



Ondřej Frinta

Natural Persons



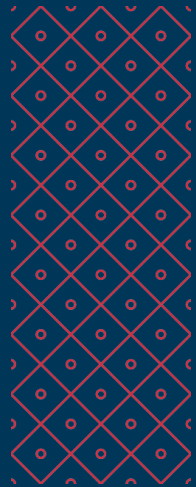
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5. Legal Capacity
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Chapter 1

Concept of a Person

Notion: Succession Law

*“Et quia magnae dignitatis est in rationali natura subsistere, ideo **omne individuum rationalis naturae dicitur persona**, ut dictum est.”*

Thomas Aquinas (*1225, †1274)
Summa theologiae, I, q. 29, a. 3 ad 2

Available at: <https://www.thelatinlibrary.com/aquinas/summa.shtml> [visited 2025-12-30].

Picture source: [Gentile da Fabriano](#) – The Yorck Project (2002) 10.000 Meisterwerke der Malerei (DVD-ROM), distributed by DIRECTMEDIA Publishing GmbH. ISBN: 3936122202. Available at: https://cs.wikipedia.org/wiki/Tom%C3%A1%C5%A1_Akvinsk%C3%BD#/media/Soubor:Gentile_da_Fabriano_052.jpg [visited 2025-12-30].





Concept of a Person

Greek notion “*prosópon*” = mask worn by actors when playing a role in the theater
different types of masks (comedy, tragedy, different characters)

the actor plays a role ► the audience is not interested in the actor hidden behind the mask,
but in the role that the mask embodies

- “*prosópon*” (later) = not only the mask, but the abstract role of the actor
- ► “*prosópon*” (final meaning in Greek) = an individual, human being, that “plays a role”
in real life



Concept of a Person

Roman law:

lat. “*persona*” = a person (“*osoba*” in Czech)

*"Omne autem ius, quo utimur, vel ad **personas** pertinet vel ad res vel ad actiones. Sed prius uideamus de **personis**."*

Gaius, Institutes, I, 8

*"Et quidem summa divisio de **iure personarum** haec est, quod omnes homines aut liberi sunt aut servi."*

Gaius, Institutes, I, 9

► Roman law (Imperial period) – *persona* in the sense of a human being in general



Concept of a Person

An actor puts on a mask

- ▶ assumes a role
- ▶ and thus becomes relevant to the play being performed.

Analogy:

Law does not concern itself with the human being as a whole, but only insofar as he is relevant to a legal norm

- ▶ i.e., one of the “roles” a human plays is the “role of a (natural) person.”



Concept of a Person

*"... so ist **jeder Mensch** als eine **Person** zu betrachten, er darf nicht, gleich einer Sache, als Mittel zu beliebigen Zwecken anderer gebraucht werden."*

von Zeiller, Commentary on § 16 ABGB

von Zeiller, F. E. Commentar über das allgemeine bürgerliche Gesetzbuch für die gesamten Deutscher Erbländer der Oesterreichischen Monarchie. Erster Band. Wien und Triest: Geistingers Verlagshandlung, 1811, p. 103.

- ▶ Every human being
- ▶ Regardless of intellectual capacity
- ▶ Is regarded as a person (no more place for slavery – treating a human being as a thing, an object of rights and duties)



Concept of a Person

Sect. 19 para 1: Every individual has **innate** natural rights knowable by the **very reason** and feelings, **and therefore is considered to be a person**. A statute only provides for the limits of application and the manner of protection of the natural rights of an individual.

= The legislator **acknowledges** the legal personality, **respects it** as inherent and natural.

cf. Art. 5 of (Czech) Charter of Fundamental Rights

cf. Art. 6 of Universal Declaration of Human Rights

Note: This is not a definition of “person” in the legal sense!



Concept of a Person

Abstraction in law:

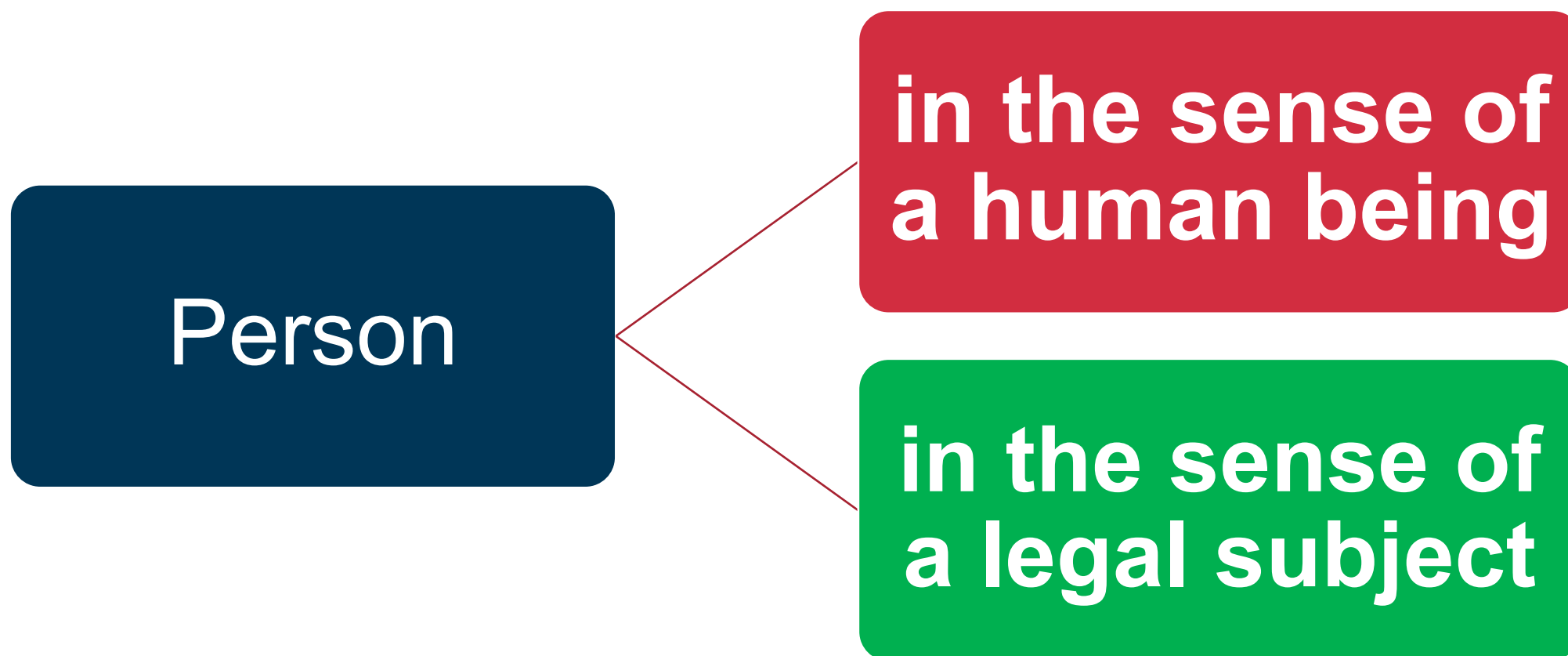
a person within the legal sense is **any entity**

(not only a human being – natural person)

that has the basic **LEGAL characteristics of a person**, i. e. is capable of having rights and duties.

► **Different meanings** of “*person*” (see next slide)

Concept of a Person





Concept of a Person

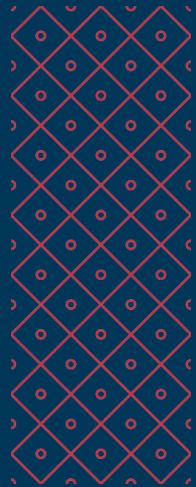
Person (in the legal sense)

= **Subject** of rights and duties

Abstraction: this entity is not necessarily only a human being

X

Object of rights and duties (e. g. a thing, a right)



Chapter 2

To Be Distinguished from a Person



To Be Distinguished from a Person

Sect. 1448 CC:

1) **A trust** is created by setting aside part of the property owned by the founder in such a way that the owner entrusts the administrator with the property for a particular purpose through a contract or disposition *mortis causa*, and the trustee undertakes to keep and administer the property.

(2) The creation of a trust establishes separate and independent ownership of the part of property, and the trustee is obliged to assume the property and its administration.

Q.: Is trust to be considered as a person or not? (For more details see the lecture on Fiducia and Trust.)



To Be Distinguished from a Person

Sect. 494 CC:

A **living animal** has a special significance and value as a living creature endowed with senses. A living animal **is not a thing**, and the provisions on things apply, by analogy, to a living animal only to the extent in which they are not contrary to its nature.

Q.: What is living animal, if it is not a thing? Shall it be treated like a Person? Think and discuss in teams.



To Be Distinguished from a Person

Sect. 1116 CC:

With respect to the thing as a whole, **co-owners are considered** and dispose of the thing **as a single person**.

Q.: Are co-owners forming together a new entity, a legal (juridical, artificial) person?

To Be Distinguished from a Person

Q.: Are co-owners forming together a new entity, a legal (juridical, artificial) person?

Cf. Sect. 828 ABGB:

(1) So lange alle Theilhaber einverstanden sind, stellen sie nur Eine Person vor, und haben das Recht, mit der gemeinschaftlichen Sache nach Belieben zu schalten.
Sobald sie uneinig sind, kann kein Theilhaber in der gemeinschaftlichen Sache eine Veränderung vernehmen, wodurch über den Antheil des Andern verfügt würde.

As long as all co-owners agree with one another, they represent only one person and have the right to dispose of the thing in common according to their pleasure. The instant, they do not agree, no co-owner can undertake an alteration in the thing in common, by which he would dispose over the share of the other.



To Be Distinguished from a Person

Q.: Are co-owners forming together a new entity, a legal (juridical, artificial) person?

*Substanzveränderungen **ohne Einstimmigkeit sind** selbst dann **unzulässig**, wenn sie einen zur ausschließlichen Benutzung durch einen Teilhaber zugewiesenen Teil des Gemeinschaftsgutes betreffen, sofern dadurch in die Rechtssphäre der übrigen eingegriffen wird und wichtige Interessen berührt werden [...].*

Changes in substance without unanimity (note: of co-owners) are inadmissible even if they concern a part of the common property assigned for the exclusive use of one partner, provided that this interferes with the legal sphere of the others and affects important interests [...].

5 Ob 174/02b (dedided 12th September 2002)
OGH (Der Oberste Gerichtshof, Supreme court of Austria)



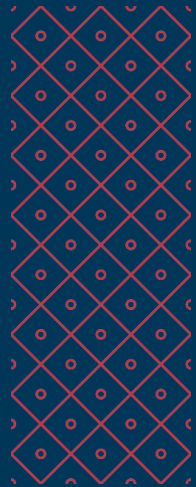
To Be Distinguished from a Person

Q.: Are co-owners forming together a new entity, a legal (juridical, artificial) person?

Result: co-owners are **NOT** forming together a new entity.

It means: if all of co-owners agree, they can dispose with the thing as a whole

► ... as being a single person (which they are not).



Chapter 3

About Persons in General



About Persons in General

Only a person has rights and duties: § 17 CC

(1) **Only persons** may have and exercise their rights. Duties may only be imposed upon and their performance enforced in relation to persons.

(2) If anyone creates a right or imposes a duty **upon something other than a person**, such a right or duty is attributed to the person to whom it belongs according to the legal nature of the case.



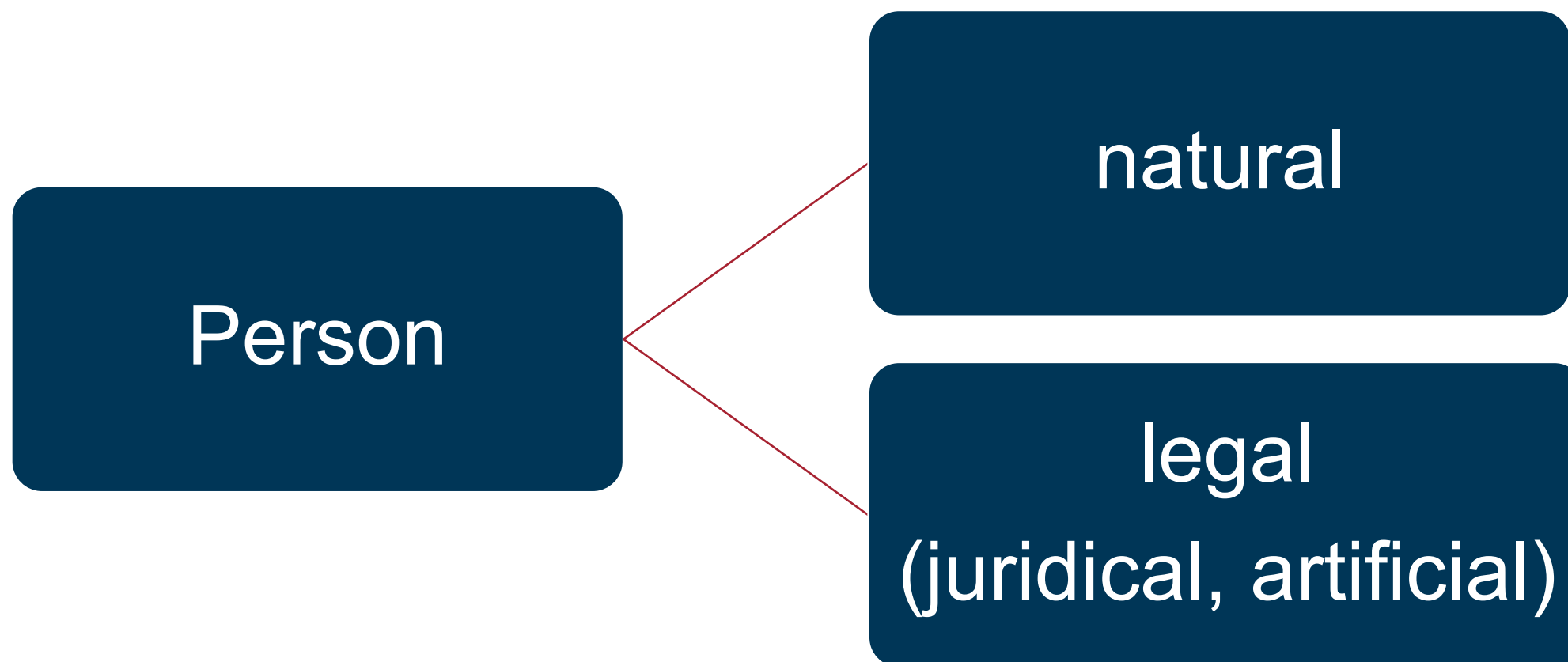
About Persons in General

Only a person has rights and duties: § 17 CC

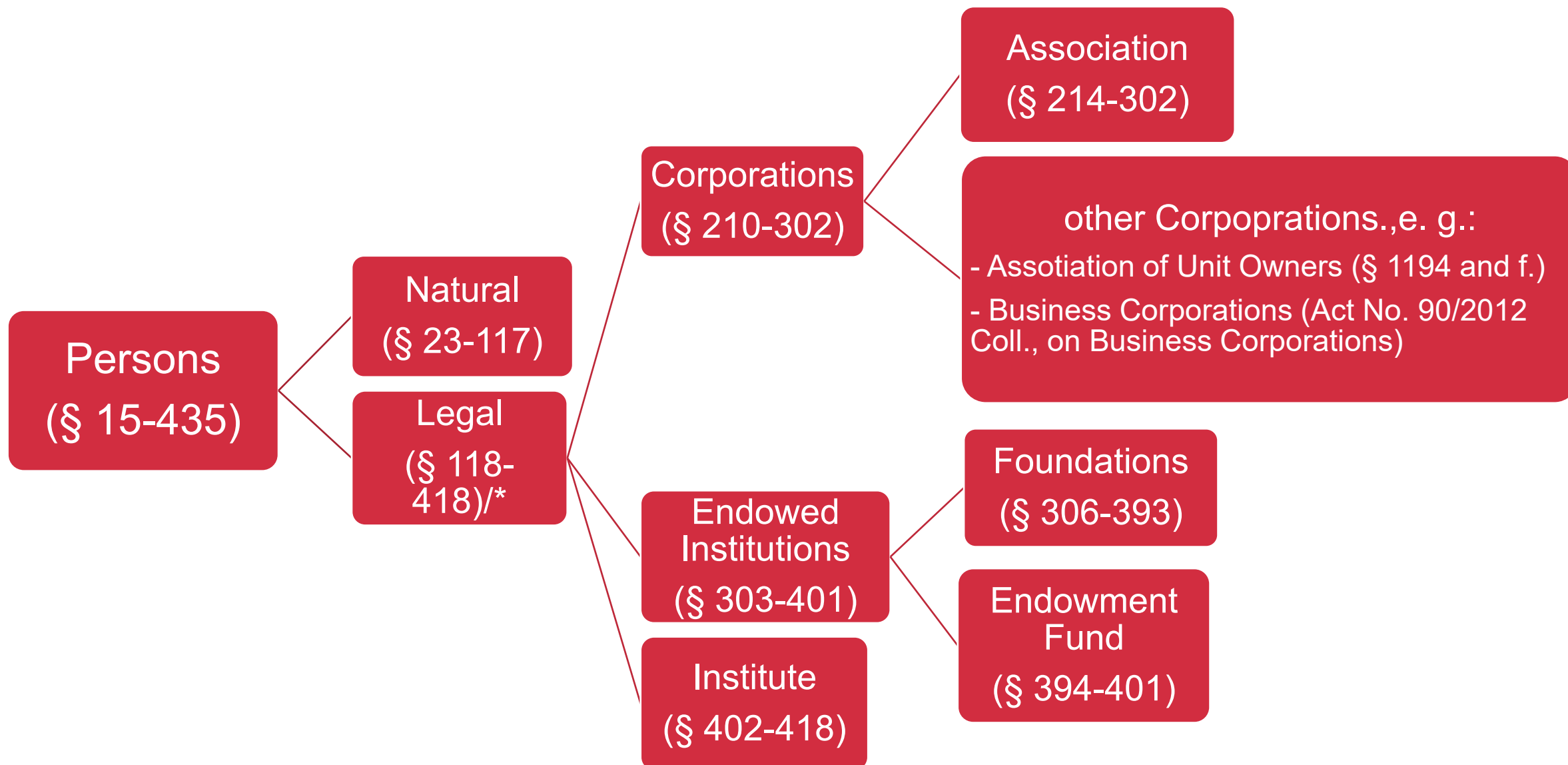
- ▶ Rights and duties can be attributed only to what is a person
- ▶ Person = point of attribution of rights and duties

Abstract concept = do not confuse with a human being!

About Persons in General: Sect. 18 CC



About Persons in General



/* Sects. 118-209 = general provisions on legal persons

About Persons in General: compare with Germany

C. Löser, Juni 2007 / August 2008
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Rechtssubjekte = Rechtspersonen = Rechtsträger

Rechtssubjektivität = Rechtspersönlichkeit = Rechtsfähigkeit =
die Fähigkeit, Träger von Rechten und/oder Pflichten zu sein
(Dies ist zunächst eine qualitative Frage. Es können jedoch auch quantitative Aussagen getroffen werden, zB „Teilrechtsfähigkeit“ oder „partielle Völkerrechtssubjektivität“)

natürliche Personen

Beginn der Rechtsfähigkeit mit Vollendung der Geburt (§ 1 BGB); Ende der Rechtsfähigkeit mit dem Tod.

Bereits vor der Geburt teilrechtsfähig: Nasciturus (die Leibesfrucht als das bereits gezeugte, aber noch ungeborene Kind) sowie Nondum Conceptus (das noch nicht empfangene Kind).

Von der Rechtsfähigkeit zu unterscheiden ist die **Handlungsfähigkeit** als die Fähigkeit, rechtlich bedeutsame Handlungen vorzunehmen (die Rechtshandlungsfähigkeit setzt die Rechtsfähigkeit voraus):

- die **Geschäftsfähigkeit** ist die Fähigkeit, Rechtsgeschäfte wirksam vorzunehmen.

Personengesellschaften

sind Zusammenschlüsse natürlicher und/oder juristischer Personen. Sie haben keine eigene Rechtspersönlichkeit, sind jedoch teilrechtsfähig.

- GbR (BGHZ 146, 341 ff.)
- oHG, GmbH & Co. oHG
- KG, GmbH & Co. KG

privatrechtliche Körperschaften

sind kraft Privatautonomie geschaffene, mitgliedschaftlich verfasste und vom Wechsel ihrer Mit-

juristische Personen

sind (voll-)rechtsfähig, als bloße Rechtskonstrukte aber nicht **handlungsfähig**. Sie bedürfen der Organisation und für sie handelnder natürlicher Personen, der Organwalter. Keine juristischen Personen sind teilrechtsfähige und nichtrechtsfähige Gebilde.

juristische Personen des Privatrechts

privatrechtliche Stiftungen

haben keinen personellen Bezug (keine Mitglieder oder Benutzer), sondern sind

juristische Personen des öffentlichen Rechts

haben Satzungsautonomie (nicht relevant bei Bund und Ländern); diese ist abzugrenzen von der Satzungs- bzw. Geschäftsordnungsautonomie ihrer Organe (siehe zB BVerfGE 1, 144 ff.)

Stiftungen des öffentlichen Rechts



About Persons in General: compare with Germany

Sect. 14 BGB:

Unternehmer ist eine

(1) natürliche oder

(2) juristische Person oder

(3) **eine rechtsfähige Personengesellschaft,**

die bei Abschluss eines Rechtsgeschäfts in Ausübung ihrer gewerblichen oder selbständigen beruflichen Tätigkeit handelt.

*A trader means a natural or legal person **or a partnership with legal-personality**—(note: better translation: **legal subjectivity**) who or which, when concluding a legal transaction, acts in exercise of their trade, business or profession.*



About Persons in General: compare with Germany

Legal Subjects

Persons

(Rechtspersönlichkeit, Reschtfähigkeit, Rechtssubjektivität)

Natural Persons

Legal Persons

Personengesellschaften

(§ 14 BGB)

= teilrechtsfähig

X Rechtspersönlichkeit



About Persons in General: a Close Person

Sect. 22 para 1:

A close person is

- (1) a relative in the direct line,
- (2) sibling and
- (3) spouse or
- (4) a partner under another statute governing registered partnership (hereinafter a “partner”);
- (5) other persons in a familial or similar relationship shall, with regard to each other, be considered to be close persons if the harm suffered by one of them is perceived as his own harm by the other.
- (6) Persons related by affinity and persons permanently living together are also presumed to be close persons.



About Persons in General: a Close Person

Person in general = natural and legal

X

Close person = only natural person **(NOT legal person)**

The provisions of Sect. 22

- **generally applicable to private law as a whole**
- **also to public law** unless special definitions apply to the relevant branches of public law



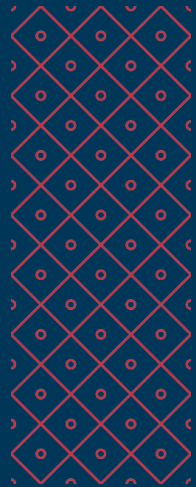
About Persons in General: a Close Person

Relevance for Sects: 62, 66 para 2, 78 para 3, 82, 98, 100, 105, 114, 353, 471, 472, 590, 967, 1540, 1893, 2067, 2272, 2959

= many provisions dealing with close person = important for Czech Civil Code

X

- General provisions on the status of close person **not common in European civil codes**
- if legislation refers to close persons, it is in connection with specific situations being addressed
- Cf. e. g. Sect. 11 StGB (Strafgesetzbuch, Penal Code), Sect. 268 ABGB, Sect. 113 Code Civil



Chapter 4

Legal Personality



Legal Personality

Sect. 15 para 1:

Legal personality is the **capacity to have rights and duties** within the legal order.

- ▶ must not be restricted in any way
- ▶ not possible to deprive a person of it
- ▶ a person cannot renounce it themselves, even not partially (Sect. 16)
- ▶ not a (subjective) right, rather **a feature** of abstract concept of a person
- ▶ a prerequisite for a person to be able to have such rights at all



Legal Personality

Sect. 15 para 1:

Legal personality is the **capacity to have rights and duties** within the legal order.

Sect. 19 CPC (Civil Procedure Code):

The right to be a party to proceedings **is held by those who have legal personality**; otherwise, only those to whom it is granted by law.

= in civil procedure law

= capacity to be a party to proceedings

= can be granted also to other “entities“, e. g.



Legal Personality

Example:

The defendant **tax office**, which, according to the so-called better right claim, should have received more than it was entitled to under substantive law in connection with the enforcement of tax arrears from the proceeds of the execution at the expense of the plaintiff, **has the capacity to be a party to the proceedings in this action within the meaning of Section 19, part of the sentence after the semicolon**, of the Code of Civil Procedure.

SC case no. 25 Cdo 2489/2003, decided 29th June 2004



Legal Personality

Relationship Between “Person” and “Legal Personality”

Person (note: abstract concept) = point of attribution of rights and obligations

Personality = rights and obligations directed toward (attributed to) a specific point

They cannot exist without each other

► Different perspectives (and different terms) **for the same legal situation**



Legal Personality

Sect. 23:

An individual has legal personality **from birth to death**.

Sect. 25:

A conceived child is considered to be already born if it suits the child's interests. A child is presumed to have been born alive. However, if the child is not born alive, he is considered never to have existed.

= presumption of legal personality of **a nasciturus**

Q.: find legal fiction(s) and legal presumption(s) in Sect. 25!



Legal Personality

Q.: find legal fiction(s) and legal presumption(s) in Sect. 25!

Sect. 25:

A conceived child is considered (= legal fiction) to be already born if it suits the child's interests. A child **is presumed** (= legal presumption) to have been born alive. However, if the child is not born alive, he **is considered** (= legal fiction) never to have existed.

Q.: Discuss the difference between legal fiction and legal presumption.



Legal Personality

Q.: Discuss the difference between legal fiction and legal presumption.

Legal fiction

= a deliberate assumption of a fact that is known to be false, adopted by law for the purpose of achieving a specific legal consequence.

= disregards reality entirely

Legal presumption

= an inference that the law draws from a known fact to an unknown fact, which remains rebuttable unless expressly declared irrebuttable by statute

= operates within the realm of probability and may be displaced by contrary evidence

= evidentiary shortcuts, facilitating the burden of proof



Legal Personality

Q.: Discuss the difference between legal fiction and legal presumption.

Legal fiction (*“hledí se”; “považuje se”; “considered”*)

= cannot be contested by **proof to the contrary**

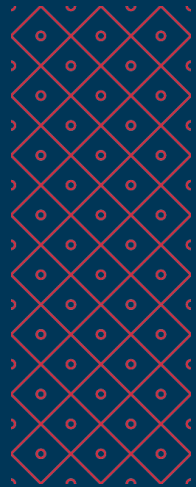
= can be eliminated by **counter-proof** (e. g. the situation linked with the effect of legal fiction didn't exist)

Legal presumption

= rebuttable (*“má se za to”, “presumed to”; proof to the contrary allowed*)

= irrebutable (*“platí”, “conclusively presumed to”; proof to the contrary not allowed*)

= can be eliminated by **counter-proof** (e. g. the situation linked with the effect of legal presumption didn't exist)



Chapter 5

Legal Capacity



Legal Capacity

Sect. 15 para 2:

Legal capacity is **the capacity to acquire rights and assume duties for oneself by making juridical acts** (to make juridical acts).

X distinguish from legal personality (see above)

Sect. 16:

No one may surrender his **legal personality** and **legal capacity**, neither in full, nor in part; doing so is disregarded.



Legal Capacity

Sect. 15 para 2:

Legal capacity is **the capacity to acquire rights and assume duties for oneself by making juridical acts** (to make juridical acts).

Extent depends on intellectual and volitional maturity:

- age reached
- absence/presence of mental disorder

Two possible modes of acquisition of legal capacity (attitudes in jurisprudence)

(1) fixed age limits X (2) gradually (according to development of intellectual and volitional maturity)



Legal Capacity

Sect. 30

(1) An individual acquires **full legal capacity** upon reaching the **age of majority**. The **age of majority** is reached upon reaching eighteen years of age.

(2) **Before reaching the age of majority**, **full legal capacity** is acquired by **being granted legal capacity** (note: cf. sect. 37) or by **entering into marriage**. Legal capacity acquired by entering into marriage is not terminated upon termination or invalidation of marriage.

- ▶ two “kinds” of minors: (1) with **full** legal capacity and (2) with **partial** legal capacity
- ▶ unusual (rare) solution compared to European legislation



Legal Capacity

Convention on the Rights of the Child, Art. 1:

For the purposes of the present Convention, **a child means every human being below the age of eighteen years** unless under the law applicable to the child, majority is attained earlier.

► as a result, the Czech **minor with full legal capacity is still a child** within the definition of Convention on the Rights of the Child and protected by it



Legal Capacity

Cf. Roman law: *venia aetatis* (= *pardoning the age*)

The emperor could **grant a waiver** for the years missing until coming of age [venia aetatis];

during the Dominate, only those men aged at least 20 or women at least 18 were eligible

the emperor could **pardon** missing years of age

- ▶ person has to be treated no more as a child/minor
- ▶ person has to be treated as having reached the age of majority ▶ ▶ also with full legal capacity (in roman law still with some restrictions)
- ▶ usual shape of relationship between majority and full legal capacity in European legislation



Legal Capacity

Sect. 31

Any **minor** who has not yet acquired full legal capacity **is presumed to be capable of making juridical acts which are, as to their nature, appropriate to the intellectual and volitional maturity of the minors of his age.**

= the “cohort” of minors of particular intellectual and volitional maturity = a typical sample

= an objective point of view

= a rebuttable presumption = a proof to the contrary is allowed in particular case



Legal Capacity

Sect. 32

Where, in accordance with the **usages of private life**, a legal representative has granted a minor who has not yet acquired full legal capacity his **consent to make a particular juridical act** or achieve a specific purpose, **the minor is capable of making juridical acts within the consent so granted**, unless specifically prohibited by a statute; the consent may be subsequently limited or withdrawn.

Q.: Try to give some examples.



Legal Capacity

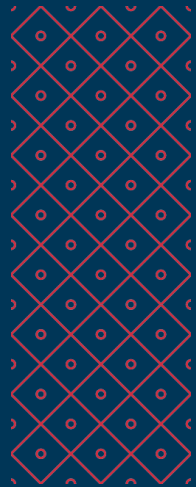
Sect. 36 para 1:

Notwithstanding the content of other provisions, a minor who has not acquired full legal capacity **shall in no case have the capacity to act independently in the matters in which his legal representative would need the leave of a court.**

= important **NEGATIVE** limit of gradually acquired legal capacity

= mandatory provision

= see Sect. 898 stipulating on situations when a parent (legal representative) needs an approval of a court (e. g. acquiring immovable thing etc.)



Chapter 6

Protection of Personality



Protection of Personality

Cf. Sect. 19 para 1 again: **Every individual has innate natural rights** knowable by the **very reason** and feelings, **and therefore is considered to be a person**. A statute only provides for the limits of application and the manner of protection of the natural rights of an individual.

Thomas Aquinas: equality of people before the Lord God

lex divina (divine law): God's will as it is expressed in holy scriptures, e. g. as the Ten Commandments

X

lex naturalis (natural law): a system of law based on inherent moral principles and human nature, rather than written statutes

X

lex humana (human law): laws created by human beings as opposed to those derived from divine or natural law



Protection of Personality

United States Declaration of Independence (1776), Preamble:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.

Available at: https://billofrightsinstitute.org/primary-sources/declaration-of-independence?gad_source=1&gad_campaignid=23021830255&gbraid=0AAAAAC2Yh3X8z7DyEzamEEE6Pzl-aPlv3&gclid=EAlaIQobChMI6OyM-9nlkQMVCpaDBx2sWhgQEAAAYASAAEgJigfD_BwE [visited 2025-12-30].

La Déclaration des droits de l'homme et du citoyen (1789)

Art I: *Men are born and remain free and equal in rights. Social distinctions may be founded only upon the general good.*

Art. II: *The goal of any political association is the conservation of the natural and imprescriptible rights of man. These rights are liberty, property, safety and resistance against oppression.*

Available at: <https://www.elysee.fr/en/french-presidency/the-declaration-of-the-rights-of-man-and-of-the-citizen> [visited 2025-12-30].



Protection of Personality

(The Czech) Charter of Fundamental Rights and Freedoms:

Preamble: *The Federal Assembly, on the basis of the proposals of the Czech National Council and the Slovak National Council, **Recognizing the inviolability of the natural rights of man, the rights of citizens, and the sovereignty of the law, [...].***

Art. 1: *All people are free and equal in their dignity and rights. Their **fundamental rights and freedoms are inherent, inalienable, non-prescriptible, and irrepealable.***

Art. 3 para 1: ***Everyone is guaranteed the enjoyment of her fundamental rights and basic freedoms without regard to** gender, race, colour of skin, language, faith and religion, political or other conviction, national or social origin, membership in a national or ethnic minority, property, birth, or other status.*



Protection of Personality

Sect. 3 para 2:

Private law primarily relies on the following principles:

a) everyone has the right to protect his life and health, as well as freedom, honour, dignity and privacy, [...].

Sect. 19 para 2:

Natural rights associated with the personality of an individual may not be alienated and may not be waived; should this occur, it is disregarded. The limitation of these rights to the extent contrary to a statute, good morals or public order is also disregarded.



Protection of Personality

Sect. 81:

(1) **Personality of an individual including all his natural rights are protected.** Every person is obliged to respect the free choice of an individual to live as he pleases.

(2) **Life and dignity of an individual, his health and the right to live in a favourable environment, his respect, honour, privacy and expressions of personal nature** enjoy particular protection.



Protection of Personality

Distinguish!

(Legal) **personality** (Sect. 15 para 1, see above)

X

Personality rights of an individual

!!! different meaning of personality in Sect. 81 !!!



Protection of Personality

Personality in sense of Sect. 81:

- = Unique combination of biological, psychological, and social aspects/values of the human being

- = Everything by which a person manifests externally toward others
 - mentally (experience, reason, emotion, etc.)
 - spiritually (ideological self-determination, faith)
 - physically (especially bodily integrity)



Protection of Personality

Personality in sense of Sect. 81; SC case no. 30 Cdo 2304/99

Although definitions may vary, it can be said, for example, **that a personality is considered to be a person as an individual, as a subject of cognition, or rather cognition, experience, and action in their social essence and individual characteristics, as the smallest social unit and a certain psychophysical and socio-psychological structure.**

From a psychological point of view, personality can be seen as a historically crystallizing and evolving whole, a **system of mental** (but undoubtedly **also spiritual**) **characteristics** and tendencies of an individual, character traits, abilities, temperament, attitudes, needs and interests, education, religious and cultural orientation, with consciousness being one of the essential features of personality.



Protection of Personality

Personality in sense of Sect. 81; SC case no. 30 Cdo 2304/99

It is certainly true that the multiplicity of manifestations of the individual aspects of a natural person's personality corresponds to a conceivably **wide range of possible unjustified interference with some of these aspects of personality**. Nevertheless, such interference will always directly affect the personality of the natural person as a whole, with all the indicated qualities and characteristics.

- ▶ special means of protection against interference with personal rights
- ▶ ▶ The Civil Code provides an enumerative list of specific claims arising from the protection of personality rights.



Protection of Personality

Special means of protection:

Sect. 82 para 1:

An individual whose personality rights have been affected has the right

- (1) to **claim that the unlawful interference be refrained from** or
- (2) its **consequence remedied**.

Sect. 82 para 2:

After the death of an individual, the protection of his personality rights **may be claimed by any of his close persons**.

X to be distinguished from **general means of protection** (general claims)



Protection of Personality

General means of protection:

Sect. 2956: Where a tortfeasor incurs a duty to compensate an individual for harm to his natural right protected by the provisions of Book One of this Act, **he shall compensate the damage as well as non-pecuniary harm thus caused**; compensation of the non-pecuniary harm shall also include mental suffering.

1) compensation of non-pecuniary harm

Sect. 2951 para 2: Non-pecuniary harm is compensated by appropriate satisfaction. Satisfaction must be provided in money unless real and sufficiently effective satisfaction for the harm incurred can provide for satisfaction otherwise.

2) compensation of damage

Sect. 2952: The actual damage (note: *damnum emergens*) and what the victim lost (lost profit) (note: *lucrum cessans*) is paid.



Protection of Personality

General means of protection:

3) restitution of unjust enrichment

Sect. 2991 para 1: A person who is enriched at the expense of another without a just cause must, to the extent of his enrichment, **make restitution to the impoverished person.**



Protection of Personality

Protection of personality in ECtHR case law:

29. The Court reiterates that, subject to paragraph 2 of Article 10 of the Convention (art. 10-2), freedom of expression is applicable not only to "information" and "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, **but also to those that offend, shock or disturb**. [...]. As to the limits of acceptable criticism, **they are wider with regard to a politician acting in his public capacity than in relation to a private individual**. [...].

33. In the Court's view, the applicant's article, and in particular the word Trottel (note: idiot), may certainly be considered polemical, but they did not on that account constitute a gratuitous personal attack as the author provided an objectively understandable explanation for them derived from Mr Haider's speech, which was itself provocative. As such they were part of the political discussion provoked by Mr Haider's speech and amount to an opinion, whose truth is not susceptible of proof. Such an opinion may, however, be excessive, in particular in the absence of any factual basis, but in the light of the above considerations that was not so in this instance [...].

ECtHR: Oberschlick v. Austria, Application no. 20834/92



Protection of Personality

Protection of personality in ECtHR case law:

I cannot concur in either the reasoning of the majority of the Chamber or the conclusion they have reached. They have ignored the fundamental distinction between a criticism or value judgment on the one hand, and an insult on the other; the first two are covered by the freedom of expression secured in Article 10 of the Convention (art. 10), whereas an insult is not.

Mr Oberschlick and Forum were at liberty to criticise severely Mr Haider's remarks in his speech at the traditional ex-servicemen's reunion at the Ulrichsberg in Carinthia on 7 October 1990.

[...].

Mr Oberschlick did not, however, simply criticise; **he went further, uttering vulgar insults aimed at Mr Haider, calling him a Trottel (idiot)**. Despite an ingenious attempt to present things differently, the **average reader** must have understood Mr Oberschlick's words **as an insult intended to ridicule Mr Haider**.

The context in which an insult is uttered is of no consequence, **except where it is held to be an immediate reaction to a provocation or affront** (this is the idea underlying Article 115 para. 3 of the Austrian Criminal Code). That was not the case here. [...].

Dissenting opinion of judge Matecher, joined by judge Thór Vilhjálmsson
ECtHR: Oberschlick v. Austria, Application no. 20834/92



List of Sources – Civil Code, Case Law

Relevant provisions of Czech Civil Code:

Sects. 15-22

Sects. 23-114

Sects. 494, 1116, 1448, 2951, 2952, 2956, 2991

Case law:

AT: SC Case No 5 Ob 174/02b

CZ: SC Case No 30 Cdo 2304/99

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ECtHR: Oberschlick v. Austria, Application no. 20834/92



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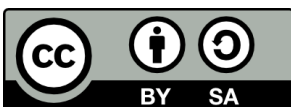
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