also conceives the objective standard of conduct for a juristic person as conduct that can be expected from a person with average skills. Any conduct will thus be assessed only in relation to the due care that should be used by a duly acting juristic person. If the wrongdoer shows specific knowledge, skill or diligence, he thus automatically assumes a higher standard of his conduct.

An objective measure is used to examine culpable conduct, with reference to the specific circumstances of the given case (specificity of the objective measure) and to the position and relationships of the potential wrongdoer (differentiation of the objective measure). However, the starting point should always be the behaviour and conduct of a diligent and reasonable person, as defined in Section 4.

Precisely in view of the objective measure, it is fundamental that, from the viewpoint of a juristic person as an ideal legal unit (theory of legal fiction), no reason can be found for deviating from the standard objective scale unless it itself adopts a greater level of knowledge, skill or diligence. In this case, human behaviour serves only as a medium for the purposes of assessing the standard of care on the part of a juristic person—while a representative acts within the scope of his capabilities, these are fully imputed to the juristic person. What is decisive in respect of a third person is not the capability of the representative, but rather of the juristic person as the subject of rights and obligations.

A higher requirement on the standard of conduct can be inferred unambiguously with reference to Section 5; however, this will not be automatic based solely on a certain object of business. In terms of exercising a stricter requirement on knowledge, skill or diligence, a juristic person must be treated as a natural person, and the stricter requirements are thus based on manifestations of that person *vis-à-vis* third parties. A juristic person must thus refer to the above through its active promotion, although it will be sufficient if the given person belongs to a specific professional field, such as a medical facility, law office, etc.

A juristic person may not base its defence against violation of the standard of care on subjective prerequisites, but rather only on an assertion that it acted with due care. However, in this respect, the approach in no way differs from natural persons, where objective assessment also forms the basis for qualifying the standard of care.

9.7 Summary

Although tort law (or rather "law of wrongs") has a relatively long tradition in the Czech Republic, interrupted only during the era of socialist law, the question of wrongs committed by juristic persons has never come entirely into the focus of legal

[347] This argument has been voiced in the Czech literature, e.g., by JANEČEK, V. Nerovná subjektivní odpovědnost [Unequal Fault-Based Liability]. *Jurisprudence*. 2016, No. 5, pp. 15–21.

theory. A majority of authors have dealt with a general concept of a wrong and concentrated only on the conduct of natural persons.

However, several basic aspects call for a change in this approach in terms of the currently applicable legislation. The author of this article makes the following fundamental conclusions, which change the view of wrongs committed by juristic and natural persons, respectively.

- Section 167 can be regarded as the basic provision on imputability. Based on this approach, a juristic person is bound by any unlawful act committed by its representative in the performance of his duties. An unlawful act may be either active or passive conduct by the representative that causes any illegal consequences (defect, delay, offence, breach of contract). This constitutes not only a wrong in the narrow sense of the word as an illegal act, but also any act taken by someone in breach of a legal obligation, whether contractual or non-contractual. The dilemma of co-existence of Sections 167 and 2914, or 1935, must be resolved in that Section 167 has to be construed as a provision establishing the possibility of imputing any unlawful act of a natural person to a juristic person, i.e. imputing a third party's conduct, while Section 2914 constitutes a provision on imputing a breach of duty within non-contractual liability, specifically within the scope of conduct of the assistant person. The same applies to Section 1935 in relation to the performance of a contractual obligation by an assistant.
- Although the Civil Code bestows a juristic person only with personality and not with legal capacity or capacity to commit a wrong, such a situation is indefensible. I therefore believe that there exists an analogy with the capacity of natural persons to commit a wrong, which results from Section 24 and is an actual reflection of the existence of a human being as an entity endowed with reason and will. The basis for these entirely new considerations lies in the fact that a juristic person has a personality within the meaning of Section 118. Thus, pursuant to Section 15, a juristic person has the capacity to bear rights and obligations under the law, although these obligations must clearly include those based on merits of fault-based and no-fault liability in the law.
- The current regulation of liability of a juristic person for a wrong is not sufficient to cover all the circumstances under which the duty to compensate damage will be inferred. Section 167 is based on the assumption that a juristic person will cause an unlawful consequence by active conduct or omission of one of its representatives, or conduct if there actually is any representative at all. However, a juristic person might cause damage that would be imputable to it even if the neglect was not caused by any of its representatives. If a company has no representative, even statutory, then it is very difficult to infer that there exists a specific entity that would cause such neglect. Consequently, the capacity of a juristic person to be liable for a wrong must be inferred even in cases where Section 167 is not applicable as there is no one whose conduct could be imputed to the juristic person. Since the legislation lays down no other basis for inferring such a duty, Sections 118 and 167 must apply *per analogiam*.

- In the case of a natural person, reasoning can follow from "subjectivisation" of culpability, i.e. taking account of the specific capabilities of the wrongdoer. However, human behaviour serves only as a medium for the purposes of assessing culpability on the part of a juristic person—while a representative uses his will and acts reasonably within the scope of his capabilities, what is decisive in respect of a third person is not the capability of a representative, but rather of the juristic person as the subject of rights and obligations. At the same time, a juristic person cannot deviate from the required standard because there is no legitimate reason why its volitional or intellectual capacity should be limited. That can only be found in a natural person. I have therefore reached the conclusion that there is no reason why lower demands should be placed on a juristic person in terms of culpable conduct, i.e. on the subjective aspect of its conduct. In that case, it can be inferred that assessment of the conduct of a juristic person within the scope of culpability must be understood objectively in view of another average juristic person. The only standard can be devised on the basis of the operations, size and other activities of the juristic person, i.e. consideration can be taken of the "outlook" of the juristic person with regard to its staffing or focus.
- In contrast, in respect of the standard of care, conduct of a juristic person should be treated in the same way as in the case of a natural person. The standard of conduct entails requirements on an average person, usually in the position of a wrongdoer, whether in terms of profession or leisure activities, depending on the specific situation, as the requirement on conduct cannot be conceived subjectively. The ability and knowledge that can be expected from an average person, rather than the knowledge of the given person or his experience, will thus be decisive. Precisely in view of the objective measure, it is fundamental that a juristic person is neutral in terms of values, unless it itself adopts a greater level of knowledge, skill or diligence. For this reason, too, it can be subject to greater demands, while there is no longer any basis for decreasing the standard of conduct.

CHAPTER TEN
VICARIOUS LIABILITY OF JURISTIC PERSONS

(A HISTORICAL, COMPARATIVE AND PHILOSOPHICAL STUDY)

10.1 Introduction

When we theorise about liability of juristic persons, we cannot omit exploring the idea of vicarious liability. Vicarious liability is a well-established institute that has its roots in common law systems and, in short, is underpinned by an idea that a person may be held (vicariously) liable for someone else's legal wrong.[348] So, unlike with fault-based or strict liability, vicarious liability is merely a tool for attributing liability to someone different from the actual wrongdoer, regardless of the fault-based or strict nature of the underlying wrong.[349] For instance, an employer may be held vicariously liable for the acts of its employees, or parents may be held vicariously liable for the acts of their children.

The legal concept of vicarious liability is alien to Czech law and, to some extent, also to continental legal thinking generally.[350] The Czech legal system, which belongs to the continental tradition, only recognises liability for the acts of an assistant (Section 2914 of the Civil Code), liability for payment of a contractual debt through a third person (Section 1935 of the Civil Code), or generic liability of juristic persons for unlawful acts by its representatives, employees or duly appointed agents (Section 167 of the Civil Code). None of these concepts equals to vicarious liability, although they resemble vicarious liability in many important aspects. Put simply, the current Czech black-letter law does not recognise vicarious liability.

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348 E.g., GILIKER, P. *Vicarious Liability in Tort: A Comparative Perspective*. Cambridge: Cambridge University Press, 2013, p. 1.

349 See Chapter 8 and Chapter 9 of this volume, which deal with fault-based and strict liability of juristic persons.

350 Cf. GILIKER, P. *Vicarious Liability in Tort: A Comparative Perspective*. Cambridge: Cambridge University Press, 2013, especially ch 9.

In theory, however, the situation looks different. It was already 1930s in Czechoslovakia when the Normative Legal Science (NLS) arrived at the concept of vicarious liability by analysing the nature of legal duties. According to the NLS, we can distinguish between liability for the person's own duties and liability for duties that the law imposes on other entities—vicarious liability. It is interesting that the NLS, in this text represented mainly by František Weyr's scholarship,[351] advocated a theoretical concept of vicarious liability even though Czech legal scholarship did not recognise any such category at that time. In this chapter, I present this concept of vicarious liability—which Weyr called *"ručení"* in the Czech language.

One purpose of the present chapter is to present the genealogy of the concept of liability *("ručení")* in Czech legal theory and, thereby, to cast new light on the concept of vicarious liability. In particular, I reconstruct and further develop an argument of the NLS according to which it is logically necessary for a legal system to have at least a theoretical concept of vicarious liability. Then I explore what essential features—from the perspective of the NLS—the category of vicarious liability entails. The added value of such research translates to both the theory of vicarious liability and to general understanding of the NLS, which is most widely associated with Hans Kelsen's *Pure Theory of Law*.

The second purpose of this chapter is to explore the concept of vicarious liability in relation to juristic persons. Since this part of the book is primarily concerned with juristic persons' wrongful conducts, i.e. with the liability generating events, I argue for a novel claim that juristic persons cannot be individually responsible or directly liable. Instead, I argue that, due to their nature and due to the nature of the rules of attribution that leads to their liability,[352] we may only conceptualise their liability as vicarious—juristic persons and other artificial legal entities can be held liable only vicariously.

This chapter is based mainly on the philosophical and historical method of legal research and it does not attempt to provide any compelling doctrinal or comparative analysis of the law of vicarious liability. Instead, what I analyse and refine here is merely the theoretical frame of vicarious liability. Since there is an imminent danger that, when explaining the NLS theory of liability, my reader will fall into a trap of technical and nationally-specific legal language, I will start this chapter by providing an overview of the relevant Czech law, its terminology and will compare this view with the common law concept of vicarious liability (Section 10.2). After this preliminary work, I will navigate through the historical context of the NLS theory of liability, showing that Weyr arrived at the concept of vicarious liability when he tried to solve the terminological issue in the Czechoslovakian law, namely that it was not able to distinguish between liability and responsibility (Sections 10.3 and 10.4). In the subsequent section,

[351] František Weyr (1879–1951) was a Czech jurist, philosopher and a founding figure of the Normative Legal Science (in Czech "normativní právní věda"), sometimes simply referred to as "normativism" or "or legal normativism". Normative Legal Science has multiple common features with Hans Kelsen's *Pure Theory of Law* but is distinct from it.

[352] In more detail on the nature of juristic persons and on the nature of attribution rules, see Chapter 2 of this volume.

I reconstruct Weyr's argument in defence of vicarious liability[353] and I advance it by making a more general claim that vicarious liability is a necessary theoretical construct for any legal system that features some basic ideas promoted by the NLS (especially the idea of a legal norm, and the idea of individual normative point to which liability can be attributed under such norm). In the same section, I try to anticipate and deflect criticism that this claim may trigger (Section 10.5). Lastly, by combining the NLS theory of liability and adopting a strict distinction between liability and responsibility, I argue that juristic persons may be held liable only vicariously (Section 10.6).

10.2 Vicarious liability and similar concepts in the Czech Civil Code

As I have noted earlier, the black-letter Czech law does not recognise the term vicarious liability. In the Czech Civil Code, there are three provisions that address closely related questions of liability—liability for the acts of an assistant (Section 2914 of the Civil Code), liability for payment of a contractual debt through a third person (Section 1935 of the Civil Code), and liability of juristic persons for acts of its representatives, employees, and agents (Section 167 of the Civil Code)—yet they are different from vicarious liability.

In the case of Section 2914, the duty to compensate damage is attributed to *"[a] person who uses an agent, employee or other helper in conducting his activities"*.

> [Such person] shall be obligated to compensate damage caused by this agent, employee or other helper in the same way as if he had caused the damage himself. If a person undertakes to carry out a certain activity independently but this performance serves as another person's performance of his obligation, the person acting independently shall not be deemed the other person's helper. If the other person did not choose him diligently or did not supervise him sufficiently, that person shall guarantee the fulfilment of his duty to compensate for damage.[354]

Unlike in the case of Section 1935 in which a person is obliged to pay damages for any damage caused within a contractual relationship, where a contractual debt is fulfilled through a third person (Section 1935 of the Civil Code), the previous provision specifies conditions of liability to pay damages for damage caused by torts (delicts) of others.

Both in the case of Section 2914 (liability in tort) and Section 1935 (liability in contract), however, the Czech Civil Code does not specify that the person, who must

[353] This argument was presented by Weyr in his 1933 journal article—WEYR, F. Povinnost a ručení [Duty and Liability]. In: ENGLIŠ, K., WEYR, F. (eds.) *Vědecká ročenka právnické fakulty Masarykovy university v Brně. Díl XII [A Scientific Yearbook of the Law Faculty of Masaryk University in Brno. Part XII]*. Prague: Orbis, 1933, pp. 16–36.

[354] Translation coped from HRÁDEK, J., BELL, A. (trs). Compensation for Damage in the New Czech Code: Selected Provisions in Translation. *Journal of European Tort Law*. 2016, No. 7, p. 312.

compensate the victim for their damage is vicariously liable. Nor does the Code expressly state that the person is liable for a wrong. The intellectual construction of both statutory provisions is that the law *ascribes* or *allocates* the duty to compensate to that person. In contrast, neither of these statutory provisions *ascribes* wrongdoing to that person—meaning that the person is not liable for, but has a duty to compensate, damage. It is more like when an insurance company compensates damage caused by an insured person, rather than when a juristic person is held liable for acts of its employees. The law here ascribes the duty to compensate, not liability.

In Section 167 of the Civil Code (regulating transactions and liability of juristic persons), the intellectual construction is different. Here a juristic person is deemed liable for the acts of its representatives, employees, and lawfully appointed agents. Under this construction, the person is considered liable, meaning that the law looks at such juristic person as if it committed the wrong itself. In this case, thus, the law ascribes liability to the juristic person (which usually also implies a duty to compensate). This invites multiple conceptual problems. One is how we ascribe actions and intentions of the representatives, employees, and agents to the juristic person. I have addressed this issue elsewhere, arguing that the extent of liability of juristic person must be, due to this statutory intellectual construction, always at least as large as the extent of liability of the representing agent. In most cases, it will be even larger.[355] Another problem is that the law does not specify whether the person is liable vicariously for other persons' legal wrong or whether it is directly liable for its own wrongs, committed by legally relevant actions of its representatives, employees, or agents.

In fact, this is one of the most important novelty that was introduced by the new Czech Civil Code (in effect from 2014). It largely avoids using the concepts of liability or responsibility and only specifies criteria for ascription/allocation/reallocation of duties to compensate. The reason for such method of regulation (regulation without using the terms "liability" and/or "responsibility") stems from a long-standing problem of Czech scholarship and doctrine of private law where said two terms (liability and responsibility) were explored as highly controversial—the controversy, in short, was that a person has duty to pay damages because she is liable, and, at the same time, is liable because she has duty to pay damages.[356] Such circular argumentation led to many inconsistencies and both liability and responsibility were thus abandoned in the new legislation. Moreover, due to peculiar historical developments, the Czech law has become unable to distinguish conceptually between liability and responsibility. This has been the case since 1940s and has triggered further problems.[357] I will follow-up on some of these remarks in Section 10.6 below.

At this point, it is important to note that when it comes to liability of juristic persons, Section 167 of the Czech Civil Code is a rare example where the law expressly ascribes

[355] See more in JANEČEK, V. Nerovná subjektivní odpovědnost [Unequal Fault-Based Liability]. *Jurisprudence*. 2016, No. 5, pp. 15–21.

[356] More on this issue, see JANEČEK, V. *Kritika právní odpovědnosti [Critique of Legal Responsibility]*. Prague: Wolters Kluwer, 2017.

[357] Ibid.

"liability" for actions of others (actions which may constitute a legal wrong), rather than ascribing some specific duty (e.g. a duty to compensate) to the person. However, Section 167 of the Civil Code does not specify whether it also ascribes vicarious liability for wrongdoing of others. We can thus argue that Czech law can, at least implicitly, absorb the concept of vicarious liability with regard to liability of juristic persons. To examine this hypothesis, I will first need to unfold some historical developments of the concepts of liability, responsibility, and duty in the Czech law. The main purpose of such analysis will be to unpack the genealogy of the concept of liability in relation to the concepts of duty and responsibility. Later in this chapter, it will allow me to show whether, and to what extent, a juristic person can be held vicariously liable for wrongs of others in the Czech law. It is important to note up front that the following two sections will be heavy on terminological obscurities stemming from fundamental indeterminacy of translation from Czech legal terminology to English. To map the adventurous genealogy of the Czech term liability *("ručení")*, there is however no way around these terminological obscurities, at least as far as I can see. Accordingly, the reader will hopefully excuse some inelegancies of expression in the following sections.

10.3 Liability and responsibility in the Czech legal theory

Any considerations concerning the Czech theory of responsibility require a historical overview that will provide at least a brief insight into the reasons why the Czech legal scholarship abandoned its earlier differentiation between the terms liability *("ručení")* and responsibility *("odpovědnost")*. The origins of this abandonment can be traced back to the 19th century, when the term responsibility *("odpovědnost")* was first introduced into Czech legal terminology.

From a historical perspective, the Czech legislation has always been influenced by the German laws and jurisprudence, which is attributable, *inter alia*, to the geographic vicinity and similar cultural traditions of the two countries, as well as to commercial and personal relations between the Czech and German nationals and their common historical and political background. Moreover, we should bear in mind that until the 19th century, comparative jurisprudence was an unknown concept and access to any foreign literature, let alone other than the German literature, was significantly more complicated than today. The German influence over laws written in Czech and the Czech language was natural and understandable, given that their German-speaking neighbours provided the easiest reference for Czech authors. The influence of the German language over the construction of Czech thinking was further strengthened under the Habsburg reign over the Czech lands. Finally, we cannot disregard the fact that, historically, the German element was also present at the Prague University, which naturally also affected the thinking of the Czech-speaking national academic elite. Hanel says: *"[t]here in not a single period in the history of Czech law where*

a historian would find no trace of the German influence".[358] Another legal historian, Stieber, believed that the questions regarding the legal concepts of responsibility and liability were no exception in this respect either.[359]

The term responsibility *("odpovědnost")*, when first introduced into the Czech legislation in the Austrian General Civil Code of 1811 (ABGB), was a translation of two different German terms—*"Verantwortung"* and *"Haftung"*.[360] At the beginning of the 19th century, i.e. at the time of adoption of the ABGB, it was indeed quite common for the Czech lawyers to discuss and publish their work in German. For example, Professor Schuster from Prague or the lawyer Luksche from Brno wrote their commentaries on the ABGB in German.[361] Indeed, the Czech translation of the ABGB itself, which contained the single term "responsibility" to cover both the two aforementioned German notions, was not widely disseminated in the Czech lands, whereas the German version of the Code was used much more frequently. In the mid-19th century, Czech lawyers therefore undertook the task of at least acquainting the Czech nation with the contents of the ABGB through new translations. In this context, Petržilka states in the Preface to his translation of 1857 that *"the Czechoslavic citizens of the Austrian Empire"* had not yet had the opportunity to acquaint themselves with the contents of the ABGB *"since the obsolete translation of the Code alone, made in 1812, has long been sold out and a great portion of the more recent body of legislation relating to the Civil Code has never been translated into the Czech language"*.[362] Moreover, we should bear in mind that the Czech National Revival movement was only gradually gaining force at that time.

Consequently, we can conclude that the Czech language had only a limited influence over the academic discourse on law in the relevant period and any detailed legal assessment of the notion of responsibility, either in the sense of *"Verantwortung"*,

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358 HANEL, J. K otázce o recepci práva německého v českém právu zemském [On the Aspect of Reflection of German law in the Law of the Czech Lands (Landrecht)]. In: *Pocta podaná českou fakultou právnickou panu Dr. Ant. rytíři Randovi k sedmdesátým narozeninám dne 8. července 1904 [Tribute from the Czech Law School to Knight Antonín Randa on the Occasion of his 70th Birthday, 8 July 1904]*. Prague: Bursík & Kohout, 1904, p. 131. Unless otherwise stated, all traslations of the original Czech texts in this chapter are my own.

359 STIEBER, M. *Dějiny soukromého práva v střední Evropě [History of Private Law in Central Europe]*. Prague: private publication, 1930, pp. 22 et seq.

360 Including their various forms (as verbs and adjectives) and derivative words. In this respect, I base my considerations on a comparison between the original German version of the ABGB (*Allgemeines bürgerliches Gesetzbuch für die gesammten Deutschen Erbländer der Oesterreichischen Monarchie*. Wien: Aus der k.k. Hof- und Staats-Druckerey, 1811) and the Czech version retrieved from the ASPI legislation database (as at 4 March 2016), which I have compared with PETRŽILKA, J. *Kniha všeobecných zákonův občanských říše rakouské [Austrian General Civil Code]*. Prague: B. A. Credner, 1857.

361 SCHUSTER, M. *Theoretisch-praktischer Kommentar über das allgemeine bürgerliche Gesetzbuch (Bd. 1).* Prague, 1818; LUKSCHE, J. *Das alte und neue Recht Mährens und Schlesiens, k. k., öster. Antheils, nach der Ordnung des bürgerlischen Gesetzbuches (Teil I–II)*. Brünn, 1818 [both references taken from BERAN, K. *Pojem osoby v právu: (osoba, morální osoba, právnická osoba) [The Concept of a Person in Law (Person, Moral Person, Juristic Person)]*. Prague: Leges, 2012, pp. 54–57.

362 PETRŽILKA, J. *Kniha všeobecných zákonův občanských říše rakouské [Austrian General Civil Code]*. Prague: B. A. Credner, 1857, cit. from the Preface (pages unnumbered).

or *"Haftung"*, had to be primarily conceived in German. Nonetheless, on the same grounds, we can also assume from the onset that the conceptual ambivalence, specifically linking the term responsibility *("odpovědnost")* to both the terms *"Verantwortung"* and *"Haftung"*, was thoroughly justified and did not occur by accident. There certainly was a reason for Czech lawyers to adopt a single Czech expression, albeit not consistently, for both German terms *("Verantwortung" as well as "Haftung")*. While, on the one hand, the noun *"Verantwortung"*, or the verb *"verantworten"*, is translated as responsibility *("odpovědnost")*, or to have a duty to respond *("odpovídat")*, in virtually all cases,[363] the words *"Haftung"*, *"haften"* (in various forms) are translated into Czech not only as responsibility, but in several cases also as liability, to be liable *("ručení"*, *"ručit")*. On the other hand, the Czech word *"ručení"*, *"ručit"* (liability, or to be liable) has only one equivalent in the German ABGB, i.e. wherever the words *"ručení"*, *"ručit"* are used in the Czech translation, we always find the term *"Haftung"*, or the verb *"haften"*, in the original German version.

Why, then, did Czech lawyers, whose parlance certainly allowed them to distinguish amongst (1) responsibility in the sense of *"Verantwortung"*, (2) responsibility in the sense of *"Haftung"*, and (3) liability in the sense of *"Haftung"*, used the words responsibility and liability identically to a certain extent?[364] In other words, why did they partially understand liability and responsibility as having the same meaning? And what was the consequence of this overlapping? It should be noted that German jurisprudence indeed uses the term *"Haftung"* for liability in a doctrinal sense (similarly to the Czech term *"ručení"*), while the term *"Verantwortung"* is interpreted as responsibility in philosophical sense. Hence, why and how were the two terms entwined?

There is another aspect that plays an important role in this context. In the first half of the 20th century, Czech jurisprudence and case law used the terms liability and responsibility *identically*, albeit inconsistently, in my opinion.[365] This might seem incomprehensible today. The current meaning of the Czech term *"ručení"* is rather different from that historically attributed to it and rather corresponds to the English term suretyship. The current notion of *"ručení"* (in the sense of suretyship) refers to a legal relationship where a surety (being a person different from the debtor) satisfies the creditor in case of the debtor's default.[366] Until as late as the first half of the 20th century, the same concept was commonly called *"rukojemství"*—suretyship

[363] Technically, there is one exception, where the verb *"verantworten"* is translated as *"je zavázán"* (is liable)—Section 930 ABGB. I nonetheless believe that this approach fully complies with the nature of responsibility as an obligation—a person "is liable" to respond in a prescribed manner.

[364] I describe the reasons particularly in the analysis accompanying footnotes 366 to 371 below.

[365] For example, SEDLÁČEK, J. *Obligační právo [The Law of Obligations]*. 2nd edition. Brno: Právník, 1933, pp. 268–272; RANDA, A. *O závazcích k náhradě škody [On Obligations to Indemnification]*. 7th edition. Prague: J. Otta, 1912, passim, and others. For secondary sources, see, e.g., LUBY, Š. *Prevencia a zodpovednosť v občianskom práve I [Prevention and Liability in Civil Law I]*. Bratislava: SAV, 1958, p. 32 or VÍTEK, J. *Odpovědnost statutárních orgánů obchodních společností [Responsibility of Governing Bodies of Juristic Persons]*. Prague: Wolters Kluwer, 2012, pp. 13–24.

[366] In this sense, see Section 2018 (1) of the New Civil Code or Section 546 of Act No. 40/1964 Coll. (the previous Czech Civil Code.).

(rather than *"ručení"*), which was an *abstractum* derived from the notion designating the person standing surety—a surety.[367] At that time, the meaning of the term *"ručení"* was substantially more general and corresponded to the term liability, as still reflected in current common Czech. People still may use *(in Czech)* expressions such as: "We assume no liability for items left unattended."; "Stop teasing me, or I'll not be liable for my actions!"; "Can you assume liability for this?"; "Limited liability company.". None of the above examples in fact refers to suretyship.

To summarise the above, the two aforementioned notions—*"ručení"* (in the sense of liability) and *"odpovědnost"* (responsibility) were assigned an identical meaning in the first half of the 20th century. This brings us to the question how the meaning of the two partially overlapping concepts, i.e. liability and responsibility, evolved in law and gradually became identical in the period between 1811 and the first half of the 20th century, and how this development affected the theoretical concept of liability, including the concept of vicarious liability in private law.

10.3.1 Liability in the ABGB

The codification of private law in the Czech and Austrian lands in the 18th century was fundamentally informed by Roman law, rationalism and the natural-law theory.[368] This applied not only to the preparatory works on the new code of civil law, which resulted in a rather academic work entitled *Codex Theresianus* (completed in 1766), but also to teaching of law at the Prague and Vienna Faculties of Law.[369] The *Codex Theresianus* (the predecessor of the ABGB) represented a compilation of law that had developed in the lands where the *Codex* was to be applicable. The *Codex* was dominated by the Czech element, thanks to authors with Czech roots (Azzoni, Zencker), and *"supplemented with 'common sense and the general natural law and the law of nations' (in the sense of ius naturale and ius gentium as defined in The Institutes of Justinian)"*.[370] Accordingly, where Article XVII of the *Codex Theresianus* stipulates that *"a person shall be liable for legal consequences"*, this expression reflects liability as understood before adoption of the ABGB, i.e. as a separate obligation.

However, at rather an early stage, the focus of the preparatory work preceding the adoption of the ABGB shifted from codification of the local laws to the creation of new laws, based on rationalism and naturalistic philosophy. Even stronger natural-law

[367] See Section 288 of Act No. 141/1950 Coll.; Section 1185 of the Czechoslovak Civil Code; or Section 1346 ABGB.

[368] See, e.g., KUKLÍK, J., SKŘEJPKOVÁ, P. *Kořeny a inspirace velkých kodifikací [Roots and Inspirations of Major Codifications]*. Luzern, Prague: AVENIRA Stiftung, 2008, p. 101.

[369] Ibid., pp. 103–105.

[370] KRČMÁŘ, J. *Právo občanské I. díl: Výklady úvodní a část všeobecná [Civil Law, Volume I: Preamble and the General Part]*. Prague: Všehrd, 1927, p. 8.

elements can thus be found in Horten's draft of the ABGB,[371] while the later preparatory work gradually abandoned the aforementioned aspect of collecting period and local customs[372] in favour of reception of Roman law, which applied in countries north of the Alps *(usus modernus Pandectarum)*. The final stage of the preparation of the ABGB hence already conceived responsibility and liability as part of a wider system of obligations (duties) informed by the reception of Roman law and transformed into a general—as opposed to casuistic—set of rational and natural-law principles.[373] Where, at the time of adoption of the ABGB, the term responsibility (duty to respond) was interpreted as a sort of obligation to provide response under the legal order, we have to bear in mind that the notion of a legal order (under which one was expected to respond) referred to the order of natural law, which was strongly influenced by rationalism, at the beginning of the 19th century.[374]

I consider this shift of focus an important milestone for a change in the perception of the relationship between responsibility and liability. Indeed, the legal thinking of the early 19th century surpassed the local contextual background and evolved, to a substantial degree, into a rationalising and abstract exercise aimed in particular towards systemically addressing the basic principles of law, including the principles of responsibility under private law. In simplified terms, such an approach prevailed throughout the first half of the 19th century, until it diminished under the influence of the so-called Historical School of Jurisprudence.

From the viewpoint of such a naturalistic-rationalistic philosophy of law, liability *("Haftung")* indeed could represent just one type of a duty to respond or just one type of responsibility. As I explained elswhere, "responsibility" (also referred to as a duty to respond) appeared in three different meanings in the pre-1811 legal texts: (1) primary responsibiliy to respond with one's own reasons that excuse or justify the person's action, the action for which the person migh be held liable; (2) secondary responsibility to give a substitutive response that excuses or justifies the person's action (e.g. a substitutive money payment); (3) secondary responsibility to give a sanctional or penal response for the contested action (e.g. a penalty for some wrong).[375] Now, liability represented a duty to provide the substitutive as well as the sanctional (penal) response and, in this sense, it was not different from the abstract concept of responsibility *("Verantwortung")*. It was rather a sub-type of responsibility. By the same token, we could replace the word "dinner" with "meal". Liability is a type of

371 For example, Krčmář also shares this opinion on Horten's draft (ibid., p. 10).

372 Ibid., p. 11.

373 Ibid., p. 18.

374 HANEL, J. J. O pojmu i objemu historie práva rakouského [On the Concept and Scope of the History of Austrian Law]. *Právník*. 1880, Vol. 19, pp. 217 et seq.; WIEACKER, F. *A History of Private Law in Europe*. Oxford: Oxford University Press, 1995, p. 267. For further details, see, e.g., MARŠÁLEK, P. Přirozenoprávní aspekty Všeobecného občanského zákoníku [Natural-law Aspects of the General Civil Code]. In: DVOŘÁK, J., MALÝ, K. (eds.) *200 let Všeobecného občanského zákoníku [200th Anniversary of the General Civil Code]*. Prague: Wolters Kluwer, 2011, pp. 294–300.

375 JANEČEK, V. *Kritika právní odpovědnosti [Critique of Legal Responsibility]*. Prague: Wolters Kluwer, 2017, ch 2.

responsibility, in the same way as dinner is a kind of meal. What is important in this context is the question why we should replace the former term with the latter, and what difference we would thus obscure.

We should remind ourselves in this context the essential difference between the terms *"Verantworung"* and *"Haftung"* as perceived by contemporary German theory. *"Verantwortung"*, on one hand, represents a general, jurisprudential responsibility, while *"Haftung"*, on the other hand, designates legal, or doctrinal responsibility. Put simply, *"Verantwortung"* refers to responsibility under any normative system, whereas *"Haftung"* refers to responsibility under the system of positive law. However, the duality of natural and positive laws was denied at the outset of the ABGB. The meaning of any and all responsibility was hence necessarily assessed from the perspective of natural law, whether incorporated in a code or embedded in the minds of rationally thinking individuals. Nonetheless, it follows from the above, *inter alia*, that responsibility in a jurisprudential and doctrinal sense both necessarily referred to the same concept. The perception of law at that time simply enabled such approach. The terms responsibility and liability were therefore interchangeable, without prejudicing the comprehension as to under which system of rules (natural or positive rules) a person should respond.

In addition to the above-described influence of natural law we also need to consider that, at the time of adoption of the ABGB, the Czech term *"ručení"* referred both to liability in the technical sense and to implicit liability (general liability through one's assets and general liability through one's honour and faith (as in "good faith"), which had secured any debt before the adoption of the ABGB). Already in 1811, it was thus impossible to clearly distinguish, from a linguistic viewpoint, between (i) universal liability, the binding nature of which could be derived from an implicit agreement between parties as well as from the natural-law obligation to abide by one's promise, and (ii) liability in the technical sense, the binding nature of which followed in principle from compliance with the prescribed form in concluding such a positive-law security obligation. Indeed, I am convinced that general implicit liability in conjunction with the natural-law understanding of obligations and a normative system of law permitted bridging the conceptual divide between responsibility and liability.

The aforementioned influencing factors were supplemented by a third factor, namely the unclear meaning of liability. As mentioned above, at the time of adoption of the ABGB, liability in the sense of a security obligation was almost, but not completely, overlapping with the two types of responsibility—substitutive and sanctional (penal), as distinguished in theory. Simultaneously with the previous sense of the term, liability *("ručení")* was also conceived as a separate debt (obligation) and hence it could also represent a duty to respond in the very original sense of the word; theoretically speaking, liability in itself could thus provide a relevant ground for the defendant's acts *(response)*.

Having regard to the above, I conclude that the above-explained development of the notion of liability contributed to the partial overlapping of liability and responsibility in the Czech translation of the ABGB. Consequently, the German

words *"Haftung"* (liability) and *"Verantwortung"* (duty to respond) were translated as *"odpovídání"* (responding) and *"(z)odpovědnost"* (responsibility) in the Czech version of the ABGB.[376] The Czech version of the ABGB thus uses the term *"(z)odpovědnost"* (responsibility) and its various forms 46 times[377] to translate various words derived from the verb *"verantworten"* (32 times) and the verb *"haften"* (14 times).[378]

Given the inconsistencies in the translation, it is also interesting to look into how the verbs *"haften"* and *"verantworten"* (and their variations and derivatives) were translated in the Czech version of the ABGB. The verb *"verantworten"* is translated into Czech as *"je zavázán"* (he is obliged to) in one case.[379] The verb *"haften"* (and its various forms) is translated as *"ručit"* (to be liable) 66 times,[380] but also as *"váznout"* (to encumber, as in an encumbering burden) 16 times and, what is important, again as *"je zavázán"* (he is obliged to) in two cases.[381] This also shows that the Czech lawyers at that time perceived the notions of responsibility, liability and obligation as partly interchangeable in their considerations (or at least in how they expressed these considerations linguistically).

A thorough linguistic analysis of the Czech translation of the ABGB[382] nonetheless reveals another interesting aspect. The Czech word *"ručit"* (to be liable) and words derived from it are always translations of the German word *"haften"*. In this context, the Czech word *"ručení"* is used in the translation of the ABGB only in cases which we could describe as the aforementioned general liability through one's assets. The term *"rukojemství"* (suretyship) or *"zástava"* (lien) was introduced for liability in the technical sense. The codification of civil law in the ABGB hence achieved two goals: firstly, a general implicit form of liability through one's assets was expressly stipulated in a legal regulation and therefore no longer needed to be justified by natural-law theory and, secondly, this general liability was linked to a certain legal fact for which

376 See also VÍTEK, J. *Odpovědnost statutárních orgánů obchodních společností [Responsibility of Governing Bodies of Juristic Persons]*. Prague: Wolters Kluwer, 2012, pp. 13–18, who comes, on slightly different grounds, to the same conclusion as to the confusion of responsibility and liability.

377 Out of which the notions *"zodpovědnost"* and *"odpovědnost"* (which have identical meaning in Czech) are used 21 and 26 times respectively.

378 As a third possible meaning, responsibility is used once in the sense of a quality warranty, being a translation of the expression *"er leistet Gewähr"* appearing in the German original (Section 922 ABGB). Nonetheless, I consider the last-mentioned interpretation an insubstantial inconsistency, which also applies to the Czech translation of the verb *"gestaned"* as *"zaručit se"* (to assume liability in the sense of standing surety) in Section 881 ABGB. Similarly, I disregard the cases where the notion *"odpovědnost"* (responsibility) is used (in the currently obsolete sense) to mean "sameness", in the sense that X (cor)responds to Y—such use of the word can be found in Sections 217, 581, 1270, 1456, 1481 ABGB.

379 Section 930 ABGB.

380 To the contrary, the Czech word *"ručit"* (to be liable) has virtually only one German equivalent, i.e. wherever the Czech word *"ručit"* is used in the Czech version, it corresponds to the word *"haften"* in the German version.

381 Incidentally, I note that the term suretyship (in Czech formerly *"rukojemství"* and currently *"ručení"*) corresponds to German term *"Bürgschaft"*.

382 See footnote 360 in this part.

such liability was established. Liability was thus systemically related to a primary duty or to some other fact, which in my opinion paved the way for the dependent nature of liability obligations—liability under positive law thus newly referred only to a duty to provide substitutive or sanctional response, which was always associated with a primary obligation, or a primary debt.[383] In other words, liability was logically linked with a primary obligation which was sanctioned by liability.

By contrast, non-pecuniary liability through one's honour and faith was not thus codified, which was most likely caused by the strong emphasis the ABGB placed on proprietary rights. The civil-law doctrine tended to disregard any legal conflicts lacking a proprietary or appraisable nature. From the positive-law perspective, the moral aspect of a promise and the obligation to bear liability through one's honour and faith was thus suppressed to give precedence to the proprietary or market dimension. Notwithstanding the above, the moral facet found its use in interpretation of obligations. Honesty, good faith and fairness actually became interpretative correctives of the aforementioned rationalistic and naturalistic law, which is indeed reflected in the well-known Ulpian's axiom *"honeste vivere—neminem ledere—suum cuique tribuere"*.[384] In simplified terms, only an obligation arising honestly, fairly and in good faith was enforceable. It follows from the above that the aforementioned implicit liability through one's honour and faith was also transformed into a general precondition for enforceability; it was nonetheless systemically and conceptually separated from the obligation (duty) to bear liability. This could not but lead to further blurring and loosening of the originally legal notion of liability, which also was a technical term of the art.

At the time around the adoption of the ABGB, the systemic classification of the institute of liability *("ručení")* hence rather radically changed in the Czech legal thinking. This ultimately allowed for partial overlapping of the terms liability and responsibility and blurred the boundary line between the individual types of a duty to respond (responsibility). Responsibility *("odpovědnost"—"Haftung")*, on the one hand, referred to all types of a duty to respond *("odpovídání")*, whereas liability *("ručení"—"Haftung")*, on the other hand, referred only to a secondary duty to respond, whether in the form of a substitutive response or a sanction. The comparative analysis of the relevant language versions of the ABGB in the light of the historical developments of the notions *"ručení"* (liability) and *"odpovědnost"* (responsibility) in the Czech language therefore reveals that the Czech terms *"ručení"* and

[383] Even though, for example, liability for accidental damage (*casus minor*) (e.g. Sections 338, 460, 964 ABGB) is, theoretically speaking, in fact an independent debt arising regardless of breach of a duty.

[384] In the original: *"iuris praecepta sunt haec: honeste vivere, alterum non laedere, suum cuique tribuere"*. (Ulp. Dig. 1, 1, 10, 1, available at URL: <http://droitromain.upmf-grenoble.fr/Corpus/d-01.htm#1> [https://perma.cc/E9PH-9F6Q]). These principles indeed often serve as the fundaments for explanation of the entire body of private law (ELIÁŠ, K. Nad legislativním záměrem zásad obecné části nového občanského zákoníku aneb kterak se promeškávají historické příležitosti [On Legislative Intention of the Principles Governing the General Part of the New Civil Law, or How Historical Opportunities Are Being Lost]. *Právní rozhledy*. 1996, No. 1, pp. 12–13).

"odpovědnost" (both being a translation of the German *"Haftung"*) overlap in the translation of the ABGB, thus obscuring the difference in their jurisprudential foundations. Liability nonetheless was still not entirely identical with responsibility, even though it also gave rise to a duty to respond.

We can conclude that at the time of the adoption of the ABGB (1811), Czech lawyers did not consistently distinguish amongst the notions of liability *("ručení")*, obligation *("závazek")* and responsibility *("odpovědnost")*. However, a notional relationship between liability and responsibility already existed in the Czech language (which was not present in the German language). In the following text, I focus on the further developments of the said concepts. As mentioned above, liability and responsibility overlapped in the Czech legal theory and terminology of the first half of the 20th century. Consequently, I need to answer the question of why and how the complete overlapping of liability and responsibility could have occurred.

10.3.2 Liability as an integral part of an obligation

In the period shortly after the adoption of the General Civil Code in 1811 (the ABGB), the Czech legal theory held that, at least in principle, every debt (obligation) gave rise to responsibility *("odpovědnost")*, i.e. a duty to respond according to some legal system. Conversely, only in cases expressly stipulated by the law, a separate obligation to bear liability *("závazek ručení")* arose together with a debt, as a general duty to provide the creditor, under certain conditions, with a substitutive or sanctional response. Accordingly, in the first half of the 19th century, it was still possible to conceive of an obligation that was not associated with liability *("ručení")* or secondary responsibility in the sense of liability.[385] Nonetheless, this perception changed as jurisprudence evolved.

The German Historical School of Law presented a counterweight to the adoption of the ABGB which was based on the rationalist and natural philosophy. This historical school criticised the idea of codification and was particularly influential in the first half of the 19th century. At that period, law was studied and systemised in Germany primarily through the analysis of Roman law, which was later enriched with and put into the context of the spirit of the German nation *("Volkgeist")*. Contrary to the philosophy of rationalism, the German Historical School of Law aimed at placing law in its true historical (Roman) or social *("Volkgeist")* context, instead of building an a-temporal abstract and rational knowledge of the law.[386] According to the Historical Law School, the legal thinking was supposed to refocus on the relations

[385] The situation was, of course, further complicated by the fact that every valid and enforceable obligation was newly subject to the requirement of honesty or good faith, whereby liability through one's honeour and faith was established in a substantive sense. Technically, though, the term liability *("ručení")* no longer encompassed liability through honour and faith.

[386] For a brief and comprehensible overview, including the relevant sources, see, e.g., GORDLEY, J. The Architecture of the Common and Civil Law of Torts: A Historical Survey. In: BUSSANI, M.,

existing in the real world and real society where the law applies, hence to abandon those abstract rationalist and natural-law categories. Indeed, the Historical School of Law had realised that law and legal texts were best understood in the societal context, which breathes life into the law, and that it was indeed the national characteristics and history (rather than legislative texts or a-temporal rationalistic considerations) that truly shaped the law. The advocates of the Historical School of Law therefore studied their subject in consideration of the relevant historical background, in particular Roman law, which clearly informed the development of German law. In the 19th century, private law within all of central Europe was indeed largely based on Roman law (or the *ius commune*) and it was hence only logical that Roman law was studied and systemised.

The German Historical School of Law adopted a novel approach in that it did not search for some universal and abstract rationalistic concepts in Roman law that could be subsequently codified, but rather identified the historical and cultural predetermination of various legal solutions. Such perception actually instigated new scrutiny of the institute of liability *("Haftung")* in relation to its previous forms in which it appeared in German law.

One of the achievements of the above-described methodical approach consisted in linking the Roman-law obligation to the old German notions of *"Schuld"* (debt) and *"Haftung"* (liability). This was the fundament of the *Schuld und Haftung* doctrine, established in 1874.[387] The doctrine holds that, by definition, liability is part of every obligation and a shadow of every debt. Debt thus newly implies liability, in the like manner as liability implies the existence of a debt [388], and the two elements together create an obligation. Following such a concept, the Czech theorist Vážný explained in 1924, quite as common knowledge, that *"[a]n obligation means a legal relationship between two persons, where one of the persons is obliged to provide a performance (a payment, service or work) to the other and is liable through his assets for proper fulfilment of his duty"*.[389] Accordingly, an obligation (as a term) newly meant more than just a sole duty; it meant that *"a debtor is obliged (to perform) and liable (for his performance)"*.[390]

This was a rather fundamental step for Czech law as concerns the perception of the institutes of liability, obligation and, given the unclear terminology, also responsibility as such. That having been said, I first briefly explain the creation and attractiveness of the *"Schuld und Haftung"* doctrine, which allows me to derive more general conclusions in the next chapter as to how Czech law and the theoretical concept of legal responsibility changed through acceptance of this doctrine.

SEBOK, A. J. (eds.) *Comparative Tort Law: Global Perspectives*. Cheltenham: Edward Elgar, 2015, pp. 195–199.

387 BRINZ, A. Der Begriff Obligatio. *Zeitschrift für das Privat- und Öffentliche Recht*. 1874, No. 1, pp. 11–40.

388 Including a debt of honour, where liability through one's honour applies.

389 VÁŽNÝ, J. *Římské právo obligační. Část I [The Roman Law of Obligations. Part I]*. Bratislava: Comenius University, 1924, p. 5. In this context, Vážný expressly refers to the original German essay *(on obligations)* by von Brinz of 1874.

390 Ibid., p. 5.

10.3.2.1 Schuld und Haftung (1874)

Von Gierke argued that no research in the area of the history of private law had had such unprecedented and far-reaching consequences as that which resulted in the clear doctrinal differentiation of *"Schuld"* (debt) and *"Haftung"* (liability) in the old German law.[391] Nonetheless, later studies show that, rather than a discovery, this was in fact a doctrinal invention because the old German law simply knew no such conceptual differentiation.[392]

The differentiation between the terms *"Schuld"* and *"Haftung"* within the concept of an obligation was first expressed by Roman-law scholar von Brinz in his essay *Der Begriff Obligatio*.[393] Von Brinz argues that an obligation means simply an active receivable and a passive debt, or more precisely a legal debt—duty to provide performance *("rechliche Verpflichtung")*, where the two elements together create an obligation *("Verbindlichkeit")*. Liability *("Hafung")* is a state inseparably linked to every debt, in the sense of something that shall be done *("Schuld")*.[394] Interestingly, the doctrine *"Schuld und Haftung"* was embraced by members of both lines of thought within the Historical School of Law, i.e. the one building on Roman tradition (e.g. the above-cited von Brinz[395]) and the one building on German tradition (e.g. the above-cited von Gierke).

German jurisprudence was aware that liability was a separate reason for fulfilment of a duty, i.e. that liability represented a separate debt in a technical sense of the word; nonetheless, an opinion prevailed that, where liability was linked to another (primary) obligation, it actually represented liability in the non-technical sense of the word. They designated such non-technical liability as potential legal force, *enforceability*, or simply a claim.[396]

By contrast, separate liability, or liability in the technical sense, as von Gierke would call it, arises only if it has been previously expressly agreed in an agreement for

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391 GIERKE, O. *Schuld und Haftung im älteren deutschen Recht, insbesondere die Form der Schuld- und Haftungsverhältnisse.* Breslau: Verlag von M. & H. Marcus, 1910, p. 1.

392 See, e.g., DIESTELKAMP, B. Die Lehre von Schuld und Haftung. In: CONIG, H., WILHELM, W. (eds.) *Wissenschaft und Kodifikation des Privatrechts im 19. Jahrhundert. Teil VI*. Fankfurt am Main: Klostermann, 1982, pp. 21, 25–28; or STIEBER, M. *Dějiny soukromého práva v střední Evropě [History of Private Law in Central Europe]*. Prague: private publication, 1930, pp. 22 et seq., 152.

393 BRINZ, A. Der Begriff Obligatio. *Zeitschrift für das Privat- und Öffentliche Recht*. 1874, No. 1, pp. 11–40. For critical review, see RÜMELIN, G. Obligation und Haftung. *Archiv für die civilistische Praxis.* 1885, No. 68, pp. 151–216. In the secondary literature, see in particular GIERKE, O. *Schuld und Haftung im älteren deutschen Recht, insbesondere die Form der Schuld- und Haftungsverhältnisse.* Breslau: Verlag von M. & H. Marcus, 1910, p. 1.

394 Also GIERKE, O. *Schuld und Haftung im älteren deutschen Recht, insbesondere die Form der Schuld- und Haftungsverhältnisse.* Breslau: Verlag von M. & H. Marcus, 1910, p. 7.

395 It is interesting that, before leaving for Tübingen, Germany (in 1866), Brinz obtained the academic title of Professor of Roman Law at the Charles-Ferdinand University in Prague (1857)—BEHRENDS, O. (Hrg.). *Rudolf von Jhering: Beiträge und Zeugnisse.* 2. Auflage. Göttingen: Wallstein Verlag, 1993, p. 112.

396 GIERKE, O. *Schuld und Haftung im älteren deutschen Recht, insbesondere die Form der Schuld- und Haftungsverhältnisse.* Breslau: Verlag von M. & H. Marcus, 1910, pp. 12–13.

the purpose of securing an obligation. Hence, an agreement, rather than a breach of an obligation, was the primary legal ground for such specific liability.[397] Von Gierke accordingly concluded that general liability through one's assets need not be separately agreed in a contract and therefore represents a fully universal enforcing element, which transforms a duty (a debt) into an enforceable and claimable duty, thus giving rise to the idea of an obligation.[398] General liability through one's assets thus newly became an essential element of an obligation, which was the root of the well-known saying that liability is the shadow of a debt.

The novel idea introduced by von Brinz was that a debt was, by definition, associated with liability; and every obligation was thus, by definition, enforceable because liability formed an integral part of every obligation (or of a debt in the sense of a Roman-law obligation). Von Brinz indeed perceived enforceability in the very possibility of a sanction—liability. Besides, general liability through one's assets was a rule in the German and Czech lands alike. Consequently, von Brinz concluded that every debt had a shadow in the form of liability and that every debt was therefore enforceable. Conversely, a debt without liability became unenforceable and represented a mere natural obligation. At this point, it is appropriate to place the above considerations in the context of Czech law and the perception of the institutes of liability, obligation and responsibility on the background of the ABGB.

10.3.2.2 Reception of the "Schuld und Haftung" doctrine in the Czech environment

We have seen above that the idea of a universal *Roman-law* obligation, i.e. an obligation with a sanction (liability) as its essential element,[399] was introduced into the Czech legal thinking only as jurisprudence gradually evolved, having re-constructed and changed the meaning of the institute of liability.[400] Until then, liability had been conceived as an *obligation* to respond, but the scope of its functional meaning was substantially narrower than that of a *Roman-law* obligation. It should be noted in this respect that, before the adoption of the ABGB, the term *"ručení"* (liability) referred (1) firstly, to a set of specific concepts, or forms, of liability and, in this sense, also to specific debts (obligations) assumed by the obliged person (or a surety, as the case may be) in case of non-fulfilment of the main obligation, (2) secondly, to implicit liability through one's assets, and (3) thirdly, to implicit liability through one's honour and faith. The adoption of the ABGB narrowed the meaning of the term *"ručení"* to general liability through one's assets, which nonetheless applied only in cases stipulated by the law.

397 Ibid., pp. 19–20.

398 Ibid., p. 20.

399 Vážný was among the first Czech authors to use the term in this sense, in: VÁŽNÝ, J. *Římské právo obligační. Část I [The Roman Law of Obligations. Part I].* Bratislava: Comenius University, 1924, p. 5.

400 STIEBER, M. *Dějiny soukromého práva v střední Evropě [History of Private Law in Central Europe]*. Prague: private publication, 1930, p. 153.

Still, the wording of the ABGB also allowed for a broader interpretation to the effect that such general liability could constitute a defining element of every debt, or of every obligation. In other words, the ABGB was compatible with the idea of an obligation that is enforceable by definition and that is always secured through liability. This being the case, it did not take long until the German *"Schuld und Haftung"* doctrine found its way into the Czech and Austrian jurisprudence.

Upon adoption of the *"Schuld und Haftung"* doctrine, Czech legal scholarship, too, newly conceived an obligation as meaning *"a legal relationship where the law attributes to a person, on certain grounds, a licence to claim certain performance from another person (in the form of an act, tolerance or omission) and simultaneously imposes on the other person a duty to provide such performance, under penalty for default"*.[401] *"A debt alone has no force. It is the liability from which the legal force stems."*[402]

The binding nature of a debt was thus derived from the existence of liability. Nonetheless, in the context of the Czech legal history, it is unclear whether the force *(enforceability)* of a debt really stemmed solely from general liability through one's assets, which was later embodied in the legislation by virtue of the ABGB, or whether the idea of the binding nature of a debt also reflected the older Czech tradition of liability through one's honour and faith. I was unable to find an answer to this question in either the primary or the secondary literature. However, I suspect that, similarly to the German Historical School of Law which studied the development of their nation's laws and examined the transformation of the German notion of liability, Czech jurists most likely studied the development of the concept of liability in their country. Consequently, it is possible that the *"Schuld und Haftung"* doctrine was embraced *inter alia* for the reason that, under older Czech laws, a debt (i.e. a promise, an obligation) had been implicitly secured by means of liability through one's honour and faith. In this respect, too, the ABGB allowed for various interpretations.

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401 KRČMÁŘ, J. *Právo občanské III. Právo obligační [Civil Law III. The Law of Obligations]*. 4th edition. Prague: Wolters Kluwer, 2014 (orig. 1947), p. 4. For more, see, e.g., SATURNÍK, T. *O právu soukromém u Slovanů v dobách starších [On Private Law of Ancient Slavs]*. Prague: Czech Academy of Art and Science, 1934, pp. 131–132, 226; RAUSCHER, R. *Několik úvah o programu a cílech slovanských právních dějin [Considerations Concerning the Plans and Objectives of the History of Slavic Law]*. Bratislava: Comenius University, 1934, p. 48; ROUČEK, F., SEDLÁČEK, J. et al. *Komentář k československému obecnému zákoníku občanskému a občanské právo platné na Slovensku a v Podkarpatské Rusi. Díl IV [Commentary on the Czechoslovak Civil Code and Civil Law Applicable in Slovakia and in Carpathian Ruthenia. Part IV]*. Prague: V. Linhart, 1936, pp. 5 et seq.; WEYR, F. Povinnost a ručení [Duty and Liability]. In: ENGLIŠ, K., WEYR, F. (eds.) *Vědecká ročenka právnické fakulty Masarykovy university v Brně. Díl XII [A Scientific Yearbook of the Law Faculty of Masaryk University in Brno. Part XII]*. Prague: Orbis, 1933; TILSCH, E. O příčinném spojení v právu soukromém [On Causal Link in Private Law]. In: *Pocta podaná českou fakultou právnickou panu Dr. Ant. rytíři Randovi k sedmdesátým narozeninám dne 8. července 1904 [Tribute from the Czech Law School to Knight Antonín Randa on the Occasion of his 70th Birthday, 8 July 1904]*. Prague: Bursík & Kohout, 1904, pp. 277–298.

402 STIEBER, M. *Dějiny soukromého práva v střední Evropě [History of Private Law in Central Europe]*. Prague: private publication, 1930, p. 22.

Even though the ABGB did not expressly stipulate that liability was a defining element of every debt, the wording of this statutory text nonetheless allowed such understanding, or interpretation, of a debt. The meaning of liability, or indeed the sense of only certain selected instantiations of the individual types of liability (substitutive or sanctional), thus substantially changed again, because the adoption of the *"Schuld und Haftung"* doctrine newly defined the legal order under which this type of liability is to be assessed. The substantive contents of the normative system thus shifted from liability applicable in certain cases towards liability applicable in all cases. Moreover, this happened at a time when legal thinking was no longer dominated by the theory of natural law. Legal practice and case law indeed already chose to prefer legal positivism at that time.[403]

The problem of the Czech law was that, at that time, the German term *"Haftung"*, as applied in the Czech doctrine, was interpreted rather loosely and its meaning and sense were no longer identical to those of the German notion of *"Haftung"*. This dissimilarity between the Czech and German legal concepts was completely disregarded by both legal theoreticians and practising lawyers. This was a problem, because the reasons for such notional confusion (see above) have already at least partially disappeared. This can be well substantiated by historical as well as more recent literary sources. The ignorance of the dissimilarity was probably one of the main causes of the subsequent overlapping of the terms liability and responsibility in the Czech law.

10.3.3 Liability in the sense of responsibility

In hindsight, I believe that three fundamental stages can be identified in the development of the relationship between liability and responsibility in the period before World War II. In the first stage, before the adoption of the ABGB, a duty to respond *("odpovídání")* was clearly distinguished from liability *("ručení")*, where liability represented a specific form of the duty to respond. Subsequently, in the second stage, i.e. after the adoption of the ABGB, the difference between the two terms became blurred; ultimately, in the third stage, i.e. from the end of the 19th century onwards,

[403] In this sense see, e.g., KUKLÍK, J., SKŘEJPKOVÁ, P. *Kořeny a inspirace velkých kodifikací [Roots and Inspirations of Major Codifications]*. Luzern, Prague: AVENIRA Stiftung, 2008, p. 141. For period literature, cf. also TRAKAL, J. Obnova problému přirozeného práva v soudobé literatuře právovědné a sociologické [Renewal of the Aspect of Natural Law in Current Legal-Theory and Sociological Literature]. In: *Pocta podaná českou fakultou právnickou panu Dr. Ant. rytíři Randovi k sedmdesátým narozeninám dne 8. července 1904 [Tribute from the Czech Law School to Knight Antonín Randa on the Occasion of his 70th Birthday, 8 July 1904]*. Prague: Bursík & Kohout, 1904, pp. 1 et seq. In the secondary literature, see, e.g., MARŠÁLEK, P. Česká právní věda mezi dvěma světovými válkami a její metodologie [Czech Jurisprudence and Methodology between the World Wars]. In: MALÝ, K., SOUKUP, L. (eds.) *Československé právo a právní věda v meziválečném období (1918–1938) a jejich místo ve střední Evropě. Svazek I [Czech Law and Jurisprudence in the Period between the World Wars (1918–1938) and their Place in the Central Europe. Volume I]*. Prague: Karolinum, 2010, pp. 61 et seq.

the terms overlapped, and liability was gradually replaced by the term responsibility. Paradoxically, the relationship between liability and responsibility have completely twisted and turned into an opposite relationship that they had initially. Their dissimilarity turned into thier sameness. How did this happen? Some of the factors that allowed for such a transformation of the relation between liability and responsibility have already been explained above. Nonetheless, I will provide a brief recapitulation of the main factors.

First, the basic paradigm had changed, having shifted from natural-law towards positive-law perception of rights, which was associated with emphasizing the positive-law meaning of responsibility *("Haftung"* instead of *"Verantwortung")*. Consequently, where responsibility was perceived as a duty to respond under the order of positive law, juristic considerations necessarily had to use the term responsibility-liability *("Haftung")* substantially more often than responsibility *("Verantwortung")*.

Secondly, liability through one's assets was a general and common concept, further supported by the *"Schuld und Haftung"* doctrine, which turned responsibility-liability *("Haftung")* into a universal way of responding to a debt. To a substantial extent, the question of responsibility could thus be reduced to the question of liability, given that liability referred to a whole set of secondary, i.e. substitutive or sanctional, responses available to the creditor under the given legal order. Lawyers embracing the philosophy of positive law therefore considered the terms of liability and responsibility to be interchangeable in a great majority of cases (with the exception of primary responsibility).

Thirdly, the Czech version of the ABGB was conceptually unclear, as it simply did not follow the original German wording and repeatedly disregarded the difference between responsibility-liability *("Haftung")* and *(general)* responsibility *("Verantwortung")*. That being the case, it was possible, on the one hand, rigorously to perceive *Haftung* as liability, as indeed mostly happened. On the other hand, it was simultaneously fully permitted and correct to conceive the same matter as a question of responsibility. I believe that the original sense of responsibility was thereby gradually narrowed or even voided, since responsibility in the form of liability *("Haftung")* undoubtedly has a substantially narrower sense and meaning than general responsibility *("Verantwortung")*.

Fourthly, the proprietary perception of civil wrongs (emphasising the result) at that time was another important factor leading to levelling of the differences between responsibility and liability. Tilsch, for example, aptly expressed this principle, stating that *"any and all civil wrongs are based on the result in the sense of criminal law. […] A human act, albeit very dangerous and driven by gravely malicious intents, has only potentially binding nature under civil law, subject to a suspensive condition that damage was incurred as a consequence of the act."*[404] Nonetheless, where such an act violated a legal norm and simultaneously caused damage, the wrongdoer always

[404] TILSCH, E. O příčinném spojení v právu soukromém [On Causal Link in Private Law]. In: *Pocta podaná českou fakultou právnickou panu Dr. Ant. rytíři Randovi k sedmdesátým narozeninám dne*

bore responsibility, or liability, through all his assets.[405] In this context, it should be noted that only proprietary damage was relevant for liability in the Austrian and Czech laws of the first half of the 20th century and this was embedded in the legislation by virtue of Section 1293 of the ABGB. Yet the duty to respond, which followed simply from the binding nature of a promise and faith enshrined outside proprietary values (the duty of honour and good faith) was completely overlooked. This was associated, *inter alia*, with the declining interest in natural law and the attempts to exclude from law and jurisprudence any elements that could not be scientifically described or exactly defined.[406]

At the same time, the Historical School of Law, which introduced the *Schuld und Haftung* doctrine, proclaimed as one of its principles that subjective rights *had already existed before establishment of the legal order*, i.e. that subjective rights were prepositive; in this respect, the right to property was considered a subjective right *par excellence*,[407] which only illustrates the ideological and property-oriented line of thought of jurisprudence in that period, later described as exploitative by the socialist jurisprudence.[408] The thus-narrowed focus of jurisprudence to proprietary interests alone had an important consequence, namely that only proprietary obligations could have been perceived as genuine legal obligations. In other words, the question of liability for a debt was considered resolved by the assertion that a person was liable only for proprietary debts, and that only such debts could be considered as pre-positively binding, wherefrom the legitimacy of automatic liability through one's assets stemmed. Consequently, the replacement of responsibility with liability not only restricted the meaning of responsibility, but also restricted liability as such to liability for debts of a proprietary nature. Liability thus newly meant only liability through one's assets, which liability was universal and interchangeable with responsibility, as explained above.

Figuratively speaking, the circle of reasoning has thus been closed and we can see the causes that led to complete overlapping of liability and responsibility. Moreover, it

8. července 1904 [Tribute from the Czech Law School to Knight Antonín Randa on the occasion of his 70th Birthday, 8 July 1904]. Prague: Bursík & Kohout, 1904, pp. 278–279.

405 STIEBER, M. *Dějiny soukromého práva v střední Evropě [History of Private Law in Central Europe]*. Prague: private publication, 1930, pp. 153–154. See also Section 1204 ABGB.

406 For more details, see MARŠÁLEK, P. Česká právní věda mezi dvěma světovými válkami a její metodologie [Czech Jurisprudence and Methodology between the World Wars]. In: MALÝ, K., SOUKUP, L. (eds.) *Československé právo a právní věda v meziválečném období (1918–1938) a jejich místo ve střední Evropě. Svazek I [Czech Law and Jurisprudence in the Period between the World Wars (1918–1938) and their Place in the Central Europe. Volume I]*. Prague: Karolinum, 2010, pp. 66–73 or TRAKAL, J. Obnova problému přirozeného práva v soudobé literatuře právovědné a sociologické [Renewal of the Aspect of Natural Law in Current Legal-Theory and Sociological Literature]. In: *Pocta podaná českou fakultou právnickou panu Dr. Ant. rytíři Randovi k sedmdesátým narozeninám dne 8. července 1904 [Tribute from the Czech Law School to Knight Antonín Randa on the occasion of his 70th Birthday, 8 July 1904]*. Prague: Bursík & Kohout, 1904, p. 35.

407 For a critical review, see KELSEN, H. *Ryzí nauka právní [Pure Theory of Law*]. Prague: Orbis, 1933, pp. 25–27.

408 Ibid., p. 27.

is quite clear that liability and responsibility no longer had the same meaning as that ascribed to them before the adoption of the ABGB. The above-explained inconspicuous and, in hindsight, rather implicit development of the line of thought concerning private law and the concept of responsibility ultimately resulted in a disappearance, or more precisely narrowing, of the natural sense of the term responsibility and its replacement with a stricly positive-law sense of the term. Responsibility became liability. Liability became responsibility. Works published in that period, even the most representative and influential ones, started to use the terms responsibility and liability as if they had an identical meaning.[409]

10.4 A circular relationship between responsibility (liability) and duty

In the first half of the 20th century, the principle applied that, where a person was liable or responsible, for his debt, the debt simply and clearly represented a legally enforceable duty. From a theoretical point of view, this was certainly an interesting and novel finding,[410] which indeed predestined the future of responsibility in the Czech lands. Responsibility newly referred to a general sanction that secured a debt (the debt was still also referred to as an obligation), being in fact a mere secondary duty to bear responsibility of a punitive (negative) nature. In other words, the civil-law doctrine thus advocated an argument by tautology: a person who had a duty also bore responsibility (liability); and a person who did not bear responsibility (liability) did not have a duty.

In the above-described line of interpretation, the notions of duty, liability and responsibility logically implied each other. Naturally, such considerations were reflected in jurisprudence of that time, which newly engaged in serious research concerning the relationship between liability/responsibility and duty and strove to find a solution to the issues arising from such a shift. Initially, the essential difficulty in this respect lied in the new circular relationship between a duty and responsibility (liability). I will now look to into this problem in more detail.

Imagine a situation where I own a horse and you want to ride it. Following the school of legal thought of the first half of the 20th century, I have a subjective right, guaranteed by the positive law, to prevent anybody from riding my horse without my permission. Put in positive terms, everybody has a duty to refrain from riding my

409 Cf., for example, the publications mentioned in footnote 401 or SEDLÁČEK, J. *Obligační právo [The Law of Obligations]*. 2nd edition. Brno: Právník, 1933, pp. 268–272.

410 For example, Svoboda documents that Randa had not yet considered such shift at all in his influential opus *O závazcích k náhradě škody s přídavkem o úrocích [On Obligations to Pay Damages, and a Supplement on Interest]* (1899, 6th edition; 1912, 7th edition). Nonetheless, Svoboda argues that even Randa implicitly incorporated the idea that *"a person who is liable must compensate damage—and a person who has no such duty is not liable"* (SVOBODA, E. K otázce ručení za náhodu [On Liability for an Accident]. In: KRČMÁŘ, J. (ed.) *Randův jubilejní památník [Randa's Jubilee Memorial].* Prague: Charles University, Faculty of Law, 1934, pp. 483–484..).

horse unless I grant them my permission. Where does the well-nigh magical binding force of such duty stem from?

The prevailing opinion of the Czech jurisprudence in the first half of the 20th century held that a penalty was the fundament giving rise to the binding nature of legal duties. Weyr, for example, asserted that *"[o]nly the fact that a punishment or enforcement may be imposed on a person for certain behaviour implies that the opposite behaviour 'shall be' (is desired), i.e. represents the person's duty"*.[411] Indeed, at that time already, the overriding perception of a legal norm (i.e. a statement of a legal duty) was that of a hypothetical imperative: If A, then B.[412] In this respect, jurisprudence and scientific research could not have taken account of psychological tendencies which conceived rights and obligations from a subjective perspective. To this psychologically-oriented jurisprudence, the obligation could have been understood only via a certain sense of a binding requirement that the person shall do something (for example because the required outcome or action is simply felt or considered as honourable). On the contrary, the notion of duty had to be analysed from an objective perspective.[413]

Considering the above, what can represent an objective indication of a duty? It was a sanction, often taking the form of a penalty. In civil law, a sanction indicates liability. Having a duty to do something means that I am liable; being liable for something means that I have a duty to do that. Nonetheless, liability, as a secondary responsibility, also represents a sort of a duty. Consequently, even liability becomes a binding duty only if secured by a sanction. It follows that the notions of duty, liability and responsibility imply each other and overlap to a certain degree. Moreover, both liability and responsibility apparently imply a duty in the same sense. The duty of others to refrain from riding my horse without my permission is secured (subject to a penalty) by means of liability and responsibility alike. Simultaneously, such a penalty represents a legal duty in objective terms. That having been said, why then do we need three notions referring to the same thing? Indeed, liability represents a duty as well as responsibility, which logically means that responsibility is a duty, too.

411 WEYR, F. Povinnost a ručení [Duty and Liability]. In: ENGLIŠ, K., WEYR, F. (eds.) *Vědecká ročenka právnické fakulty Masarykovy university v Brně. Díl XII [A Scientific Yearbook of the Law Faculty of Masaryk University in Brno. Part XII]*. Prague: Orbis, 1933, p. 22.

412 In this sense, e.g. WEYR, ibid., p. 21; KELSEN, H. *Ryzí nauka právní [Pure Theory of Law]*. Prague: Orbis, 1933, pp. 15 et seq.; ROUČEK, F., SEDLÁČEK, J. et al. *Komentář k československému obecnému zákoníku občanskému a občanské právo platné na Slovensku a v Podkarpatské Rusi. Díl V [Commentary on the Czechoslovak Civil Code and Civil Law Applicable in Slovakia and in Carpathian Ruthenia. Part V]*. (Sections 1090 to 1341) [orig. 1937]. Prague: Codex Bohemia, 1998, pp. 669–670; SEDLÁČEK, J. *Obligační právo. 3. díl [The Law of Obligations. Part 3]* (orig. 1933). 2nd edition. Prague: Wolters Kluwer, 2010, p. 23; SEDLÁČEK, J. *Obligační právo. 1. díl [The Law of Obligations. Part 1]* (orig. 1933). 2nd edition. Prague: Wolters Kluwer, 2010, pp. 3–4; WEYR, F. *Teorie práva [Theory of Law]*. Prague: Orbis, 1936, pp. 34–35.

413 WEYR, F. Povinnost a ručení [Duty and Liability]. In: ENGLIŠ, K., WEYR, F. (eds.) *Vědecká ročenka právnické fakulty Masarykovy university v Brně. Díl XII [A Scientific Yearbook of the Law Faculty of Masaryk University in Brno. Part XII]*. Prague: Orbis, 1933, pp. 20, 23; KELSEN, H. *Ryzí nauka právní [Pure Theory of Law]*. Prague: Orbis, 1933, pp. 24–31.

10.4.1 A solution to the circular relationship by abandoning the notion of liability

Assuming that jurisprudence should be clear, elegant and use a minimum number of terms, we can understand why the Normative Legal Science (NLS) wished to clarify the theory of legal responsibility/liability/duty under civil law and remove either the circular relationship, or redundant terms in the Czech legal thinking of the first half of the 20th century. The NLS thus offered an interesting solution to the aforementioned issue of the circular definition, consisting in an idea that liability should be reserved for responsibility for a third-party duty. *"Where an enforcement act is aimed at a person other than the person whose conduct was a precondition for the enforcement act, we can describe the contents of such a duty as liability; there lies the difference between the notions of duty and liability, where liability appears to represent a special type of duty."*[414] *"The two notions—duty and liability—thus overlap if a negative precondition is met, namely that the merits for which the liability has arisen do not simultaneously give rise to a duty on the part of an entity other than the liable person."*[415] The notion of liability differs from the notion of obligation only in that *"the broader concept of 'liability for a thing' has been replaced with a more precise concept of 'liability for (a third) person'"*. [416]

Accordingly, the NLS believed that a third-party duty, rather than the duty of the liable person, constituted a precondition for arising of liability. This can be illustrated, for example, on liability of the owner of a car for an accident caused by the driver (a third person). While the car owner breached no duty of his own, the legal order usually imposes on him a duty to bear liability for the driver's acts. The concept of liability is thereby again redefined and obscured. Indeed, the available sources do not even allow clear determination of whether responsibility is to be reserved for responsibility-liability for one's own obligation *(Haftung)*, or whether it also encompasses responsibility-liability *(Haftung)* for a third person.

Interestingly, both Kelsen and Weyr played a key role in the re-definition of liability in relation to duty, although none of them expressly discussed the concept of "responsibility". Instead, they only focused on "liability" in their writings. Conceptually, their considerations were strictly confined to the notions of duty and liability (unlike the ABGB and the civil-law doctrine of the early 20th century). However, the elimination of the notion of liability actually meant that the problem of the circular relationship between liability and duty was transformed into an evident problem of a circular relationship between responsibility and duty. The reason is that once liability (for one's own obligation) ceased to constitute an essential element of a duty in Czech law, its role in this respect passed to responsibility to the full extent.

414 KELSEN, H. *Ryzí nauka právní [Pure Theory of Law]*. Prague: Orbis, 1933, p. 28.

415 WEYR, F. Povinnost a ručení [Duty and Liability]. In: ENGLIŠ, K., WEYR, F. (eds.) *Vědecká ročenka právnické fakulty Masarykovy university v Brně. Díl XII [A Scientific Yearbook of the Law Faculty of Masaryk University in Brno. Part XII]*. Prague: Orbis, 1933, pp. 28–29.

416 Ibid., p. 29.

This might appear quite surprising, considering that the wording of the ABGB ascribed a different meaning to the notion of liability. The NLS, however, perceived liability as a theoretical concept, rather than a positive-law term. From a normativist viewpoint, this position was not unique. *"The normative legal science pointed out the logical inconsistencies of many terms used by the 'traditional' legal doctrine and offered their own terminology, [… where the focal] point of their line of thought was the notion of a norm[, which] always implies duties"*.[417] Consequently, it was not surprising for the NLS critically to review the concept of liability, which in their opinion represented an important sanctional element of a legal norm and to provide its theoretical re-definition.

Moreover, many principal representatives of the Czech civil-law doctrine embraced, to greater or lesser extent, the NLS and the normativist perception of a legal norm, including Rouček, Sedláček or Krčmář.[418] A way was thus opened for rapid incorporation of the new normativist theoretical definition of liability into the Czech legal scholarship. Around the end of the first half of the 20th century, the concept of liability for one's own duty *("Haftung")* had already been replaced with responsibility, whereas the term liability was reserved for additional liability of a third person for someone else's duty. The importance of such a solution and its actual impact on the perception of responsibility in private law can be documented not only with reference to the draft Civil Code of 1937, which draft followed the NLS and differentiated between the terms liability and responsibility, but in particular with reference to the legislative regime of liability adopted after World War II. Through the latter, the normativist concept of liability was authoritatively embedded in positive law, which has remained in effect to the present.

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417 MARŠÁLEK, P. Česká právní věda mezi dvěma světovými válkami a její metodologie [Czech Jurisprudence and Methodology between the World Wars]. In: MALÝ, K., SOUKUP, L. (eds.) *Československé právo a právní věda v meziválečném období (1918–1938) a jejich místo ve střední Evropě. Svazek I [Czech Law and Jurisprudence in the Period between the World Wars (1918–1938) and their Place in the Central Europe. Volume I]*. Prague: Karolinum, 2010, p. 68.

418 In this respect, see, e.g., ROUČEK, F., SEDLÁČEK, J. et al. *Komentář k československému obecnému zákoníku občanskému a občanské právo platné na Slovensku a v Podkarpatské Rusi. Díl V [Commentary on the Czechoslovak Civil Code and Civil Law Applicable in Slovakia and in Carpathian Ruthenia. Part V]*. (Sections 1090 to 1341) [orig. 1937]. Prague: Codex Bohemia, 1998, pp. 669–670; SEDLÁČEK, J. *Obligační právo. 3. díl [The Law of Obligations. Part 3]* (orig. 1933). 2nd edition. Prague: Wolters Kluwer, 2010, p. 23; SEDLÁČEK, J. *Obligační právo. 1. díl [The Law of Obligations. Part 1]* (orig. 1933). 2nd edition. Prague: Wolters Kluwer, 2010, pp. 3–4; KRČMÁŘ, J. *Právo občanské. I. díl: Výklady úvodní a část všeobecná [Civil Law. Volume I: Preamble and the General Part]*. Prague: Všehrd, 1927, pp. 70–71. For secondary literature, see WEYR, F. Povinnost a ručení [Duty and Liability]. In: ENGLIŠ, K., WEYR, F. (eds.) *Vědecká ročenka právnické fakulty Masarykovy university v Brně. Díl XII [A Scientific Yearbook of the Law Faculty of Masaryk University in Brno. Part XII]*. Prague: Orbis, 1933, pp. 30–31; or MARŠÁLEK, P. Česká právní věda mezi dvěma světovými válkami a její metodologie [Czech Jurisprudence and Methodology between the World Wars]. In: MALÝ, K., SOUKUP, L. (eds.) *Československé právo a právní věda v meziválečném období (1918–1938) a jejich místo ve střední Evropě. Svazek I [Czech Law and Jurisprudence in the Period between the World Wars (1918–1938) and their Place in the Central Europe. Volume I]*. Prague: Karolinum, 2010, p. 69.

The replacement of liability with responsibility within the structure of a legal norm inevitably transposed the original problem of the circular relationship between liability and duty into a problem of the circular relationship between responsibility and duty. A new question thus arose as to how the notions of duty (D) and responsibility (R) could be different where a duty implied responsibility and, simultaneously, responsibility implied a duty. Illustrated schematically, how is it possible that $D \neq R$, where $(D \Rightarrow R) \wedge (R \Rightarrow D)$? Indeed, it follows from the above that $(D \neq R) \wedge (D \Leftrightarrow R)$, which is logically a contradiction. The Czech jurisprudence dedicated more than half a century to solve the problem and still has not come to a satisfactory conclusion. But that is a problem for a different study.[419]

10.4.2 The first loss of the meaning of responsibility

At this stage, we can already arrive at quite a qualified conclusion that responsibility was deprived of its original meaning around the end of the first half of the 20th century. In fact, the re-consideration and subsequent abandonment of the term "liability" and its replacement with the general term "responsibility" completely changed the context that originally gave responsibility its meaning. Unlike in the time when responsibility was introduced into the Czech doctrinal legal discourse, i.e. when it meant a duty to respond or duty to provide legally relevant grounds for one's acts (primary, substitutive or sanctional responsibility), the term "responsibility" was doctrinally understood only as a secondary response within the context of a legal norm in around mid-20th century. The term responsibility newly described only a secondary response of either substitutive or sanctional nature. The original meaning of responsibility as a duty to give primary reasons of one's acts (primary responsibility) had therefore partly disappeared.

Moreover, in the realm of civil law, responsibility no longer applied to rights other than those pertaining to property, and thus to norms other than those protecting proprietary interests. Finally, this has lead to a third narrowing and a partial loss of the meaning of responsibility, consisting in the fact that responsibility was newly linked to a positive legal norm, and not to a general norm that makes part of the legal order (normative system) in the broadest sense of the word.

All the three aforementioned moments, i.e. (1) the loss of the meaning of responsibility as primary, rather than only secondary duty to respond; (2) the loss of the meaning of responsibility as a duty to respond under norms governing non-proprietary interests; and (3) the loss of the meaning of responsibility as a duty to respond under the order of law in the broadest possible, rather than merely positive-law, sense of the word, actually affected doctrinal responsibility, i.e. responsibility-liability *("Haftung")*, and not to jurisprudential responsibility *("Verantwortung")*. Notwithstanding

[419] See more in JANEČEK, V. *Kritika právní odpovědnosti [Critique of Legal Responsibility]*. Prague: Wolters Kluwer, 2017.

the above, the NLS, and later also the socialist jurisprudence, gave precedence to a structural and formalistic approach to law, which approach linked legal norms and legal responsibility with a formal positive stipulation of law, i.e. with the legislative text. Responsibility *("Verantwortung")* was thus completely disregarded by jurisprudence. Even today, it is still claimed in Czech jurisprudence that responsibility is not a legal notion, in reliance on an erroneous assumption that responsibility has only one meaning, either legal, or non-legal.[420]

Such a shift and loss of meaning of responsibility, which, for the above-explained reasons, could have only occurred in Czech jurisprudence and which were inconceivable, for example, in Austrian or German jurisprudence, have never been reflected in the current or older available literature. The overlapping of liability *("Haftung")* and responsibility *("Verantwortung")* is somewhat incidentally considered natural and Czech legal theory applies the same concepts in deliberations concerning foreign laws, where it errs, in my opinion. Ultimately, Czech jurisprudence thus unfortunately completely ignores foreign influences and lines of thought conceiving private-law responsibility outside the above-described conceptual framework which I consider arbitrarily distorted.

10.4.3 Interim conclusions

In the previous text, we saw why and how, in the Czech civil law, the term responsibility became identical to the German concept of *"Haftung"* (liability) which was indeed also translated as liability in the Czech version of the ABGB. Secondly, we saw how such overlapping might have affected our perception of responsibility. To find the answer, we went through a historical, doctrinal and comparative analysis of primary and secondary sources written in the Czech and German languages. This approach has revealed that, during the Czech legal history, the notions of liability and responsibility underwent quite dramatic doctrinal and positive-law changes which shaped the mutual relationship of those concepts.

In the analysis, we briefly scrutinised the institute of liability before the adoption of the ABGB (mainly by looking at liability through one's honour and faith, as well as through one's assets). We looked at how liability evolved, including how it evolved in its relationship with the institute of responsibility (mainly in the time around and after the adoption of the ABGB, as well as in the period until the end of the first half of the 20th century). Put briefly, the relationship between liability and responsibility has been completely reversed during the analysed period. Originally, responsibility and liability had been clearly distinguished (responsibility for an act, debt or obligation had not been conditional on liability had or associated with enforceability;

[420] For example, HANDLAR, J. Právní odpovědnost – netradiční zamyšlení nad tradičním pojmem [Legal Responsibility—Unconventional Considerations on a Conventional Term]. *Právník*. 2004, Vol. 144, pp. 1054–1065.

liability had represented an independent obligation); subsequently, upon adoption of the ABGB, the two notions started to overlap until eventually, at the turn of the 19th and 20th centuries, they have become completely identical, at least from the perspective of the then contemporary theory of law, under the influence of the *"Schuld und Haftung"* doctrine and due to other circumstances. At that time, i.e. at the end of the 19th century, the meaning of responsibility was restricted to a substitutive or sanctional duty securing an economic right, i.e. what can essentially be characterised as general liability through one's assets. A duty implied liability and liability implied the duty. Accordingly, liability and responsibility were, figuratively speaking, shadows of every debt.

Later, it was emphasized that liability could bind the debtor regardless of whether such liability secured a duty (an obligation) or a mere legal fact. Liability could mean both the shadow of a debt (one's own duty), but also an independent obligation. The latter meaning could be found, for example, in cases of liability for a third person or liability for accidental damage. The Normative Legal Science therefore subjected the institute of liability to a methodical scrutiny, leading to a necessary conclusion that the binding nature of a duty stipulated in a legal norm could not stem from liability. Consequently, the NLS reserved the term liability for a separate obligation that did not secure the liable person's own duty. Simultaneously, the notion of responsibility was thereby re-defined. The binding nature of the debtor's primary duty was thus newly derived from the fact that the debtor bore responsibility, i.e. that the primary legal norm was secured by a secondary legal norm stipulating responsibility. Around the end of the analysed period, i.e. around the end of the first half of the 20th century, the meaning of responsibility was thus diametrically different from its original meaning that was attributed to it upon its introduction into the Czech legal discourse in 1811.

Firstly, responsibility was newly defined only as a secondary duty to respond, the purpose of which was to secure a primary duty. Hence, responsibility was implicitly associated with only a substitutive and sanctional form of the legal response. Responsibility has thereby partly lost its meaning as responsibility to respond under a given legal order, including responsibility as giving primary reasons for one's acts.

Secondly, due to the strong proprietary orientation of civil law, where assets and ownership were of the utmost importance, the aforementioned secondary responsibility was defined merely as a duty to provide a response in the form of substitutive or sanctional proprietary performance, or in the form of substitutive or sanctional performance for a breach of a duty stipulated by a norm protecting the proprietary rights or proprietary interests of the injured person. This has lead to a further partial loss of the meaning of responsibility as a proper duty to respond under norms that would also protect non-proprietary interests.

Thirdly, responsibility was newly subjected to a legal order in the sense of positive law, meaning that the duty to respond had to be stipulated in a positive-law norm. The new definition of responsibility hence directly affected doctrinal responsibility *("Haftung")* and not the general or jurisprudential responsibility *("Verantwortung")*. Nonetheless, this notional difference was completely blurred in the Czech

legal thinking which conceived of both these types of "responsibility" as a single comprehensive institute. The above-described developments have substantially obscured the important non-positivist meaning of responsibility, which had been attributed to the abstract institute of responsibility upon its introduction into the juristic discourse in 1811. Responsibility was hence deprived of its meaning as a duty to respond under the order of law in the widest possible sense of the word, rather than merely in a positive-law sense.

That being the case, the subsequent development of Czech legal scholarship was based solely on a reflection of legal responsibility which had been largely deprived of its original meaning. At the same time, this curious genealogy of the terms responsibility and liability allowed the NLS to ask what difference (if any) existed between liability for one's own duty and vicarious liability for another person's duty. This will be our focus in the following section.

10.5 The normativist account of vicarious liability

We have now seen the context in which František Weyr presented his argument[421] in favour of what very closely resembles an institute that common law calls vicarious liability. In fact, we have seen that his argument was not directed at advocating vicarious liability but at solving a different problem, namely the problem of a legal duty in relation to secondary liability. The theoretical concept of vicarious liability, as opposed to liability, may thus be seen as a side effect of Weyr's NLS theory. In this section, I will focus on the normativist (NLS) theory of vicarious liability and aim to advance the NLS argumentation.

We have seen that Weyr argued for a strict separation of general liability for one's own duty from special liability for another person's duty. He suggested that we should call the first type of liability "responsibility", whereas the second type of liability should remain, according to him, entitled simply "liability". From a theoretical viewpoint, though, he could have also suggested that we call the first type of (general) liability simply as liability, and the second type of (special) liability as vicarious liability. Had he taken such step, the Czech private law scholarship would have probably developed in a way that would be much closer to the common law approach to vicarious liability.

Weyr, however, used different strategy and terminology, thereby affecting how normative legal theory understood the notion of responsibility. In particular, since he reserved the notion of responsibility as a term for liability for one's own lawful or wrongful transactions, the term responsibility implicitly contained the ability of an agent to give secondary explanation (reasons) of their own actions. Analytically, had

[421] WEYR, F. Povinnost a ručení [Duty and Liability]. In: ENGLIŠ, K., WEYR, F. (eds.) *Vědecká ročenka právnické fakulty Masarykovy university v Brně. Díl XII [A Scientific Yearbook of the Law Faculty of Masaryk University in Brno. Part XII]*. Prague: Orbis, 1933.

the person been responsible for actions of a person distinct form himself or herself, then such responsibility must have fallen under the scope of "liability" (in Weyr's terminology), or vicarious liability (in the common law terminology).

It is important to stress that the NLS understood both liability and responsibility as notions that are intertwined with a notion of a legal obligation, or more precisely a legal norm, in which both liability and responsibility can only arise as a result of some liability/responsibility generating event—in this case a breach of a duty. In cases that we would normally call cases of strict liability, i.e. where the liability generating event could be seen as a mere outcome, the NLS would describe such liability as a primary duty, i.e. as a duty that is not generated by a wrong. In other words, strict liability (such as in the case of Section 2914 or 1935 of the Czech Civil Code) could be better described by the NLS as a primary duty, rather than as a secondary remedy.

Now, if we accept such interpretation and restrict the meaning of the term liability and responsibility to *"a secondary remedial response to a breach of a primary duty (a legal wrong)"*, then it must be the case that every legal system that contain such remedial norms need to be able to construct, at least in theory, vicarious liability. The reason is that a person to whom a legal system ascribes a secondary remedial duty in response to a breach of primary duty can be held liable or responsible only for breach of either its own primary duty, or someone else's primary duty. In the first case, the person is individually responsible (and thus could be held, in the common law terminology, liable) for its own duties, whereas in the second, he could be held vicariously liable for duties of other's. Under the NLS framework, these two combinations of secondary liability exhaust the universe of all possibilities and, therefore, we can conclude that vicarious liability is theoretically a necessary feature of every legal system that contains remedial legal norms.

Let us expand on this argument by focusing on the concept of duty. One can argue that a person can be liable for breach of that person's own duty in two ways—either by legally relevant conduct of the liable person, or by conduct of a third person. The same would apply to vicarious liability for breach of duties of other persons—these duties can be breached either by the conduct of the liable person, or by the conduct of a third person. Such an approach seems analytically correct and implies a different distinction, namely a divide between liability for one's own conduct and for conduct of others.

From this viewpoint, one could easily formulate an objection that if we were to adopt such distinction, the NLS idea of vicarious liability would become irrelevant. If we would be distinguishing the types of liability by reference to an extra-normative notion of conduct (factual behaviour) of the liable person and of third persons, the difference between liability for one's own conduct and liability for one's own wrong would be blurred. Liability for conduct and liability for wrong are however not the same thing. By the same token, once we start combining legal considerations (a wrong) with factual considerations (conduct), we would not be able to distinguish between vicarious liability for legal wrongs of others, and vicarious liability for conduct of others. Again, these are not the same thing. From the NLS viewpoint, liability

as well as vicarious liability are, however, purely legal notions and they cannot be confused with attribution of the factual conduct. This objection must, therefore, be rejected.

10.6 Vicarious liability as the only form of secondary liability of juristic persons

The last point about factual conduct brings us to a peculiar conclusion regarding liability of juristic persons and other artifical legal entities. From a factual point of view, juristic persons cannot perform any conduct themselves. From a normative viewpoint, law thus cannot ask them ever to provide any explanation (reasons) for their own conduct or legal transactions. All their transactions are factually derived from the legally relevant conduct transactions of natural persons (human individuals). This means, conceptually, that juristic persons can only be attributed conduct of others, and therefore, they cannot themselves breach neither their own nor anyone else's primary legal duty. In other words, juristic persons cannot be liable themselves but must be (conceptually) attributed liability for conduct of third persons.

Now, should we accept the NLS distinction between responsibility for one's own legal wrongs and (vicarious) liability for third person's wrongs, it is, again conceptually, only possible for juristic persons to be liable vicariously. The reason is that a juristic person cannot be solely responsible for its own duties because these primary duties must always be also duties of the juristic persons representatives, employees or agents whose conduct and whose wrongful transactions are then ascribed or attributed to the juristic person. In other words, a juristic person can only be responsible derivatively (as set out expressly in Section 167 of the Czech Civil Code), meaning that it can only be liable vicariously.

Overall, by adopting the NLS terminology and its theory of liability and responsibility, we can argue that juristic persons cannot be individually responsible, or directly liable for their own actions. They can be liable only vicariously for *wrongs* of others. This notion of juristic persons' liability strongly resembles the common law concept of vicarious liability. A further comparison of the two concepts would, however, be needed if we were to advocate a claim that these two legal institutions are the same and that, analogically, in the common law juristic persons also can be held liable only vicariously. Finally, it is important to stress that the argument about juristic persons' vicarious liability does not apply to liability for outcomes (strict liability). It only applies to liability for duty-based wrongdoing, i.e. secondary liability.

CHAPTER ELEVEN
ADMINISTRATIVE-LAW LIABILITY OF JURISTIC PERSONS

11.1 Introduction

The legal regulation of the public-law (administrative) liability of juristic persons and natural persons operating a business has undergone considerable development in Czech law over the past half century. The original concept of administrative offences committed by organisations, existing under the socialist system, was replaced after 1989 by a modified concept of (so-called) "other administrative offences" of juristic persons and of natural person operating a business. The first part of this paper describes the conditions before 2017. During the almost three decades which have passed since 1989, the issue of an inadequate legislative basis for this type of administrative punishment has grown considerably in importance, *nota bene* in a situation where this type of punishment also falls within the scope of Art. 6 of the Convention, and should thus be subject to increased constitutional requirements. A fundamental change took place in July 2017, with the effect of new Act No. 250/2016 Coll., on liability for infractions and proceedings concerning infractions. The new Act, which will be subject to analysis in part two, codified the basic procedural and substantive aspects of administrative punishment, and also brought the notions of infractions and administrative offences together in a single category titled "infractions" while, however, maintaining certain important specific features related to infractions committed by juristic persons and by natural persons operating a business. Nonetheless, the substantive definition of the merits of infractions committed by juristic persons and natural persons operating a business remains scattered over hundreds of special laws and, moreover, proceedings on these infractions continue to be conducted separately before various administrative authorities. Consequently, part three focuses on conformity of this state of affairs with the requirements following from case-law of the European Court of Human Rights.

11.2 Czech legislation on administrative offences committed by juristic persons until 1 July 2017

Until 2017, the legislation on administrative offences was a reflection of the spontaneous and unsystematic development, which mostly commenced in the 1960s. As noted by V. Mikule, *"before and during the war, occasional attempts were already being made to extend liability for infractions also to juristic persons […] Later, after almost complete étatisation, the same aim was pursued in a quite straightforward manner—by laying down special administrative offences committed by governmental, co-operative and other organisations (i.e. juristic persons) which were not subject to subsidiary application of the infraction codices."*[422]

After the socialist regime fell in 1989 and the related changes took place in society, special administrative offences of "organisations" (newly, of course, juristic persons) were also extended to natural persons operating a business (*"When natural persons, too, were allowed to operate economic and other businesses, the special administrative offences applicable to organisations were simply transformed into offences committed by juristic persons and natural persons operating a business."*[423]). Of course, the phrase "operating a business" pertains only to natural persons; this condition does not apply in administrative punishment of juristic persons.[424]

It should be noted that even during this century, many lawyers still could not decide *"whether this concept continues to have a rationale at the current stage of social and legal development, or whether it was rather merely a response to the new state of affairs after 1989. Indeed, until then, business activities of natural persons had been almost unknown in law; individuals began pursuing activities that had previously been a monopoly of organisations."*[425] However, the modified concept of liability under administrative law of juristic persons and of natural persons operating a business will continue to exist in the third decade of the 21st century—and rightly so, I should add. The rationale behind this concept lies *"especially in the major economic strength, growing influence and importance of industrial and commercial companies, and the scope of their rights and obligations, which entail substantial risks and often serious unlawful conduct."*[426]

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422 MIKULE, V. Ústavní zakotvení a historické aspekty správního trestání. Kolokvium o správním trestání [Constitutional Basis and Historical Aspects of Administrative Punishment. A Colloquium on Administrative Punishment]. *Správní právo*. 2002, No. 1, p. 4.

423 Ibid, p. 4.

424 Cf., e.g., the judgement of the Supreme Administrative Court of the Czech Republic of 9 July 2009, File No. 7 As 17/2009-61, No. 2408/2011 Coll. of SAC, *Zayferus o. p. s.*

425 PRÁŠKOVÁ, H. K některým otázkám reformy správního trestání. Kolokvium o správním trestání [Certain Aspects of the Reform of Administrative Punishment. A Colloquium on Administrative Punishment]. *Správní právo*. 2002, No. 1, p. 10. Cf. also in respect of this topic, in general, PRÁŠKOVÁ, H. *Základy odpovědnosti za správní delikty [Bases of Liability for Administrative Offences]*. Prague: C. H. Beck, 2013.

426 This is how continued existence of the modified concept of corporate liability for administrative offences (from 2017, "infractions") was substantiated in the explanatory memorandum on Act

The spontaneous development of the legislation on *"other administrative offences of juristic persons and of natural persons operating a business"* also took its toll on the regulation of administrative offences applicable until comprehensive recodification was adopted in 2016 (by virtue of Act No. 250/2016 Coll., on liability for infractions and proceedings concerning infractions, effective from 1 July 2017). "Other administrative offences" were scattered over hundreds and thousands of various laws, in varying and random forms. There was no law whatsoever that would provide for general aspects of punishment and address specific features of procedures related to administrative offences (indeed, major problems were frequently caused by the application of the general provisions enshrined in the Code of Administrative Procedure, which as such is not conceived for administrative punishment), etc. It was even unclear what would happen to liability for an offence in case of transformation of a juristic person, its termination with a legal successor (or without a legal successor), etc.

As noted by the legal doctrine at that time, the rapid growth of administrative punishment *"is often spontaneous, the merits of offences are not defined carefully, definitely and specifically, the amounts of penalties are not set on the basis of analysis of the typical gravity of offences and their comparison with offences in other fields of public administration, but rather randomly, according to preferences and needs of the individual sectors [...] the amounts and strictness of the fines imposed by administrative authorities for administrative offences contrast with the options available to courts in respect of crimes, and have been justifiably criticised."*[427]

Until 2002, i.e. the year when a major debate on administrative punishment took place, also encompassing a debate on the substantive intent of the Administrative Punishment Act, law-making in the field of administrative criminal law had lacked a logical basis and the individual regulations had been created without any systemic approach. As noted by H. Prášková on the issue of rates of fines, *"the laws do not differentiate among these rates according to the typical gravity of the unlawful acts, and criteria for setting the penalties are either entirely lacking or are insufficiently definite"*.[428]

Since 2002, the legislature has attempted to draw up at least some unifying criteria, e.g. criteria for imposing penalties. Irrational differences thus tended to arise between older and newer provisions in the practice of imposing penalties, and it even occurred that such differences could be seen between new rules adopted by the Government, on the one hand, and rules randomly formulated during the legislative process in the Parliament, on the other hand.

For illustration, there were certain laws which were so similar in their purpose and protected object that it was hard to explain why they comprised different criteria for

No. 250/2016 Coll., on liability for infractions and proceedings concerning infractions.

427 PRÁŠKOVÁ, H. K některým otázkám reformy správního trestání. Kolokvium o správním trestání [Certain Aspects of the Reform of Administrative Punishment. A Colloquium on Administrative Punishment]. *Správní právo*. 2002, No. 1, p. 6.

428 Ibid, p. 7.

setting sanctions. On the one hand was Act No. 254/2001 Coll., on waters (the Water Act) and, on the other, later Act No. 86/2002 Coll., on protection of the air (repealed in 2012). Both of these laws aimed to protect one of the components of the environment and prevent its pollution or other damage (unauthorised withdrawals of water, pollution of water, pollution of the air, etc.). The two laws set variously differentiated penalties for administrative offences, while the maximum amount of the fine was set identically in both of them, at CZK 10,000,000. In spite of the similar purposes of the two laws, the principles for imposing penalties for violation of their provisions differed—the Air Protection Act set exhaustive criteria for imposing fines,[429] while the Water Act comprised mostly non-exhaustive lists of criteria.[430] If one attempted to determine what led the legislator to adopt the individual criteria, he could solely depend on the explanatory memoranda—which normally should explain the legislator's intention—that *"the provision was taken from the former regulation and further specified"* and that *"within this provision, principles were proposed for decision-making on the amounts of fines"*.[431] However, the explanatory memorandum on the Air Protection Act does not provide any answer to the question of why the principles were drafted as they were, and no further debate was held in the Parliament on this subject.[432]

Numerous examples could be mentioned to this effect. They would relate not only to the criteria for imposing penalties, but also, in particular, to types of no-fault liability, (im)possibility of exoneration, etc. Many laws were based on no-fault liability without possible exoneration,[433] while a number of others did contain grounds for exoneration, but these grounds differed in the individual pieces of legislation. The legal regulation of "other administrative offences" of juristic persons and of natural persons operating a business developed into a confusing jungle where liability for an

[429] Act No. 86/2002, Section 41 (3) read as follows: *"When making a decision on imposing a fine, the air protection body shall take into account the gravity of breach of a statutory duty, the duration of the unlawful state of affairs, the amount of damage incurred or imminent and the consequences of the unlawful state of affairs, if any."*

[430] E.g., Sections 118 (2), 119 (2) and 122 (2) of the Water Act, all in the wording applicable until 31 July 2010. In contrast, however, the administrative authority imposed fines for breach of duties regarding the use of surface waters for navigation based on exhaustively listed criteria (Section 121 (2)).

[431] The Chamber of Deputies of the Parliament of the Czech Republic, parliamentary press No. 912/0, electoral term 1998–2002, explanatory memorandum on Sections 40 and 41 of the Air Protection Act (www.psp.cz).

[432] Moreover, it is worth noting in respect of the Water Act that its Section 121, comprising (unlike other provisions) an exhaustive list of criteria for determining the amount of a fine, was introduced into the Act based on an amending motion although it differed from the other provisions in its nature (the stenographic record of the 3rd reading of press No. 688, which took place at the 36th meeting on 18 May 2001 and where a vote took place on the amending motion, indicates only that 106 of the 174 deputies present voted for the motion and 56 against the motion—see information from the web depository of the Chamber of Deputies at http://www.psp.cz/).

[433] However, even in these cases, the case-law managed to infer certain grounds for exoneration, e.g. in situations where a major contribution to the unlawful state of affairs was made by the non-functioning public administration (cf. judgement of the Supreme Administrative Court of the Czech republic of 18 April 2013, File No. 1 As 188/2012-30, No. 2872/2013 Coll. of SAC, *ZAYFERUS, o.p.s.*).

offence differed not only among laws, but even among individual provisions of one and the same law.

A substantial role was left to creative case-law of administrative courts, especially the Supreme Administrative Court. By drawing analogies with criminal law, the courts established such important norms and rules as the concept of lasting and continuing offence, the rules of punishment, proceedings on concurrent (competing) offences, including their punishment, passage of liability for an offence, etc.[434] Thus, entirely at variance with theoretical rules, both substantive and procedural norms of administrative punishment were created as *judge-made law*—this naturally did not contribute to legal certainty in this area.

This highly fragmented regulation was often criticised by legal theorists. They pointed out that, for example, the requirement for equality of citizens before the law was not met if *"the existence of various types of administrative offences, with different objective and subjective prerequisites of liability and different systems of penalties"*, was not justified *"by functionality, rationality and necessity"*.[435] The principle of equality before the law was also endangered where the legislature arbitrarily laid down criteria for the imposition of penalties, thus putting into unequal positions those who were punished for similarly grave violations of a public interest (see the example given above).

11.3 New regulation of corporate liability for administrative offences existing since 2017

The absence of uniformity and logic in the field of administrative punishment forced the Ministry of Interior to draw up a new concept of administrative punishment at the turn of the millennia, which aimed to return the regulation of this subject *"to a single track, in both material and procedural terms"*.[436] The reason for this step was that the existing legal regulation of administrative offences was incoherent, non-uniform and lacking any logical basis. The Draft substantive intent of the Administrative Punishment Act also viewed this field of law in negative terms: *"The current state of affairs is characteristic especially for the existence of a chaotic bunch of laws adopted at various times, and the corresponding amounts of fines. Where older laws envisage fines in the order of hundreds of thousands, the newer ones lay down an upper limit of millions. Co-ordination in this area is non-existent."*[437]

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[434] In general, cf. BOHADLO, D., POTĚŠIL, L., POTMĚŠIL, J. *Správní trestání z hlediska praxe a judikatury [Administrative Punishment in Practice and Case-law]*. Prague: C. H. Beck, 2013.

[435] HENDRYCH, D. *Správní právo. Obecná část [Administrative Law. General Part]*. 6th edition. Prague: C. H. Beck, 2006, p. 415.

[436] MIKULE, V. Ústavní zakotvení a historické aspekty správního trestání. Kolokvium o správním trestání [Constitutional Basis and Historical Aspects of Administrative Punishment. A Colloquium on Administrative Punishment]. *Správní právo*. 2002, No. 1, p. 4.

[437] Draft substantive intent of the Administrative Punishment Act, p. 10.

It took almost twenty years to accomplish what was initiated at the very beginning of the 21st century. Act No. 250/2016 Coll., on liability for infractions and proceedings concerning infractions, was adopted in July 2016. The Act is quite ambitious as it unifies—as indeed originally planned—the existing regulation of infractions (which originally could only be committed by natural persons) and "other offences" of juristic persons and of natural persons operating a business, doing so in both procedural and substantive terms. The current terminology no longer distinguishes between infractions (of natural persons) and "other administrative offences" of juristic persons and of natural persons operating a business. The Act designates both as infractions; moreover, it explicitly provides that infractions and the former "other administrative offences", with the exception of disciplinary offences, are both perceived as infractions under the new Act (Section 112 (1)) as from the effective date of the Act (1 July 2017). The basic rules remain the same; however, the Act comprises some specific rules related to liability of juristic persons for infractions.

To a certain degree, the new regulation was inspired by the logic of corporate criminal liability.[438] The latter is based on the fiction of a juristic person which does not act itself but can be encumbered (its liability for infractions established by) natural persons acting for it or for its benefit. In the spirit of corporate criminal liability, the Act thus works with imputability of the acts of certain natural persons to a juristic person.[439]

A juristic person can thus commit an infraction if the elements of an infraction were established by the conduct of a natural person who is considered, in terms of assessing liability of the juristic person for an infraction, a person whose acts are imputable to the juristic person[440] and who breached a legal duty imposed on the juristic person within an activity of the juristic person, in direct connection with an activity of the juristic person or for the benefit of the juristic person or in its interest; breach of a legal duty imposed on a juristic person is also deemed to mean a breach of a legal duty imposed on its organisational component or some other body that forms part of the juristic person (Section 20 (1) of the Liability for Infractions Act).[441] It is thus crucial that a duty imposed on the juristic person has actually been breached; e.g. if a person driving a vehicle belonging to a juristic person exceeds the speed limit

438 See Act No. 418/2011 Coll., on corporate criminal liability and prosecution.

439 Cf. BERAN, K. How Criminal Liability of Juristic Persons Depends on the Concept of Juristic Persons in Private Law. *European Criminal Law Review*. 2015, No. 2, pp. 161–194.

440 According to Section 20 (2) of the Liability for Infractions Act, the following are considered persons whose acts are imputable to a juristic person, with a view to assessing the juristic person's liability for an infraction: a) the governing body or member of the governing body; b) another body of the juristic person or its member; c) an employee or a person in a similar position in the performance of tasks following from that position; d) a natural person who is performing tasks of the juristic person; e) a natural person who is used by the juristic person in its activity; or f) a natural person who has acted for the juristic person if the latter has utilised the result of such action.

441 Inspiration drawn from Section 8 of Act No. 418/2011 Coll., on corporate criminal liability and prosecution, is quite clear in this sense.

while working for the juristic person, the juristic person cannot be considered to have committed an infraction because it has no such duty.[442]

Identification of the specific natural person who acted in the given case and whose acts are imputable to a juristic person could, however, be an obstacle to punishing the juristic person in many cases. Indeed, while it is clear in a number of routine cases that an infraction was committed by a juristic person in its activity, the specific person is nonetheless never identified. This will typically occur in the case of various environmental infractions, such as leaks of substances endangering the environment from a factory, where the search for the person who actually discharged the substance is often unsuccessful. Another typical example will be a case where a sales outlet fails to issue a receipt to a customer,[443] or where the personnel of a restaurant serve alcohol to an underaged person[444]—it is irrelevant in both cases which employee specifically failed to comply with the duty to issue a receipt or not to serve alcohol as it is beyond doubt that the infraction occurred in an activity of the juristic person.

The Act therefore further specifies that liability of a juristic person for an infraction is not conditional on identifying a specific natural person, especially if it is apparent from the established facts that the conduct giving rise to liability of the juristic person for the infraction occurred within an activity of the juristic person (Section 20 (6) of the Liability for Infractions Act). In this respect, the Act goes further than the comparable provision of Act No. 418/2011 Coll., on corporate criminal liability and prosecution, which simply states that criminal liability of a juristic person is not excluded in cases where it is not established which specific natural person acted in the manner set out in the Act (Section 8 (3)). However, I cannot see any dramatic difference in this respect—after all, the fact that an infraction occurred in an activity of a juristic person constitutes the basis for legal responsibility in administrative cases.

Moreover, just to be certain, the Act states the obvious, i.e. that liability of a juristic person for an infraction in no way prejudices liability of a natural person for an infraction and, *vice versa*, that liability of a juristic person for an infraction is not prejudiced by liability of a natural person for an infraction (Section 20 (6) of the Liability for Infractions Act).[445]

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442 This differs from subsidiary liability of the operator of a vehicle pursuant to Section 125f of Act No. 361/2000 Coll., on road traffic and amendment to certain laws (the Road Traffic Act), which is invoked in cases where the actual offender—a natural person—has not been established.

443 See Section 29 (1)(b) of Act No. 112/2016 Coll., on records of sales: A juristic person or a natural person operating a business commits an infraction by failing, as a person required to record sales, to issue a receipt to a person from whom income to be recorded is obtained.

444 See Section 36 (1) of Act No. 65/2017 Coll., on protection of health against harmful effects of dependency producing substances.

445 The same conclusion was also reached in case-law relating to the previous legislation—cf. the judgement of the Supreme Administrative Court of the Czech Republic of 19 January 2017, File No. 10 As 225/2016-57, paragraphs 45–49. Cf. Section 9 (3) of Act No. 418/2011 Coll., on corporate criminal liability and prosecution, which provides that criminal liability of a juristic person in no way prejudices criminal liability of natural persons listed in Section 8 (1) and criminal liability of such natural persons in no way prejudices criminal liability of a juristic person.

A major innovation lies in the fact that the Act abandoned the concept of absolute no-fault liability of juristic persons and natural persons operating a business for "other administrative offences", as provided by certain laws. Now, all former "other administrative offences" (newly termed "infractions") are subject to no-fault liability with possible exoneration. According to Section 21 of the Liability for Infractions Act, a juristic person is not liable for an infraction if it demonstrates that it used every effort that could possibly have been required to prevent the infraction (Section 21 (1)).[446] The Act leaves interpretation of this provision to subsequent administrative practice, but provides at least one explicit example when exoneration is not possible: *"A juristic person cannot be exonerated from liability for an infraction if it failed to perform the obligatory or necessary control over a natural person who is considered, in terms of assessing liability of the juristic person for an infraction, a person whose acts are imputable to the juristic person, or if the necessary measures have not been taken to prevent or avoid the infraction"* (Section 21 (2)).

It is worth mentioning that Section 21 imposes on the juristic person the burden of assertion and burden of proof in demonstrating that it used *"all efforts that could possibly have been required to prevent the infraction"*. The explanatory memorandum states in respect of Section 21 that these are *"measures that it was objectively capable of taking (in particular, ensuring sufficient and regular control by the employer over its employees, various preventive measures, protection of property, levels of management, etc.). The use of all efforts must be assessed objectively, rather than subjectively, and grounds for exoneration will therefore not apply in cases of subjective economic difficulties and cases where the person liable was obliged to overcome or eliminate the obstacles to the performance of the duty (e.g. a lack of an official permission), etc."*

The actual performance of obligatory or required control over employees and other persons does not mean, in itself, that the juristic person will be exonerated. I understand Section 21 (2) in that it lists situations where exoneration is not possible. However, this provision certainly does not lend itself to interpretation *a contrario*, i.e. that a juristic person will be exonerated if it complies with it. The Act intentionally phrases the exoneration principle in general terms and the result will thus depend on the overall context of each case, the type of violated duty, etc.

Another fundamental change lies in the fact that the Act explicitly stipulated,[447] in response to the previous interpretation doubts, that liability of a juristic person

[446] Cf. Section 8 (5) of Act No. 418/2011 Coll., on corporate criminal liability and prosecution, according to which a juristic person will be exonerated from criminal liability if it has used all the efforts that could be reasonably required of it to prevent the unlawful act committed by persons whose conduct is imputable to the juristic person.

[447] Cf. in general, PRÁŠKOVÁ, H. *Základy odpovědnosti za správní delikty [Bases of Liability for Administrative Offences]*. Prague: C. H. Beck, 2013, p. 41 et seq. While administrative courts generally rejected the passage of liability for an offence under the previous legislation, liability could nevertheless exceptionally pass based on application of the prohibition of abuse of law: *"A change in the legal form, restructuring or organisational changes made during administrative proceedings could, but also might not, be carried out (even if not only exclusively) with a view to avoiding punishment. However, if an entity which has violated competition rules (offender) has terminated without*

for an infraction passes to a legal successor. If a juristic person has several legal successors, each of them is liable for the infraction as if it committed the infraction itself (Section 33). It should be noted in this respect that when imposing a penalty on a legal successor, the administrative authority will bear in mind to what extent the revenues, benefits and other advantages flowing from the infraction passed to the successor, and if there are several successors, which one of them continues the activity in which the infraction was committed (Section 37 (h)). However, if a juristic person terminates without a legal successor, liability for an infraction also ceases to exist (Section 29 (c)).

This also entails the newly established power of an administrative authority to prohibit the dissolution, termination or transformation of an accused juristic person if it has a justified suspicion that the juristic person might, through its termination, avoid punishment for an infraction or the exercise of an administrative penalty, or could frustrate the satisfaction of a claim for damages or claim for surrendering unjust enrichment, unless such a procedure would be clearly disproportionate to the nature and gravity of the infraction of which it is accused (Section 84 (1)).[448]

Unfortunately, the Act still does not explicitly rank property among the criteria relevant for imposing a pecuniary penalty.[449] Section 37 (f) merely states in respect of a natural person that account shall also be taken, in determining the type of administrative punishment and its degree, of the personal situation of the offender;[450] under subparagraph g), in the case of a juristic person or a natural person operating a business, account is also taken of the nature of its activity. While the list of criteria in Section 37 is non-exhaustive, the silence of the law is telling in this respect. The Act does not even work with the notion of "property" in the sense of "property situation"; this is in no way mentioned.

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liquidation, and its economic (material and non-material) component has found a legal successor in the form of another legal entity, this continues to be one and the same economic entity; if the established facts indicate that the offender attempted to avoid the Competition Act through such transformation, then a shift of the punitive liability to this—albeit legally different—person is legitimate. Consideration must also be taken of the dynamic substance of juristic persons which, unlike natural persons, may—even purposively—manipulate their basic characteristic features, e.g. in the form of organisational changes; termination of a juristic person without liquidation cannot be equated to death of a natural person" (judgement of the Supreme Administrative Court of 30 December 2009, Ref. No. 8 Afs 56/2007-479).

448 If a juristic person was founded or established for a fixed term or to attain a certain purpose, and the term for which it was founded or established has expired or the purpose for which it was founded or established has been attained after the proceedings on an infraction were initiated, from that time to the final closure of the proceedings, it is considered as if it were founded or established for an indefinite term. Ibid, Section 84 (1).

449 Cf., in relation to the previous legislation, the critical comments by KÜHN, Z. Přiměřenost správních sankcí ve vztahu k majetkovým poměrům delikventa [Proportionality of Administrative Penalties in Relation to the Offender's Property]. In: VANDUCHOVÁ, M., HOŘÁK, J. (eds.) *Na křižovatkách práva – Pocta prof. J. Musilovi [On the Crossroads of Law—A Tribute to Prof. J. Musil]*. Prague: C. H. Beck, 2011, pp. 337–350.

450 While using broad interpretation, the notion of personal situation could also comprise circumstances related to property.

In view of the amounts of fines that can be imposed under Czech infraction laws, it is hardly acceptable that the offender's property would be totally ignored. On the other hand, the list of criteria for imposing punishment is non-exhaustive. In this respect, the new Act differs from a majority of previous regulations, scattered over hundreds of laws, which often set exhaustive lists of criteria, usually not including any criteria related to property.[451] Consequently, the current Act does not prevent either case-law or administrative practice from taking the property of a juristic person into consideration, at least in some cases. However, the will expressed by the legislature, which is greatly reserved towards using property criteria in determining the degree of punishment, is relatively clear and case-law should not ignore this clear intention. Consequently, the property of a juristic person should only be taken into account exceptionally, in cases where this is indeed justified.

In its approach to the property of the person being punished, the Liability for Infractions Act differs even from Act No. 418/2011 Coll., on corporate criminal liability and prosecution. Indeed, Act No. 418/2011 Coll. stipulates in general that when setting the type of punishment and its extent, the court shall take into account, *inter alia*, the situation of the juristic person, including its activity to date and its property (Section 14 (1)). The concept of imposing penalties is then based in Act No. 418/2011 Coll., similar to the Criminal Code, on "daily fines": *"The daily rate equals at least CZK 1,000 and no more than CZK 2,000,000. When determining the amount of the daily rate, the court shall take into account the property of the juristic person."* (Section 18 (2)).

11.4 Case-law of the European Court of Human Rights, the principle of *ne bis in idem* and its impact on the Czech national practice of administrative punishment

Today, there is generally no longer any dispute that penalties imposed for "other administrative offences" are "criminal" sanctions within the meaning of Art. 6 of the Convention.[452] This, however, brings about the issue of how far the principles developed by the European Court will extend beyond the scope of classical criminal law,

[451] Cf. the resolution of the Extended Chamber of the Supreme Administrative Court of the Czech Republic of 20 April 2010, File No. 1 As 9/2008-133, No. 2092/2010 Coll. of SAC, paragraph 26.

[452] In judgement of the Supreme Administrative Court of the Czech republic of 20 January 2006, File No. 4 As 2/2005-62, No. 847/2006 Coll. of SAC; in judgement of the European Court of Human Rights of 8 June 1996, *Engel and Others v. The Netherlands* (applications Nos. 5100/71 to 5102/71, 5354/72 and 5370/72) (Czech translation: Berger, V. Judikatura Evropského soudu pro lidská práva. *(Case-law of the European Court of Human Rights.)* Prague, IFEC 2006, p. 262); judgement of the European Court of Human Rights of 21 February 1984, Öztürk v. Germany (application No. 8544/79) (Czech translation, ibid, p. 329), etc.

and thus to "criminal" law in a broader sense, i.e. including infractions and the former "other administrative offences". The new codex of infractions resolved a number of problems in Czech law while maintaining concordance with the Convention. Primarily, it provided uniform procedural rules for proceedings on infractions of juristic persons and natural persons operating a business, and laid down uniform basic substantive principles for administrative punishment. Nevertheless, the practice of Czech administrative punishment still left some questions open. In proceedings on "other administrative offences" of juristic persons and natural persons operating a business, i.e. today's infractions of juristic persons and natural persons operating a business, the greatest challenges are related to the construction of the principle of *ne bis in idem*.[453]

This topic was first broached in the judgement of the Grand Chamber of the ECtHR in the case of *Zolotukhin v. Russia.*[454] In that judgement, the ECtHR unified the previously contradictory approach to the prohibition of double punishment for the same act in that identity of an act has to be assessed *de facto*, rather than *de iure* (with respect to the legally protected values). Determining whether the same criminal acts are involved *(idem)* depends on factual assessment (ibid, § 84), rather than, e.g., on formal assessment based on comparison of the "basic elements" of the crimes in question. The prohibition applies to prosecution or proceedings related to the second "crime" if the latter is based on the same factual circumstances or facts which are identical in substance.

The key moment when Art. 4 of Protocol No. 7 is activated is the initiation of new (second) criminal prosecution if the previous acquittal or conviction has entered into legal force. Description of the facts relevant in the two sets of proceedings present a suitable starting point for assessing the question of whether the acts in the two cases are identical (or are identical at least in material features), regardless of the potential differences in the legal qualification in the two sets of proceedings (§ 83: *"The guarantee enshrined in Article 4 of Protocol No. 7 becomes relevant on commencement of a new prosecution, where a prior acquittal or conviction has already acquired the force of res judicata. […] Statements of fact [in the documents relating to both proceedings] are an appropriate starting-point for its determination of the issue whether the facts in both proceedings were identical or substantially the same [irrespective of different legal classification]"*). Identity of an act is therefore established if the specific factual circumstances concern the same defendant are inextricably

[453] Art. 4 (1) of Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, which lays down the right not to be tried or punished twice: *"No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same state for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that state."* The criteria developed in case-law in respect of a criminal charge under Art. 6 (1) of the Convention (see the previous footnote) are also fully applicable in terms of identifying certain proceedings as criminal within the meaning of Art. 4 of Protocol No. 7 (see the judgement of the Grand Chamber of the European Court of Human Rights of 16 November 2016, *A and B v. Norway*, application No. 24130/11, §§ 105–107).

[454] Judgement of the Grand Chamber of the European Court of Human Rights of 10 February 2009, *Sergey Zolotukhin v. Russia* (application No. 14939/03).

linked together in time and space (§ 84: *"The Court's inquiry should therefore focus on those facts which constitute a set of concrete factual circumstances involving the same defendant and inextricably linked together in time and space"*).

It thus clearly follows from the case-law of the ECtHR that determinative of identity of an act is the act as such, the facts of the act (i.e. the act *de facto, idem factum*), rather than its legal qualification or other legally protected values (the act *de iure*). The ECtHR then summarised this as *"conduct on the part of the same defendant and within the same time frame"*.[455] An act is distinguished by itself in this sense; facts forming an act are conceived as an objective category *per se*.

However, those who criticise this approach point out the philosophical and practical unsustainability of these premises. In substance, all of modern philosophy infers that the process of recognition cannot be conceived as a mere physical and empirical causal link. All experience presupposes forms *a priori* (notions, principles, ideas) that are not inferred from experience.[456] Thus, facts never exist in themselves. While certain facts activate the use of a certain legal qualification, it is only such qualification that makes certain facts relevant and others irrelevant. This is why the factual basis of any specific case can never be entirely severed from the norms that apply to it. If the process of defining a certain act is not to be entirely arbitrary, the decision-making on which of the vast number of different factual circumstances will be related to the given act must always reflect the legal qualification of the given offence in some way.[457]

The dilemma just described is not merely a vacuous philosophical discourse. Indeed, in the practice of administrative punishment, the factual *(de facto)* concept of an act causes problems in the long term. These relate to questions of double punishment for various administrative offences laid down by various laws protecting various values, on the one hand, and to the specific situation of concurrent criminal prosecution for tax crimes and imposition of tax penalties by the tax administration, on the other hand. While the Czech legal debate has recently tended to accentuate the latter issue, I contend that, in fact, a greater problem is represented by the former (indeed, a ticking time bomb for Czech administrative punishment), i.e. the issue of concurrent administrative punishment by several administrative authorities for various administrative offences having their origin in the same act.

It commonly occurs in administrative law that one and the same act meets the factual criteria for several administrative offences laid down in various sectoral laws, depending on the different consequences of actions and different legally protected values. In other words, we constantly encounter definitions of an act *de facto* and *de iure*

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455 Judgement of the European Court of Human Rights of 25 June 2009, *Maresti v. Croatia*, application No. 55759/07, § 63.

456 Cf. ANZENBACHER, A. *Úvod do filosofie [Introduction to Philosophy].* Prague: Portál, 2004, pp. 101–132.

457 Similar considerations also appear in the judgement of the Supreme Administrative Court of the Czech Republic of 11 January 2012, File No. 1 As 125/2011-163, paragraph 33, in which—it must be admitted—the author of this paper was involved. Cf. also ZUPANČIČ, B. Ne bis in idem (zabrana ponovnog suđenja za isto delo). La belle dame sans merci. *Crimen*. 2012, No. 2, pp. 172–173.

in administrative law. An example could be the judgement rendered by the Supreme Administrative Court in the case of the cassation complaint filed by the municipality of Kralice nad Oslavou.[458] The municipality was punished by three decisions for the following act (or three acts?):

- an offence under Act No. 254/2001 Coll., on waters (the Water Act), consisting in the fact that, on several occasions, the municipality pushed soil and construction rubble accumulated on plot of land No. 781/1 in the land registry territory of Kralice nad Oslavou in the direction of the Jinošovský stream, most recently at the beginning of July 2009. On the day of inspection, 27 July 2009, the inspection authority found soil and construction rubble on the mentioned land at places where they could be washed into the Jinošovský stream.
- an offence under Act No. 185/2001 Coll., on waste, consisting in the fact that at least from the beginning of 2008 to the date of the inspection (27 July 2009), the municipality allowed the transport of waste, especially soil and rocks, as well as construction and demolition waste, to plot of land No. 781/1 in the land registry territory of Kralice and Oslavou, i.e. managed waste on premises where waste management is either prohibited or not permitted;
- an offence under Act No. 114/1992 Coll., on nature conservation and landscape protection, because from 2008 to 27 July 2009, it deposited and subsequently spread out waste, soil and rocks on plot of land No. 781/1 in the land registry territory of Kralice and Oslavou, which forms a part of the nature reserve of "Valley of Oslava and Chvojnice" and of a site of European importance of the same name, although such an activity is prohibited in the given territory.

It thus seemed in the given case that the municipality was punished three times for the same act in the sense of the ruling in *Zolotukhin*. While the municipality committed each of the three offences, in substance, by a single act, it thus affected three entirely different values protected by various laws: protection of a water course; regulation of waste management; and nature conservation and landscape protection (nature reserve). In the opinion of the Supreme Administrative Court, these were therefore three different acts. The Court also questioned the ruling in *Zolotukhin*. Indeed, as stated by the Supreme Administrative Court, the court did not overlook that, when assessing the principle of *ne bis in idem* in *Zolotukhin v. Russia*, the Grand Chamber of the ECtHR rejected an approach placing emphasis of the legal qualification of the offence in question. Nonetheless, the Supreme Administrative Court considered that *"the relevant act considered de iure must be considered the decisive comparative criterion for determining the element of idem"* (paragraph 30).

In this respect, the Court referred to the specific features of the system of administrative punishment. Indeed, different administrative authorities often have jurisdiction *ratione materiae* to hold proceedings on individual administrative offences. One and the same offender's conduct can thus cause various legal consequences (and violation

[458] Judgement of the Supreme Administrative Court of 11 January 2012, Ref. No. 1 As 125/2011-163, municipality of *Kralice nad Oslavou*.

or endangerment of entirely different interests and values), and thus the commission of administrative offences laid down by various laws and penalised by various administrative authorities. In these cases, it is precisely the construction of an act *de iure* that enables punishment of the offender for all the legally relevant consequences of his conduct:

"If this were not so and the imposition of a sanction by one of the affected administrative authorities created an obstacle of ne bis in idem, this would lead to situations where certain interests and values could not be provided with protection by administrative authorities, although they are obliged to protect them under the law. Inadmissibility of such a situation would be especially apparent if the offender was first punished by one administrative authority for a certain, less serious consequence of his conduct, thus preventing his punishment for some other, much more grave consequence" (paragraph 31, ibid).

The Supreme Administrative Court was aware, of course, that the fragmented description of individual administrative offences can sometimes result in partial overlapping of the merits of those offences. *"However, these are precisely those cases where it is appropriate to protect the offender against double punishment by applying the ne bis in idem principle."* For it to be possible to punish an offender for two different offences based on the same conduct, it is not sufficient if there are two nominally different merits of an offence. The existence of two separate acts on which separate proceedings can be held is conditional on *"difference in the legally significant consequence of the conduct"* (paragraph 34, ibid).

The example just provided shows that the concept of *ne bis in idem* which was adopted by the ECtHR in the case of Zolotukhin creates considerable tension with the concept of administrative punishment in the Czech Republic.[459] Since it would not be realistic to expect the ECtHR to reconsider its concept of acts *de facto*, the case-law of the Supreme Administrative Court will have to be revised in the future. Administrative punishment of juristic persons and of natural persons operating a business should no longer be divided by a "thick wall" into various sectors. Various administrative authorities acting within the scope of various laws should be aware of each other; the individual sets of proceedings should be either joined or at least mutually coordinated. This is exactly what is required by the case-law of the ECtHR (see below an analysis of the case of A and B v. Norway). Indeed, it does not exclude that different legally protected interests might be taken into account in various sets of proceedings.

[459] However, problems also arise outside the field of administrative law. A notorious example in case-law of the problematic effects of the case of *Zolotukhin* is the ruling rendered by the Disciplinary Chamber of the Supreme Court of the Czech Republic of 30 October 2008, File No. 1 SKNO 10/2008, where the Supreme Court upheld a decision on discontinuation of disciplinary proceedings against justice Z. Sovák on the grounds that he had already been punished for the same act (infringement of copyright) in criminal proceedings. The Court did not take into consideration in any way that the disciplinary proceedings against the mentioned judge were based on entirely different legally protected values, specifically that, by "stealing" someone else's copyrighted work and presenting it as his own, the judge had cast doubt on the judicial oath and tarnished the position of justice in society.

However, it requires that such proceedings be mutually reconciled (see below). This also overcomes the basic argument raised by the Supreme Administrative Court in the case of the municipality of *Kralice and Oslavou* against the ruling in *Zolotukhin*.

The above described issue of co-ordinating various criminal (in the broad sense) proceedings recently culminated in Czech law in terms of the relationship between tax penalties and a criminal sentence for tax evasion. Until recently, Czech case-law avoided this problem by not considering tax penalties to constitute a criminal accusation in the sense of Art. 6 (1) of the Convention.[460] However, in the case of *Odeř Agrar* of November 2015,[461] the Extended Chamber of the Supreme Administrative Court opined that tax penalties under Section 251 of the Tax Rules had the nature of a punishment. In this respect, the Extended Chamber followed from the case-law of the ECtHR, which it applied, in substance, without further ado. The Extended Chamber did not deal with the issue of a ban on double punishment for the same act (the dispute before the Supreme Administrative Court was concerned only with the question of whether a tax penalty was a penalty within the meaning of Art. 6 (1) of the Convention and whether it was therefore necessary to apply the rules more favourable for the offender, even if such rules were *lex posterior*). Nonetheless, this is a problem that has to be resolved in criminal case-law, and not only in the Czech Republic.

The significance of this problem is also indicated by the fact that it was dealt with by the Grand Chamber of the ECtHR in November 2016.[462] It came to the conclusion that *"states should be able legitimately to choose complementary legal responses to socially offensive conduct (such as non-compliance with road-traffic regulations or non-payment/evasion of taxes) through different procedures forming a coherent*

[460] As already stated in the judgement of the Supreme Administrative Court of the Czech Republic of 28 April 2011, File No. 1 Afs 1/2011-82, a tax penalty (in this case, under Section 63 of Act No. 337/1992 Coll., on administration of taxes and fees) *"undoubtedly affects the property of the tax debtor; nonetheless, in view of its basic function (liquidated damages compensating damage that could be incurred by the state as a result of a delay in tax income), it cannot be conceived as an administrative offence or criminal charge within the meaning of Art. 6 (1) of the Convention for the Protection of Human Rights and Fundamental Freedoms (No. 209/1992 Coll.)"* (on a similar note, e.g. judgement of the Supreme Administrative Court of the Czech Republic of 2 December 2011, File No. 2 Afs 13/2011-73, and judgement of the Supreme Administrative Court of the Czech Republic of 7 August 2014, File No. 10 As 48/2014-35, paragraph 19).

[461] Resolution of the Extended Chamber of the Supreme Administrative Court of the Czech Republic of 24 November 2015, File No. 4 Afs 210/2014-57, No. 3348/2016 Coll. of SAC, *Odeř Agrar*.

[462] Judgement of the Grand Chamber of the European Court of Human Rights of 16 November 2016, *A and B v. Norway*, application No. 24130/11. For reflection of this judgement in Czech national case-law, cf. the resolution of the Grand Chamber of the Criminal Division of the Supreme Court of 4 January 2017, File No. 15 Tdo 832/2016, No. 15/2017 Coll. of Criminal Rulings. For specific application, cf. paragraphs 75 to 90 of the resolution. According to the Supreme Court, the criteria set in ECtHR's ruling in the case of A and B v. Norway were met. Although different penalties were imposed by two different bodies in various sets of proceedings (by a tax administrator in tax proceedings and by a criminal court in criminal proceedings), there was nonetheless a sufficiently close substantive and temporal link for them to be considered a part of an integrated system of sanctions that comprehensively describes the nature of the conduct of the accused and does not represent an unforeseeable and disproportionate burden for him.

whole so as to address different aspects of the social problem involved, provided that the accumulated legal responses do not represent an excessive burden for the individual concerned" (§ 121), and that they take an "integrated" approach to the social wrongdoing in question, and in particular an approach involving parallel stages of legal response to the wrongdoing by different authorities and for different purposes (§ 123). However, this must not result in double jeopardy to the detriment of the individual, but should rather be the product of an integrated system enabling different aspects of the wrongdoing to be addressed in *"a foreseeable and proportionate manner forming a coherent whole, so that the individual concerned is not thereby subjected to injustice"* (§ 122). The issue of when exactly one set of proceedings is closed by a final decision or in what order the sets of proceedings are held is thus not, in itself, relevant (§§ 126 to 128).[463]

The ECtHR emphasised the *"sufficiently close connection in substance and in time"* test which indicates that there must be both a *substantive* and a *temporal* link of dual criminal prosecution (§ 125). The purposes pursued and the means used to achieve them should, in essence, be complementary and linked *in time*, and the possible consequences of organising the legal treatment of the conduct concerned in such a manner should be proportionate and foreseeable for the persons affected (§ 130).

The ECtHR was rather concise in its analysis of the temporal link of the dual prosecution. Indeed, the existence of a temporal link between two sets of proceedings does not mean that the two sets of proceedings have to be conducted concurrently from beginning to end. However, the connection in time must be sufficiently close to protect the individual from uncertainty, protraction and delays in the proceedings.

Unlike the relative brief analysis of the time link, the ECtHR was much more thorough in explaining the substantive connection. In doing so, it also provided examples of the factors decisive for determining whether a sufficiently close substantive link exists between two sets of proceedings. It will thus be material:

- whether the different proceedings pursue complementary purposes and thus address, not only *in abstracto* but also *in concreto*, different aspects of the social misconduct involved;
- the duality of proceedings concerned is a foreseeable consequence, both in law and in practice, of the same impugned conduct *(idem)*;
- whether the relevant sets of proceedings are conducted in such a manner as to avoid as far as possible any duplication in the collection as well as the assessment of the evidence, notably through adequate interaction between the various competent authorities to bring about that the establishment of facts in one set is also used in the other set;
- and, above all, whether the sanction imposed in the proceedings which become final first is taken into account in those which become final last, so as to prevent

[463] Cf. also the judgement of the European Court of Human Rights of 18 May 2017, *Jóhannesson and Others v. Iceland* (application No. 22007/11), § 48.

that the individual concerned is in the end made to bear an excessive burden, this latter risk being least likely to be present where there is in place an offsetting mechanism designed to ensure that the overall amount of any penalties imposed is proportionate (§ 132).

By means of the above-listed criteria, the ECtHR actually tries, *ex post facto* and in a rather complicated way, to make good the harm caused by the previous strict definition of identity of an act *de facto* in the case of *Zolotukhin*.[464] Indeed, one should note that while different legally protected values are not relevant for determining identity of the act *(idem)*, they are nonetheless important for acceptability of dual proceedings on the same act *(bis)*. The ECtHR thus, in fact, shifted the problem of applying the prohibition of *ne bis in idem* from the act *(idem)* to the repeated proceedings *(bis)*. However, I entertain great doubts about the clarity and foreseeability of the new approach taken by the ECtHR.

The ECtHR also followed up on its earlier case-law where it distinguished between traditional criminal cases, on the one hand *("hard core of criminal law")*, and cases not strictly belonging to the traditional categories of the criminal law, for example administrative penalties, prison disciplinary proceedings, customs law, competition law, etc. Thus, there are "criminal charges" (within the meaning of Art. 6 (1) of the Convention) of differing weight.[465] The fact that a criminal charge pertains to an area outside the *"hard core of criminal law"* (which will also regularly include cases of Czech infraction law) will thus be a sufficient factor for concluding that the combination of proceedings will (probably) not entail a disproportionate burden on the accused person (§ 133). Nonetheless, it must be pointed out that the mere fact that a charge is outside the *"hard core of criminal law"* will certainly not justify double punishment in itself (in the absence of the further conditions analysed above).

In practice, it was thus considered a breach of the principle of *ne bis in idem* if criminal proceedings and tax proceedings were pursued for over nine years in aggregate, although they were held concurrently for a little less than one year. Moreover, the ECtHR pointed out the predominantly independent collection and evaluation of evidence. This is why a sufficiently close connection in substance and time between two sets of proceedings was not found in that case, resulting in violation of Art. 4 of Protocol No. 7 to the Convention.[466]

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[464] In contrast, judge de Albuquerque, who provided a dissenting opinion in the judgement of the Grand Chamber of the European Court of Human Rights of 16 November 2016, *A and B v. Norway* (application No. 24130/11, considers that, by rendering its new decision, the ECtHR reversed the main benefits of the ruling in Zolotukhin.

[465] Judgement of the Grand Chamber of the European Court of Human Rights of 23 November 2006, *Jussila v. Finland* (application No. 73053/01), § 43; identically, *A and B v. Norway*, § 133. Nonetheless, dissenting judge de Albuquerque correctly noted in the latter case that *"[u]nfortunately, the Court has not made any effort, either in Jussila or subsequently, to develop a coherent approach to the* magna quaestio *of the dividing line between 'hard-core criminal law' and the rest of criminal law"* to explain what differing impact would follow in practice in terms of protection of human rights, etc.

[466] Cf. also the judgement of the European Court of Human Rights of 18 May 2017, *Jóhannesson and Others v. Iceland* (application No. 22007/11), § 55.

It can thus be summarised that in 2016, the ECtHR confirmed the understanding of identity of an act *(idem)* as a concept of *de facto*, i.e. an aggregate of facts regardless of the legally protected values. However, it was immediately forced to "salvage" the viability of this dogmatic concept by taking account of legally protected values in legitimising concurrent proceedings on the same act.

11.5 Summary

Since 2017, the Czech administrative punishment of juristic persons has been based on a new procedural and substantive codex which, in spite of all the shortcomings and interpretative issues, increased legal certainty on the part of the persons being punished. In my opinion, the basic problem remains connected with double punishment in various sectoral laws. Various, or even the same, administrative authorities hold mutually entirely independent sets of proceedings in which they punish the same persons for violation of different laws through the same conduct (same act). Such procedures are unacceptable in view of case-law of the ECtHR. At the same time, case-law of the ECtHR offers a viable option of how to protect various values protected by various laws against offences having the origin in the same conduct. However, such sets of proceedings must be harmonised in time and substance, the authorities must be aware of the course of the other proceedings and, when deciding on the penalty, they must take account of any penalty that has already been imposed; taking of evidence should also be harmonised between these proceedings. This is the only way to ensure that the Czech regulation of administrative punishment will respect the guarantees set out in Art. 4 of Protocol No. 7 to the Convention.

CHAPTER TWELVE
CONCLUSION

(HOW CAN JURISTIC PERSONS ENGAGE IN LEGAL ACTS AND BEAR POTENTIAL LIABILITY?)

12.1 General remarks

The present monograph aims to answer the question of how juristic persons can perform legal acts (i.e. engage in legal conduct) and in what way they can potentially become legally liable (not only for their conduct). This is reflected in the structure of the monograph. Attention is first turned to the concept of a juristic person and the legal acts it makes from the viewpoint of the general legal doctrine, which then informs the view under constitutional law. Only then are legal acts analysed in terms of the law currently applicable in the Czech Republic, which conceives the bodies of a juristic person as its representatives. However, legal conduct comprises not only substantive, but also procedural acts within civil court proceedings, where the latter show significant deviations from the former and thus require separate considerations. The last group of issues pertain to liability (or responsibility) of a juristic person. Once a general explanation has been provided in terms of the juristic persons' capacity to bear liability, an answer can be sought to the question of what can be imputed to such persons on the grounds of "no-fault" and "fault-based" liability. Following the traditional concept of private-law liability of juristic persons, the monograph also introduces an alternative approach to legal liability (responsibility) of juristic persons based on the notion of "vicarious liability". The section dealing with liability then concludes with a chapter on juristic persons' liability for administrative offences. This structure and scheme of individual chapters is also reflected in their contents.

12.2 What entity can engage in legal conduct?

Both a natural and a juristic person are a legal construct aimed to create an entity vested with rights and obligations. The capacity to have rights and obligations has

traditionally been denoted as legal personality (personhood). A person lacking such personality would be deprived of any sense in law. However, legal personality means only a potential capacity to be vested with rights and obligations. This is also the rationale behind the concept of a person "bearing" rights and obligations, i.e. their bearer (holder). Nonetheless, for any entity to be able to bear a right, it must first acquire one. This means that, from the viewpoint of acquiring rights, legal personality is a condition that is necessary, but not in itself sufficient. Each and every person must therefore be capable of not only bearing, but **also of acquiring**, rights and obligations. The most important and frequent (albeit not the sole) ground for acquiring a right or obligation lies in the existence of a legal act (otherwise designated as legal conduct).

The answer to the question of **who can perform legal acts** is closely related to the question of who can actually (i.e. not only *de iure*) "act" and, consequently, **what an act (or conduct, action) is in itself.** An act or conduct can be described as purposeful behaviour directed to satisfy a certain interest. The difference between "conduct" in general and "legal conduct" lies in the purpose at which the conduct is aimed. The purpose of legal conduct is limited to the creation, modification or termination of a right (and obligation). However, even a right, as such, can be considered nothing else than a means of satisfying a certain interest. It follows from the above that a common feature of conduct in the general sense and of "legal conduct" lies in satisfying an interest. Legal conduct thus represents a certain type of conduct (its subset).

For anyone to be able to "act", i.e. assess whether the attainment of a certain objective (e.g. the creation of a right) is in his interest and, at the same time, really strive to achieve the interest, he must dispose of reason and will. The same is true of **legal conduct**, where the one who acts must also take into consideration whether the creation of a certain right is at all possible in view of the applicable law. Indeed, the law orders or prohibits the pursuit of certain interests, or permits their existence, i.e. leaves the decision to be made by those who may want to and can, or on the other hand, might not pursue those interests. An answer to the question of whether the one who acts really wants to attain a certain interest and, at the same time, whether the attainment of the interest in the form of a right is permitted by the law, requires "reason". What is required for its pursuit is "will". However, only a human being has both reason and will in the aforesaid meaning. Human reason and will are a *conditio sine qua non* for both legal conduct and for any conduct in general. However, "legal conduct" is not reserved for human beings, but rather for "persons". While any human being can engage in conduct, only natural or juristic person can engage in legal conduct. What is the meaning of legal conduct of persons?

The fact that legal conduct always requires reason and will of a human being might indicate that a human being bestowed with reason and will must have the capacity to engage in legal conduct and, *a contrario*, a human being deprived of reason and will must lack the capacity to engage in legal conduct. However, none of the above assumptions apply in law: A slave was undoubtedly a human being bestowed with reason and will and, still, his reason and will were not imputed to him as a person (but rather possibly to the person of his master). On the other hand, the existence

of a person *non compos mentis* proves that even a human being deprived of reason and will can be considered a person. How can a person, or a human being, engage in legal conduct if he lacks the power of reasoning and will and hence is incapable of engaging in any conduct "in reality"? On the other hand, why a person endowed with reason and will, and necessarily engaging in conduct (albeit as a slave), cannot simultaneously engage in legal conduct?

The above incongruity is resolved through the concept of **"imputability"**. Each and every human being who has reason and will (even if not granted a legal personality by the law and thus being a slave) can act, i.e. pursue his interests (however, a slave's interest can only lie in performing duties imposed on him heteronomously). A human being who is moreover a person can (if actually capable of doing so) also **legally act** for himself and attain the satisfaction of his interests by virtue of law. In that case, we refer to one's **own legal conduct**. However, the same human being may also "legally act" for other persons and thus follow interests other than his own. In that case, his reason and will are not imputed to him, but rather to another person—we denote this as **someone else's legal conduct.** Reason and will of a human being can then be attributed to himself as a natural person enjoying legal capacity, as well as to another person who lacks such capacity. The aforementioned concept makes it possible for a human being who, in reality, simply cannot, and does not, engage in any conduct due to a lack of reason and will to engage in legal conduct within the normative order, having been attributed with the reason and will of some other human being. This is also why the law distinguishes between a person who enjoys **"legal capacity"** *(or a person compos mentis)* and a person who **lacks legal capacity** *(or a person non compos mentis)*. The reason why the law provides at all for persons lacking legal capacity is that the legislation respects and recognises not only interests of persons who are capable, by using their own reason and will, to determine, pursue and protect their own interests, but also those who are not capable of the same. For these reasons, such people have to be granted legal personality, but at the same time, their interests are determined by other persons. The latter, as representatives, are involved to a varying degree in determining the interest(s) of the represented person. From this viewpoint, a person lacking legal capacity is dependent on the reason and will of another person and is *de facto* subjected to that person's power; however, the latter is no longer denoted, e.g., as *"pater familias"* but only as the former person's statutory or curator.

12.3 Can a juristic person really enjoy legal capacity?

For any person—and thus also a juristic person—to be able to **legally act**, such a person must be endowed with reason and will. What is reason and will can be determined empirically only for a natural person. The same is not possible for a juristic person. Legal conduct of a juristic person is only conceivable if recognised as such by a legal

regulation—a law. Nonetheless, positive law may envisage different arrangements concerning legal conduct of juristic persons. Positive law thus contains provisions to the effect that a juristic person acts through its bodies, implying that a juristic person enjoys the capacity to engage in its own legal conduct, as well as provisions stipulating that governing bodies of a juristic person replace its will, which tends to support the conclusion that a juristic person lacks the capacity to engage in its own legal conduct. However, positive law alone cannot explain why a juristic person can be deemed once capable and once incapable of engaging in legal conduct, or put in other words, why a juristic person enjoys legal capacity under certain circumstances and lacks legal capacity under other circumstances.

Unlike a human being, reason and will of a juristic person are merely a theoretical concept. This is why it was necessary to deal with various theories of the concept of juristic person, especially the organic theory and legal fiction theory, which can explain what cannot be discerned through senses, and thus understood. The perception of legal conduct of a juristic person based on the **organic theory** means that a juristic person is an organism whose certain bodies create its "reason and will", while other bodies manifest the thus-created reason and will. An individual acting as a juristic person's body is not a person himself, but rather serves as a mere medium through which the reason and will of a superior spiritual organism—a juristic person—are expressed. On the other hand, the **theory of legal fiction**, put simply, implies that a juristic person does not exist as such and hence is not bestowed with its own reason and will and cannot independently engage in its own legal conduct. The legal fiction concerning a juristic person lies in the assumption that the reason and will of an individual acting on behalf of a juristic person represents the will of that juristic person. Considering the description of the aforementioned theories, it might seem that the legislator arbitrarily, in its exclusive discretion, chooses the applicable theory and decides to follow either the organic theory or the theory of fiction *(legal fiction)*. It is therefore necessary to approach the issue analytically and begin with determining what reason and will of a juristic person are not, or cannot be.

A juristic person is an entity different from a natural person, i.e. a human. It follows that its reason cannot be simply equated to reason of an individual. However, it must be derived in some way from the reason of an individual human being, or human beings. This is why reason of a juristic person must be considered "collective". While it is formed by humans, they do so not as natural persons, but rather as bodies of the juristic person. When a **human being as a "body"** expresses the will of a juristic person, he should in fact not use "his own reason", but rather should only serve as a medium whereby reason of the juristic person is manifested. This also means that a human acting as a body should forget his own ego, which should be replaced by the alter ego of the juristic person. The consideration that a human being uses "one reason" when acting as a body of a juristic person and "different reason" when acting as a natural person has one inevitable result—every person who acts as a body of a juristic person must, in one way or another, suffer from legally imposed schizophrenia—he must have a split personality. The existence of such schizophrenia

is also a prerequisite for any possible considerations regarding "own reason and will of a juristic person".

However, the problem lies in the fact that although a certain human being acts as a body of a juristic person, this certainly does not mean that he would have to forget about his own interests and thus his ego. Therefore, there may also be a **conflict of interests** between a human in the position of a natural person and a human as a body of a juristic person. This potential conflict is resolved by the duty of loyalty, which prohibits bodies of juristic persons from pursuing any interests other than those of the juristic person. However, the very fact that a conflict of interests may arise proves that the question of own reason and will of a juristic person, and thus, necessarily, also of schizophrenia of a human being as its body, is not correctly asked.

Indeed, reason and will of a juristic person must always originate from a natural person, i.e. a person other than the former. This is why **reason and will of a juristic person** are also always **someone else's reason and will**, which can be considered own reason and will only of a specific natural person enjoying legal capacity. In this respect, the difference between a natural and legal person lies in the fact that a natural person lacking legal capacity will usually acquire reason and will at some point and thus obtain legal capacity, while this will never be possible for a juristic person. The rule of imputing (or attributing) someone else's reason and will has no exemptions in its case. From this viewpoint, a juristic person can also never enjoy legal capacity analogously to a natural person enjoying capacity. Indeed, it can never have the capacity to pursue its own legal acts, because it cannot have its own reason and will.

12.4 Juristic persons as holders of fundamental rights

The objective of Chapter Four was to answer the following question: What are the consequences of granting fundamental rights to juristic persons? The very fact that a juristic person should be bestowed with fundamental rights raises controversy. This is so most probably because a juristic person as a beneficiary of fundamental rights does not fit into the traditional discourse in human rights. In view of the basic historical purpose of the concept of a juristic person—the autonomy of property and protection of the property of members of the juristic person—justification of fundamental rights vested in juristic persons relates not only to morals, but even more so to support for the economy and free market.

The reason why rights of a juristic person are afforded protection also at the constitutional level, whether in human-rights documents or in court case law, relates to the development of society, where juristic persons and corporations play an increasingly important role. Those who advocate the application of fundamental rights to juristic persons point out that these rights do not replace human rights—i.e. rights bestowed

in a human being—and should rather be conceived as a recognition of another level of protection of human rights, standing above the protection of an individual himself. In contrast, those who oppose increased protection of juristic persons through fundamental rights argue that specific people always stand behind juristic persons and they are the ones who ultimately profit from the protection of fundamental rights of a juristic person. Moreover, many juristic persons already have considerable economic strength; some multinational corporations are even stronger than states.

Another theoretically disputable issue examined in this chapter is the question of granting protection of fundamental rights to juristic persons of public law, especially the state. Given the scarce legislation in this area, a significant role is played by the rulings of supreme courts, and this is true not only in the Czech Republic. In this relation, the author compares the practice of the Czech Constitutional Court, of the German Federal Constitutional Court and of the European Court of Human Rights. Each of these courts uses a specific approach and follows from a different position of corporations under public law in private- and public-law relations. It is therefore indecisive whether the position of a constitutional complainant is borne by the state itself or by its organisational components (the state thus suing itself, so to speak), but rather in what position the state acts.

12.5 How can a juristic person act under substantive law?

Chapter Five aimed to find, based on applicable Czech law and case law of Czech courts, an answer to the question of how a juristic person can act under substantive law. Indeed, the Czech Civil Code declares a member of the governing body a representative of the juristic person, while however distinguishing between contractual and statutory representation. It could be inferred from the above that acts taken by a member of such a body for the juristic person must fall in one or the other category. However, does this rule out the possible existence of a third option? An answer is offered by a certain part of doctrine, as well as by the case-law of supreme Czech courts. This is witnessed, for example, by the resolution of 4 August 2015, File No. 14 Cmo 184/2014, in which the High Court in Prague concluded, *inter alia*: *"The legislation effective from 1 January 2014, as is clear from the cited Section 164 (1) and (2) of the Civil Code, is newly based on the fact that a member of the governing body acts as a representative sui generis of the juristic person (this is neither statutory nor contractual representation)."* This conclusion was supported not only by the civil and commercial department of the Supreme Court of the Czech Republic, which approved the mentioned resolution for publication in the Collection of Court Rulings and Opinions in early 2016 (resolution of the Supreme Court of the Czech Republic of 29 February 2016, File No. 29 NSCR 42/2016), but also by a small chamber of the Supreme Court of the Czech Republic, which supplemented and further elaborated

the arguments presented by the High Court in Prague in its resolution of 31 October 2017, File No. 29 Cdo 387/2016.

The author of Chapter Five also promotes this concept. In his opinion, the concept of representation *"sui generis"* best reflects the specific position of a member of the governing body compared to all other representatives. Only exceptionally, under the conditions laid down by the law (e.g., in Section 164 (2) of Section 430 of the Civil Code), will a member of the governing body find himself, when representing the juristic person, in the position of its contractual or statutory representative. It is inferred from the specific nature of representation of juristic persons by members of their governing bodies that the provisions on contractual or statutory representation will generally not apply to acts taken by these members. Only the general provisions common to both these types of representation (Sections 436 to 440 of the Civil Code) will apply, and this will only be true insofar as there are no special provisions in Title II, Chapter 3 of the Civil Code, or in the Corporations Act.

It follows primarily from the mentioned specificities that, unlike under the first sentence of Section 436 (2) of the Civil Code, according to which it is possible to impute to a juristic person **good or bad faith,** as well as knowledge of a certain legally relevant fact, on the part of persons who acted for the juristic person in a case affected by that faith or knowledge only in respect of facts of which these representatives learnt after they became authorised to act in the given matter, the regime under Section 151 (2) of the Civil Code, which does not permit such differentiation in terms of time, will have to be preferred in respect of members of the governing body. However, even a juristic person cannot invoke good faith of its representative if it itself lacked such faith (Section 436 (2), second sentence of the Civil Code). According to Section 151 (2) of the Civil Code, the existence of the thus-conceived good faith of a juristic person, irrespective of the identity of its representative, will have to be inferred especially from good faith of members of its governing body. In the case of a collective body, it will be necessary to impute to the juristic person the knowledge of even a single of its members. At the same time, it cannot be relevant in this case, either, whether he learnt about the given fact after his appointment or earlier.

The author of Chapter Five also describes and supports the conclusions made by the Supreme Court to the effect that acts taken by a member of the governing body on behalf of a juristic person are (in the case of corporations, if the special requirements laid down by the Corporations Act were not complied with) subject to application of **Section 437 (1) of the Civil Code and the ensuing prohibition to represent the juristic person in the event of a conflict of interests**, including the consequences of its violation. Beyond the scope of reasoning of that ruling, the author has no doubt that such a consequence will consist, in conformity with Section 437 (2) of the Civil Code, in voidability of an act made at variance with that prohibition, which may be invoked by the juristic person (within the general limitation period) if the third party knew or must have known about the conflict.

The author of Chapter Five also provides an affirmative answer (and thus deviates from opposite opinions which he held in the past) to the question of **whether**

it is possible to subsequently approve acts taken by a member of the governing body who failed to comply with the prescribed manner of representation of the juristic person and acted independently for that person although it was supposed to be represented by several body members jointly. The author infers that the provisions on *ratihabitio* enshrined in Section 440 (1) of the Civil Code will also be applicable to a member of the governing body of a juristic person. If a member of the governing body violates the "four eyes" rule, his acts will not be binding on the juristic person, but will nevertheless bear legal significance. On the one hand, they can later be complemented by a successive act taken by another member of the same body, whereby *(ex nunc)* the given act becomes binding on the juristic person. It cannot be ruled out, either, that the juristic person might subsequently approve such acts taken by the member of its governing body, with effects *ex tunc*. Since such an act of *ratihabitio* also represents a legal act (different from the act being approved), it must be performed for the juristic person in the prescribed way. It could again be done for that person by members of the governing body (through joint representation, as required by the founding legal act). However, it could also be taken by any other person whose authority to represent also covers the act that is to be approved, and thus also logically its subsequent confirmation. In view of the nature of such a legal act, this could be true, e.g., of a contractual representative (e.g. a corporate agent), as well as a statutory representative under Section 430 (1) of the Civil Code (for example, the chief executive officer or a director whose mandate, and thus also the statutory authorisation under the said provision, covers such an act).

Finally, it is concluded based on the described concept of representation of a juristic person by members of its governing body (and based on further arguments) that **the manner of representation of the juristic person by these members cannot be combined with other types of representation, including corporate agency.** An arrangement made among the shareholders (and comprised in the founding legal act) which combines representation by a member of the governing body with representation by a corporate agent would not have the effect of limiting the governing body member or the corporate agent in his authority to represent the juristic person *vis-à-vis* third parties. At most, it would constitute an internal restriction that would have no effects towards third parties. If joint acts taken by a member of the governing body and by a corporate agent were entered in a public register as the manner of representation of a juristic person, then an act taken even by a single member of the governing body, as well as that of the corporate agent (if made within the operation of an enterprise) would bind the juristic person.

12.6 Specific features of legal acts taken (not only by juristic persons) in procedural law

The primary objective of Chapter Seven was to answer the question of what differences there are between acts taken by (not only juristic) persons in substantive legal relations, on the one hand, and in procedural relations, on the other hand. It ought to be noted in this respect that "legal acts" and "procedural acts" within civil court proceedings differ substantially from one another. This is reflected in the provisions on their effects alone, where effective procedural acts may also be made by entities which lack a legal personality under substantive law (e.g. terminated juristic persons). There is also a significant difference in interpretation of procedural acts, as the decisive criterion in procedural relations is (as a rule) not the actual will of the parties, but rather the objective meaning of their expressions. As regards the consequences of defects of procedural acts, it was shown that the provisions of private substantive law on defects of legal acts cannot be applied to them without further considerations. It therefore applies, as a rule, that a procedural act cannot be considered invalid on the grounds of a mistake, nor can it be considered "ostensible" in the event of a lacking will of the party. Chapter Seven also examined in detail the question of conditionality of procedural acts, with the conclusion that even procedural law cannot completely prevent the use of certain conditions. Their existence must be admitted in those cases where they will not lead to uncertainty as regards the further procedure. The chapter also paid attention to legal acts made within pending proceedings. The author of this chapter reached the conclusion that the fact itself that a legal act was made during proceedings changes nothing about its substantive nature. It is therefore valid only if all the preconditions laid down by substantive law were met. Of course—in terms of substantive legal relations—if a claim is set off during proceedings, the counterclaim terminates. However, this fact will be reflected in the final judgement only if invoked by the given party in the proceedings—via its own procedural act (a plea of set-off). The differences in the prerequisites laid down by substantive law and by procedural law are also clear in respect of acts such as acknowledgement of debt and acknowledgement of a procedural claim. The preconditions for their validity (effects) and their consequences are entirely different, where it must hold that acknowledgement of a debt as such does not equate to acknowledgement of a procedural claim, and *vice versa*. In terms of the legal regulation of procedural agreements, the author found that they could only be effectively concluded where this was permitted by the legislation. This follows from their public-law nature; the principle of autonomy of will cannot apply in procedural law. It was also examined why the regulation of acts taken by a juristic person in substantive and in procedural relations differs. The author of this chapter arrived at an important conclusion that an emphasis on the value of legal certainty led the legislature to adopt procedural provisions which—unlike substantive law—unambiguously lay down (cf. Sections 21 to 21b of the Code of Civil Procedure) that a juristic person has its own will, and who specifically expresses such will.

12.7 Juristic person as a subject of responsibility

If a juristic person lacks capacity to take its "own" legal acts, it cannot have the capacity to perform its "own" unlawful conduct, either. However, if a juristic person does not have the capacity to take unlawful acts, **how could it become liable under law?** The answer is simple—it can be liable if so stipulated by the applicable laws—the legislation. Indeed, for juristic persons to **have the capacity to bear legal responsibility**, it is indecisive whether they are capable of making their own unlawful acts; the only decisive aspect is whether such a capacity is attributed to them by law as part of their legal personality. In actuality, a sovereign legislator is free to determine whether and to what extent a juristic person and the persons representing it shall bear responsibility. In other words, the legislator determines whether a duty arising on the basis of such responsibility (or liability) can be attributed to the juristic person. At the same time, it is true that potential capacity to bear legal responsibility (or liability) is not sufficient, in itself, to create a certain obligation based on such liability. Indeed, the capacity to be an offender or wrongdoer as such does not suffice for any person to actually become an offender or wrongdoer. It is necessary in this respect that the legislation also determine the legal ground for the inception of liability for any harm caused. Such a legal ground differs, however, for no-fault and fault-based liability.

In the case of **no-fault liability**, it is unimportant why the harm arose, and its existence is sufficient in itself. Indeed, the legislation itself qualifies the harm caused as an unlawful state of affairs and, based on the legislation alone, the harm is attributable (imputable) to the juristic person. A similar situation also arises in the case of **contractual liability**. In this case, the contractual obligation of a juristic person lies in attaining a certain result, rather than in the action leading to that result. It follows from the above that a failure to perform a contractual obligation can be qualified as an "unlawful result", i.e. "unlawful state of affairs". The creation of contractual liability therefore does not require unlawful conduct, either.

The situation is more complex in the case of **fault-based liability**. If we consider that a juristic person does not have its own reason and will, this must mean that it lacks legal capacity. However, if it lacks "legal capacity", it cannot have "mental capacity", either, analogously to a human being who has lost his recognition and control abilities and therefore cannot be considered a criminal offender. However, if the lack of legal capacity on the part of a juristic person does not prevent it from performing legal acts using someone else's reason and will, it is possible, on the same note, for it to act unlawfully, again via reason and will of another person. This means, in other words, that the reason and will of another person are imputed to a juristic person as its unlawful conduct. The viability of this legal construct is attested to by the existence of criminal and infraction liability of juristic persons, which can be found in some form in a majority of EU countries.

12.8 No-fault liability of juristic persons

No culpable unlawful conduct is required to create no-fault liability (unlike fault-based liability). The capacity to bear no-fault liability ensues from the fact that a juristic person has legal personality and, therefore, also the capacity to bear a legal duty. There can be no doubt as to the capacity of a juristic person to be liable in this case. Indeed, in the case of no-fault liability, a juristic person incurs a legal duty as a result of harm whose existence, or more specifically, the circumstances of its arising, are defined directly by law; this is why we also refer to a "law-based harmful event" as a ground for the creation of no-fault liability. Such an **event envisaged by law** (i.e. law-based) is also the reason why the duty to compensate such harm is imputed to the juristic person. It is thus indecisive in this case whether the subject of liability (i.e. the entity liable) is a juristic or natural person. "Imputability" of a duty based on liability does not follow from unlawful conduct of the perpetrator, but rather directly from the law. There is thus no difference between a natural and a juristic person in terms of imputing to them duties arising from no-fault liability.

It should be noted in this respect that no-fault liability always arises based on imputability laid down by law; however, it is not entirely clear whether such a reason must always be a law-based "harmful event". This is closely related to the issue of **"contractual liability"**. It is common ground within legal doctrine that liability for breach of a contractual obligation takes the form of "no-fault liability" (i.e. existing regardless of culpability); however, it is usually considered[467] that breach of a contractual obligation can be conceived as unlawful conduct which need not be culpable. In the case of contractual liability, no-fault liability does not arise, strictly speaking, on the grounds of a law-based "event", but rather on the basis of a breach of contract envisaged by law. This, however, changes nothing about the fact that the law itself qualifies breach of contract as a ground for the creation of no-fault liability.

If, in the case of no-fault liability, the reason for imputability always lies in the specific elements described by the law, it is then necessary to demonstrate the **creation of liability duty in connection with the specific elements laid down by law**. Two basic groups of liability can be distinguished from this viewpoint—liability for an activity and liability for harm caused by a thing. In both these cases, it can be concluded that the ground for imputability lies in the special relationship of the wrongdoer to the operation or thing that caused the harm. This "special relationship" is usually—but not exclusively—an ownership relationship, i.e. the owner is usually also the operator of a certain activity in whose operation the harm arises. The operator might not simultaneously be the owner, for example, in a situation where a certain person operates certain activities, equipment or uses a certain thing, e.g. based on rent, usufructuary lease, lease, etc.

[467] The opposite opinion is maintained by Karel Beran. In this respect, cf. BERAN, K. "Juristic person as a subject of responsibility", Chapter 7.

However, it cannot be inferred from the fact alone that no-fault liability does not arise as a result of culpable unlawful conduct that such conduct has no significance in the case of no-fault liability. That is not so. Indeed, culpable unlawful conduct can be relevant in terms of the grounds for exoneration (including contributory conduct of the aggrieved party), which will play a considerable role especially in the case of a juristic person. Indeed, juristic persons, too, can undoubtedly claim that they used all the care that could be reasonably required of them, i.e. specifically that they did not neglect due supervision, or that the harm was caused (fully or partially) through the fault of the aggrieved party. However, these are still grounds for exoneration, rather than for exculpation, i.e. grounds which lead to a release from the duty to compensate harm based on criteria laid down by the law.

12.9 Liability of juristic persons based on fault

Any considerations regarding fault-based liability of a juristic person had to start with terminological clarification of the notion of **"capacity to commit a wrong"** (also sometimes denoted as "delictual capacity") on the part of a juristic person and differentiating it from the juristic person as a **"subject of responsibility (liability)"**. The capacity of a legal person to bear legal responsibility (liability) follows from the fact alone that it is a person and thus has legal personality. However, this only means that a juristic person is potentially capable of bearing a legal duty which may arise for it, e.g. on the grounds of liability. Nonetheless, a precondition for incurring subjective liability is **culpable unlawful conduct**. If a wrong is considered a culpable breach of a legal duty, it is then a question **whether a juristic person has at all the capacity to commit a wrong.** In Czech legislation, doubts arise as to the capacity of juristic persons to commit a wrong in view of Section 24 of the Civil Code, whose phrasing indicates that such a capacity can only be borne by a human being—natural person. Only a human being is capable of assessing and controlling his conduct, and thus being liable for it. Such narrowly conceived capacity to commit a wrong implies that a juristic person can never be liable based on fault because—as shown in Chapter Three—it cannot have its own reason and will which is not derived from a natural person. However, although a juristic person cannot have its own reason and will from the legal-analytical viewpoint, nothing prevents the law from attributing to it the reason and will of natural persons who act as members of its bodies, employees or other representatives within the meaning of Section 167 of the Civil Code. This "foreign" reason and will, imputed to the juristic person based on special laws, is then fully sufficient for the juristic person to be capable of bearing criminal or administrative liability for conduct that is considered its own. It would be absurd if a juristic person under public law bore fault-based liability for committing a criminal or administrative offence, and did not have such liability under private law. For these reasons, in particular, the author of Chapter Nine concludes that a juristic person must have an

analogous capacity to commit a wrong as a natural person—human being—in connection with Section 24. However, a complex issue arises in the case of a juristic person in terms of imputing to it the conduct of a natural person.

Imputability of unlawful conduct to a juristic person cannot be set otherwise than by law. This must be true both of criminal or administrative liability and of liability under private law. The basic provision setting such imputability in private law is Section 167 of the Civil Code. However, the scope of application of Section 167 of the Civil Code is somewhat disputable in view of Section 2914 of the Civil Code, which also sets the rules of imputing and liability. The scope of application and the mutual relationship between the two above provisions has yet to be satisfactorily resolved in doctrine, and all the more so in case law. One possible line of interpretation is that Section 167 of the Civil Code can be considered a special provision applicable to juristic persons, while Section 2914 of the Civil Code a general provision applicable to all persons (not only juristic) who use an assistant to pursue their activity. Another possible interpretation assumes that Section 167 of the Civil Code provides for the attribution of unlawful conduct resulting in an "unlawful act". An unlawful act, in the broadest sense of the word, can be considered a precondition for the creation of a legal duty, and this duty need not only lie in compensation for damage, but can also take the form of invalidity, liability for defects, liability for a delay, etc. In contrast, Section 2914 of the Civil Code applies in this respect only to cases of compensation for damage. The author of Chapter Nine adopts his own opinion on this issue ensuing from the special nature of Section 2914, which—he assumes—can only be applied to cases where statutory civil liability arises.

Both in the case of a natural and of a juristic person, it must apply that unlawful conduct as such is not sufficient. The **unlawful conduct must be culpable**, at least in the form of negligence. An answer to the question of whether or not unlawful conduct of a juristic person was negligent, turns on the question of what negligence is, both in relation to a natural person and in relation to a juristic person. Indeed, up to 2014, i.e. under the former Civil Code, negligence was construed in the Czech Republic based on its definition in criminal law. It was therefore decisive what each person objectively "should have known" and also subjectively "could have known". However, in terms of the current Civil Code, it must be borne in mind that it lays down presumptions of negligence (Sections 2911 and 2912), which apparently comprise their own definition of negligent conduct under private law. In view of the above, it cannot be ruled out that the objective standard of what every person "objectively should have known", regardless of what that person "subjectively could have known", will have to be preferred in private law. However, the author of Chapter Nine does not share this view and believes that, for a natural person—human being—, the Civil Code also allows the application of the subjective criterion (of what the given person could have known).[468] This nonetheless does not apply in the case of a juristic person. A juristic

[468] However, in terms of the objective standard of care, the author in no way subjectivises this requirement and applies strict objective criteria both to natural and to juristic persons. This is so because the

person is a mere legal construct that does not allow for considerations as to what it subjectively could have known in respect of specific unlawful conduct, but it is rather necessary to follow from the ideal standard of what the juristic person should have known, objectively. It follows that the stricter objective standard will apply in case of negligent conduct of a juristic person, where (in the case of a juristic person) the above standard cannot be mitigated by reference to the subjective criterion.

12.10 Vicarious liability of juristic persons

The concept of "vicarious liability of juristic persons" relates to the author's own theory of responsibility/liability as such. In line with his previously published conclusions,[469] the author differentiates between "liability" under positive law and "responsibility" under natural law. *Responsibility* (in German: *Verantwortung*, in Czech: *odpovědnost*) means, in his opinion, a *material* duty to provide a legally relevant response based on the law, i.e. most often a response based on natural law, or rather any law without a necessary link to positive law. Such responsibility, as the duty to provide a response based on the law, thus follows for the *responsible entity* primarily from non-positive grounds linked to a human being (individual). Responsibility in this sense tends to be a natural duty to provide justification for a human's conduct, which is based on reason, will or nature. In contrast, *liability* (in German: *Haftung*, in Czech: *zavázanost*) means a *formal* duty to provide a legally relevant response based on the law, i.e. based on positive law. Liability, as an obligation to provide a response based on the law, thus follows for the *liable* entity primarily from grounds under positive law related to the given person *qua* person under the law (legal entity). Liability in this sense tends to be a formal duty under positive law to present reasons justifying the conduct of a person (e.g. to compensate damage), which is attributed to this person by positive law. The author substantiates this differentiation especially by historical and philosophical analysis.

Two possible conclusions can be derived against the backdrop of this differentiation, and also based on adaptation of the normativist terminology and the theory presented by the author. On the one hand, every legal system must be capable of theoretically devising the idea of vicarious liability (as opposed to direct liability and responsibility). Theoretically, any person could be held liable for wrongs only in two ways—liability for the person's own wrongs and liability for wrongs of other persons. On the other hand, Chapter Ten concludes that juristic persons may be liable only vicariously for wrongs committed by other persons, who ultimately have to be humans. Juristic persons, especially in view of their nature, cannot be held individually

view of a legal duty and its proper performance must be applicable, without further ado, in the same way to every person who is bestowed with personality under civil law.

469 JANEČEK, V. *Kritika právní odpovědnosti [Critique of Legal Responsibility]*. Prague: Wolters Kluwer, 2017.

responsible or directly liable for their own acts. A clear advantage of this approach lies, according to the author, in a clear distinction of responsibility (liability) of juristic persons from that of natural persons—human beings.

12.11 Administrative-law liability of juristic persons

Chapter Eleven first describes the development of the legislation on public-law (administrative) liability of juristic persons, which has undergone dramatic changes in Czech law during the last half century. The original concept of administrative offences committed by organisations, existing under the socialist system, was replaced after 1989 by a modified concept of (so-called) "other administrative offences" of juristic persons and of natural person operating a business. During the almost three decades which have passed since 1989, however, the issue of an inadequate legislative basis for this type of administrative punishment has grown considerably in importance, *nota bene* in a situation where this type of punishment also falls within the scope of Art. 6 of the Convention, and should thus be subject to increased constitutional requirements. A fundamental change took place in the Czech Republic in July 2017, with the effect of new Act No. 250/2016 Coll., on liability for infractions and proceedings concerning infractions. The new Act codified the basic procedural and substantive aspects of administrative punishment, and also brought the notions of infractions and administrative offences together in a single category titled "infractions" while, however, maintaining certain important specific features related to infractions committed by juristic persons and by natural persons operating a business. **The objective of Chapter Eleven was therefore primarily to clarify certain disputable questions related to a juristic person as a wrongdoer under public law.**

When seeking an answer to the question of when unlawful conduct of natural persons (or the results of such conduct) can be imputed to a juristic person, it must (also) be borne in mind primarily that the conduct of the natural person led to *"breach of a duty imposed on the juristic person"*. It follows that, e.g., if a person driving a vehicle belonging to a juristic person exceeds the speed limit while working for the juristic person, the juristic person cannot be considered to have committed an infraction because it has no such duty. However, this does not mean, on the other hand, that in cases where *"breach of a duty imposed on a juristic person"* undoubtedly occurs and, at the same time, it is not possible to identify a specific human being responsible for the conduct, liability of the juristic person is not conditional on finding that specific natural person. Nonetheless, even such imputability cannot be limitless. Therefore, the author of this chapter prefers a construction according to which the law does not permit punishment of a juristic person—"empty shell"—which has no personnel whatsoever. Similarly, he believes—although the law has abandoned the concept of strict no-fault liability of juristic persons and thus permitted possible exoneration (Section 21)—that *"the actual mandatory or necessary performance of supervision*

over employees" need not mean, in itself, that the juristic person will exonerate itself. In his opinion, the possibility of exoneration will depend on the overall context, type of duty breached, etc. As regards the property of the juristic person, which should be taken into consideration when imposing sanctions, the author considers that it should be reflected only exceptionally, in view of the applicable legislation which, *expressis verbis*, does not allow such consideration. One of the most topical issues in terms of administrative punishment (not only) of juristic persons then lies in the application of the principle of *"ne bis in idem"*, given the possibility of dual punishment under various sectoral laws. Indeed, the current practice in the Czech Republic is such that various, or even the same, administrative authorities hold mutually entirely independent sets of proceedings in which they punish the same persons for violation of different laws through the same conduct (same act). Such procedures are unacceptable in view of case-law of the ECtHR. At the same time, case-law of the ECtHR offers a viable option of how to protect various values protected by various laws against offences having the origin in the same conduct. However, such sets of proceedings must be harmonised in time and substance, the authorities must be aware of the course of the other proceedings and, when deciding on the penalty, they must take account of any penalty that has already been imposed; taking of evidence should also be harmonised between these proceedings. This is the only way to ensure that the Czech regulation of administrative punishment will respect the guarantees set out in Art. 4 of Protocol No. 7 to the Convention.

SUMMARY

The monograph entitled "Artificial Legal Entities: Essays on Legal Agency and Liability" aims to answer the question of how juristic persons can perform legal acts (i.e. engage in legal conduct) and in what way they can potentially become legally liable (not only for their conduct). This is reflected in the structure of the monograph. Attention is first turned to the concept of a juristic person and the legal acts it makes from the viewpoint of the general legal doctrine, which then informs the view under constitutional law. Only then are legal acts analysed in terms of the law currently applicable in the Czech Republic, which conceives the bodies of a juristic person as its representatives. However, legal conduct comprises not only substantive, but also procedural acts within civil court proceedings, where the latter show significant deviations from the former and thus require separate considerations. The last group of issues pertain to liability (or responsibility) of a juristic person. Once a general explanation has been provided in terms of the juristic persons' capacity to bear liability, an answer can be sought to the question of what can be imputed to such persons on the grounds of "no-fault" and "fault-based" liability. Following the traditional concept of private-law liability of juristic persons, the monograph also introduces an alternative approach to legal liability (responsibility) of juristic persons based on the notion of "vicarious liability". The section dealing with liability then concludes with a chapter on juristic persons' liability for administrative offences. This structure and scheme of individual chapters is also reflected in their contents.

The **first** chapter aims to introduce the common features and effects of legal acts and of responsibility, or liability, of juristic persons; indeed "legal act" ("legal conduct"), "responsibility (liability)", as well as "juristic person" are usually construed and treated as mutually isolated concepts, which seemingly have nothing in common. On rare occasions, the concepts of legal act (legal conduct), legal responsibility and liability and juristic person are considered in mutual conjunction, in searching for an answer to the following questions: "What is legal conduct of a juristic person?" and "What is legal responsibility and liability of a juristic person?". For this reason, this chapter explains what "legal act" ("legal conduct") and "legal responsibility (liability)" have in common with regard to juristic persons. This analysis serves as a basis for the arrangement and contents of the individual chapters.

The **second** chapter titled "What entity could engage in legal conduct?" aims to explain the prerequisites that must be met for any legal entity to have capacity to enter into legal relationships and thus act as a person in terms of law, i.e. an entity vested with rights and obligations. There are two essential prerequisites for a person to be able to engage in any conduct, including legal conduct: reason and will. However, the law also provides for the concept of "persons lacking legal capacity", i.e. entities that

lack reason and will, or persons in whom these faculties are insufficiently developed. This raises a question of how it is possible that such persons enter into legal relationships and acquire rights and obligations. To understand how a person lacking reason and will could engage in legal conduct, we first need to explain the meaning of the notion of "conduct" and how it differs from "legal conduct". The first difference lies in the purpose of "conduct" and "legal conduct", respectively. The second then lies in the question as to who can engage in "conduct", on the one hand, and in "legal conduct", on the other hand. Once those questions are answered, it then becomes clear how law permits even a person without reason and will, i.e. lacking legal competence, to engage in legal conduct.

The **third** chapter aims to tackle the question of whether a juristic person can be considered to have or lack legal capacity, which presumes an answer to the question of what is or can be considered reason and will of a juristic person. The way a legal personality is discerned nonetheless differs for natural and juristic persons. Indeed, in the case of natural persons, our senses allow us to determine who a natural person is and what legal conduct can be attributed to him (or her). Such an approach cannot be used in the case of juristic persons. Accordingly, for juristic persons, answers to both aforesaid questions need to be derived from the applicable law. However, even the applicable law cannot explain why an entity other than a human being is considered a person or why only specific conduct that is described by the applicable law can be considered legal conduct of a juristic person. Therefore, we must analyse the conclusions which follow from theories of legal persons as concerns their legal acts (conduct). It then has to be shown, in particular, how such theories explain the substance and creation of juristic persons' reason and will, and how it is at all possible for a juristic person to possess its own reason and will and, accordingly, to be deemed to enjoy legal capacity in a sense similar to natural persons.

The **fourth** chapter titled "Juristic persons as holders of fundamental rights" discusses the legal relationships in which juristic persons take part as persons vested with fundamental rights. Although human rights conventions have not provided a clear answer to whether persons other than humans can be vested with fundamental rights, social developments and the growing importance of juristic persons in the 20th century led courts to increasingly attribute fundamental rights also to juristic persons. Moreover, explicit regulation of fundamental rights of juristic persons appears in newly constructed fundamental rights conventions. This chapter compares the approach in legal theory and case law with the legal environment in the Czech Republic, Germany and, finally, the Strasbourg system of protection of human rights. Special attention is paid to fundamental rights of the state and other public-law corporations, a widely debated and controversial issue in Czech jurisprudence.

The **fifth** chapter titled "How can a juristic person act under substantive law?" discusses how the members of a juristic person's governing body create and manifest its will and what rules apply to this conduct. Czech law does stipulate that members of the governing body represent the juristic person. However, this representation is so unique in form that it cannot be subsumed under either contractual or statutory

representation, i.e. the traditional categories distinguished and regulated by law. For example, the position of such members in the structure of the juristic person is different; their will and good faith is imputed to the juristic person differently and the statutory scope of their authorisation to represent the juristic person is unique, to name just a few differences. For this reason, it is inconceivable that this form of representation be governed by the rules applicable to contractual or statutory representation, and that in the same conduct, the juristic person be jointly represented by a member of its governing body and another representative (e.g. a corporate agent). Only the rules common to all forms of representation can be applied, with exceptions following from special regulations pertaining to the governing body. This chapter provides an overview of the rules and modifications (including the regulation of conflict of interest), as well as the practical difficulties in their application.

The **sixth** chapter deals with the difference between substantive-law conduct of (not only) juristic persons on the one hand and acts of juristic persons under procedural law on the other hand. It is pointed out that the conditions under which legal conduct of a juristic person gives rise to legal consequences are stipulated differently for substantive-law and procedural-law relationships, respectively. For the aforementioned reason, the author of the chapter attempts to separate the concepts of legal and procedural conduct and proposes a terminological definition of a procedural act and procedural conduct. The author notes that substantive-law conduct differs from procedural acts not only in terms of their requisites, but also in terms of the legal consequences of a failure to meet these requisites. Firstly, procedural law does not operate with the term "invalidity" because it offers other means of remedying defects of procedural acts. Procedural-law relationships are determined by the supervisory activities of the court, which can ascertain any shortcomings of procedural acts through enquiries, advice or other appropriate measures and thus facilitate a remedy of any defects. Major differences between substantive-law conduct and procedural acts of persons can also be found in the area of their interpretation, the possibility to perform acts subject to a certain condition, etc. The chapter pays special attention to distinguishing procedural and substantive-law effects of procedural acts made by a party (person) in court proceedings, and also to procedural agreements. In the final part of this chapter, the author demonstrates on an example of a Czech legal regulation why the concept of conduct of juristic persons can differ under substantive-law and procedural regulations. The author believes that the different approach is a result of a stronger emphasis placed by procedural law on the unambiguity of legal regulations.

The aim of the **seventh** chapter is to explain how it is possible that a person who—as was shown in the third chapter—cannot be deemed to truly enjoy legal personality can be liable for a wrong and thus be a subject of responsibility (liability). To a certain degree, "legal personality" is associated with the person's "mental capacity" in terms of his or her capacity to **bear legal responsibility (liability)**. The answer is simple—it can be liable if so stipulated by the applicable laws—the legislation. Indeed, for juristic persons to **have the capacity to bear legal responsibility**, it is indecisive whether they are capable of making their own unlawful acts; the only

decisive aspect is whether such a capacity is attributed to them by law as part of their legal personality. In actuality, a sovereign legislator is free to determine whether and to what extent a juristic person and the persons representing it shall bear responsibility. In other words, the legislator determines whether a duty arising on the basis of such responsibility (or liability) can be attributed to the juristic person. At the same time, it is true that potential capacity to bear legal responsibility (or liability) is not sufficient, in itself, to create a certain obligation based on such liability. Indeed, the capacity to be an offender or wrongdoer as such does not suffice for any person to actually become an offender or wrongdoer. It is necessary in this respect that the legislation also determine the legal ground for the inception of liability for any harm caused. Such a legal ground differs, however, for no-fault and fault-based liability.

The **eight** chapter titled "No-Fault Liability of Juristic Persons" strives primarily to define strict liability in private law with regard to its functions, which remain the same, albeit in a different social context. No-fault liability is increasingly becoming the dominant liability relationship in private law, despite the declared primacy of liability based on fault. This is not development in recent years, but rather a long-term trend in tort law. European countries (France, Germany, Austria, Italy, Poland, Spain, the Netherlands and others) have witnessed recurring discussions on the various models of introducing "stricter" civil liability for damage. The main motivation lies in fair allocation of risks and consistent protection of the aggrieved parties. However, the regulation of no-fault liability should not paralyse desirable social, technical and technological progress. It is thus necessary that the debates strike a balance among these social interests.

The aim of the **ninth** chapter titled "Liability of juristic persons based on fault under the New Civil Code" is to introduce the legal regulation of liability based on fault, i.e. the obligation to compensate damage based of fault, under the Czech Civil Code, and to answer questions crucial for the creation and imputing the obligation to compensate damage to a juristic person. It follows from theory of legal fiction, which currently serves as the basis of legal understanding of juristic person, that a juristic person cannot act itself, but rather that unlawful conduct of specific natural persons is imputed to it. The author first deals with the issue of imputability of unlawful conduct of a natural person (an individual) to a juristic person, i.e. under which circumstances this occurs and to what extent the capacity to be liable for a wrong can be inferred. For a liability based on fault to be incurred, the mere existence of unlawful conduct is not sufficient; even in the case of juristic persons, it holds that the given unlawful conduct must be culpable. For this reason, in the final part of the chapter the author tries to clarify what constitutes negligence on the part of a juristic person and whether and how it can be distinguished from unlawfulness of a conduct. The author finds the answer to this question by analysing conduct of both natural and juristic persons.

The **tenth** chapter puts forth two claims regarding vicarious liability. First, that every legal system must be capable of theoretically devising the idea of vicarious liability (as opposed to direct liability and responsibility). Second, that juristic persons and other artificial legal entities may be liable only vicariously for wrongs committed

by other persons, who ultimately have to be human beings. To cast new light on the concept of vicarious liability, this chapter analyses the changing relationship of the terms liability *(in Czech: "ručení")* and responsibility *(in Czech: "odpovědnost")* in the historical development of Czech law. This development was marked not only by radical changes in the understanding of law as such and the problematic connection of the Czech legal terminology with the German one (especially with the terms *Haftung* and *Verantwortung*), but especially by the normative theory of law, known abroad especially thanks to the work of Hans Kelsen. A peculiarity of the Czech tradition in the normative theory of law (analysed in this chapter primarily through the work of František Weyr) is that it has arrived at the concept of vicarious liability by analysing the abstract nature of legal duties, i.e. regardless of any positive legal system. This happened already in the 1930s, although the Czech normative theory of law did not take into account any developments in the common law systems with which the concept of "vicarious liability" is typically associated.

The aim of the **eleventh** chapter is to explain the changes and the existing regulation of the Administrative Law-Liability of Juristic Persons The legal regulation of the administrative liability of juristic persons and natural persons operating a business has undergone considerable development in Czech law over the past half century. The original concept of administrative offences committed by organisations, existing under the socialist system, was replaced after 1989 by a modified concept of (the so-called) "other administrative offences" of juristic persons and of natural person operating a business. The first part of this chapter describes the conditions before 2017. During the almost three decades which have passed since 1989, the issue of an inadequate legislative basis for this type of administrative punishment has grown considerably in importance. A fundamental change took place in July 2017, with the effect of new Act No. 250/2016 Coll., on liability for infractions and proceedings concerning infractions. The new Act, which will be subject to analysis in part two, codified the basic procedural and substantive aspects of administrative punishment, and also brought the notions of infractions and administrative offences together in a single category titled "infractions" while, however, maintaining certain important specific features related to infractions committed by juristic persons and by natural persons operating a business. Nonetheless, the substantive definition of the merits of infractions committed by juristic persons and natural persons operating a business remains scattered over hundreds of special laws and, moreover, proceedings on these infractions continue to be conducted separately before various administrative authorities. The problem of double jeopardy *(ne bis in idem)* arises. Consequently, part three focuses on conformity of this state of affairs with the requirements following from case-law of the European Court of Human Rights.

The **twelve** chapter summarises the findings of the authors of previous chapters in order to answer, in terms of general legal theory, the question of how juristic persons can perform legal acts (i.e. engage in legal conduct) and in what way they can potentially become legally liable (not only for their conduct). The structure and contents of the summary thus corresponds to the structure of the monograph and is subdivided

into the following subchapters: What entity could engage in legal conduct; Can a juristic person really enjoy legal capacity; Juristic persons as holders of fundamental rights; How can a juristic person act under substantive law; Acts of the parties and court in civil procedure; Juristic person as a subject of responsibility; No-fault liability of juristic persons; Liability of juristic persons based on fault; Vicarious liability of juristic persons; Administrative law liability of juristic persons.

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