How Criminal Liability of Juristic Persons Depends on the Concept of Juristic Persons in Private Law

(or the Consequences of the Conflict Between the Law on Criminal Liability of Juristic Persons and the New Civil Code in the Czech Republic)

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The purpose of this article is to show the reason why criminal liability of juristic persons depends on the definition of the concept of juristic persons in private law. For the juristic person to be capable of being liable for criminal acts, it should be devised as an independent entity that has a will of its own, distinct from that of the people who make up the juristic person, thereby relying on the organic theory. The juristic person cannot be regarded as a mere 'fiction' where its representatives' will 'is deemed' to be its own will. The Czech law on criminal liability of juristic persons is therefore based on the organic theory. This law only provides for criminal liability of juristic persons. However, it is left to private law to determine what a juristic person is and what its acts are. Thus, a juristic person can only be the perpetrator of a criminal act if this is made possible by its construction in private law. But Czech private law currently stems from the theory of fiction. The result is that this law can only be applied at the cost of courts adopting an interpretation that completely diverges from the literal wording of the law. The contribution shows the specific problems caused by the incongruent concepts of juristic persons in criminal law and in private law, and the options for addressing this incongruence.

I. Introduction

Until recently, corporate criminal liability[1], a normal part of the UK and the US legal culture, was unknown to the Czech legal system, which had traditionally been embedded in the continental legal culture; even the translation alone of the term '*právnická osoba*'[2] ['juristic person'] in the Czech, or continental

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[1] Corporate criminal liability is usually translated from English [into Czech] as 'trestní odpovědnost právnických osob' ['criminal liability of juristic persons']. This is not, however, a particularly accurate translation, since in continental law, corporations are only one type of juristic persons (foundations constitute the other type). On the other hand, it is true that in the continental system criminal liability actually applies to all juristic persons, i. e. including foundations, and from the perspective of the Czech legal system it is correct to talk about criminal liability of juristic persons. For this reason, this text consistently uses the term 'trestní odpovědnost právnických osob' ['criminal liability of juristic persons'].

[2] In translating the term 'právnická osoba' into English, as many as three terms are apparently at hand: 'legal entity', 'legal person' and 'juristic person'. This text uses consistently 'juristic person', which covers both corpora-

legal terminology is constrained by certain difficulties. Probably the most important reason for introducing **criminal liability of juristic persons** was the Czech Republic's accession to the European Union. Since in the mid-1990 s, the European Communities, or the European Union, adopted a number of international treaties and regulations requiring the Member States to modify their national legislations so that juristic persons can effectively be held liable for the illegal practices specified in those documents.

Thus, as early as 2004, a bill on criminal liability of juristic persons was first laid before the Chamber of Deputies of the Czech Parliament. However, it was rejected at that time. In 2011, the author and Jiří Jelínek described the underlying philosophy of that bill, adding their reflections on the introduction of administrative liability for juristic persons, in a treatise to which the author refers.[3]

The fact that although most EU Member States already had in place, in one form or another, criminal liability of juristic persons while this type of liability was still missing in the Czech Republic prompted a number of international organisations (OECD, Council of Europe, the UN, GRECO[4]) to exert pressure on the Czech Republic to honour its international obligations as well. Accordingly, the bill was laid before the Chamber of Deputies of the Czech Parliament again in 2011. Then, it was passed as Act No 418/2011 on criminal liability of juristic persons and proceedings against them ('the **JPCL Act**') and came into force on 1 January 2012.

Both in jurisprudential theory and in practice, a number of questions have been left unanswered ever since the moment when not only human beings but also juristic persons gained the capacity to be perpetrators of criminal acts in the Czech Republic.

First and foremost, the question is being asked of how we can actually recognise a juristic person. It is relatively simple to find that the perpetrator of a criminal act is a human being – our senses will suffice for that. However, can we also take this approach in the case of a juristic person, which we can then, using this approach, identify as a group of people? Can we therefore simply regard criminal liability of juristic persons as collective liability?

Generalising this question, we have to ask further: in fact, what is a juristic person, or in what way can we explain what it is? In this respect it will then be inevitable to deal with 'theories of juristic persons'. To wit, it is only on the basis of a particular theory of juristic persons that it is feasible to explain why, in the applicable legislation, a certain formation is viewed as a juristic person while

tions and foundations, to translate the term 'právnická osoba'. The reason is that the terms legal person and legal entity are also sometimes used within a meaning that includes not only juristic persons but also all persons who are subject to law. In fact, apparently both 'juristic persons' and human beings as natural persons can be subsumed under the terms 'legal entity' or 'legal person'. The latter two terms are therefore relatively fuzzy and will possibly be used only where the purpose is to use a fuzzy term.

[3] *Jelinek, J., Beran, K.* Why the Czech Republic does not (yet) recognize corporate criminal liability: a description of unsuccessful law reforms. In: PIETH, Mark; IVORY, Radha (eds.). Criminal Responsibility as Corporate Risk: A Comparative Analysis of Corporate Criminal Liability Laws. Publisher's series: GENTIUM: Comparative Perspectives on Law and Justice. ISBN-10: 9400706731, Springer, Dordrecht (the Netherlands) 2011, pp. 333-355

[4] Group of States against Corruption

another is not, and also to explain from what a juristic person's capacity to be the perpetrator of criminal acts arises. The question at hand is therefore which theory of juristic persons is congruous with criminal liability of juristic persons. Closely related to that is also the question of whether the JPCL Act is based on an *a priori* theory of juristic persons.

The JPCL Act lays down the prerequisites for criminal liability of juristic persons; however, the basic definition of the concept of juristic person cannot be found in criminal law but in private law. Not only in the Czech Republic but in all legal systems it is probably true that the notion of what a juristic person is and in what manner juristic persons legally act originates from private law rather than criminal law. Whether we like it or not, criminal law must base its definition of the juristic person, as a perpetrator of criminal acts, on the concept of the juristic person in private law.

However, the answer to the question of how Czech private law understands the juristic person and defines the concept of the juristic person is more complicated. The reason is that criminal liability of juristic persons was introduced into Czech law as of 1 January 2012, i. e. when the Civil Code from 1964 was in effect. However, the latter was repealed as of 1 January 2014 and simultaneously superseded by the New Civil Code ('**NCC**')[5]. Unlike the 1964 Civil Code, which vested juristic persons with their own will and an ability to express this will through their organs, the NCC conceives of the juristic person as a "fiction without its own will and legal capacity". Thus, the concept of juristic persons in the NCC is based on 'the theory of fiction'. This is borne out by the explanatory notes to the bill, which explicitly avow to the theory of fiction, and also by the provisions on the acting of juristic persons contained in the applicable legislation.

The Czech Republic is therefore facing an urgent question: to what extent does criminal liability of juristic persons depend on the definition of the concept of juristic persons in private law? Now that the NCC is in effect, the question of the congruence of criminal liability of juristic persons with the understanding of juristic persons as merely a fiction under private law is being asked both at the theoretical level and in the practical application of the JPCL Act.

To be able to assess the conceptual congruence, or incongruence, between the JPCL Act and the NCC, the author will now analyse the general conditions under which a criminal act can be attributed to a juristic persons, as laid down in the first sentence of Section 8(1) of the JPCL Act. That sentence specifies the prerequisites for considering the acts named in the subsequent subsections to be criminal acts of juristic persons.[6] From the *de lege lata* perspective, the author will therefore try to answer the question of whether juristic persons are at all capable of committing criminal acts by their actions, whether a criminal act can be committed in the name of juristic persons, and whether a criminal act can be committed in the interest of

[5] Act No 89/2012, the Civil Code

[6] The first sentence of Section 8(1) of the JPCL Act lays down: "a criminal act committed by a juristic person is an illegal act committed in its name or in its interest or as part of its activities, if […] acted so".

juristic persons, and also the question of the problems that may emerge when examining the perpetration of a criminal act "as part of the juristic person's activities".

The answer to all of these questions is to demonstrate the dependence of criminal liability of juristic persons on the definition of the concept of juristic persons in private law and to show the practical problems caused by the conflict between the JPCL Act and the NCC in the Czech Republic when it comes to the application of criminal liability of juristic persons.

II. Juristic persons as perpetrators of criminal acts

The rule, expressed more or less exactly, that the perpetrator of a criminal act is the one who has committed the criminal act, probably constitutes the basis for the understanding of perpetrators of criminal acts in all national criminal codes. This rule is also contained in the valid and effective Czech criminal code, specifically in Section 22(1) laying down that "the perpetrator of a criminal act is the one **who** by his conduct has fulfilled the external elements of the criminal act […]". Until recently, the continental legal culture proceeded from an almost matter-of-course assumption that only human beings can be such perpetrators. However, this assumption is no longer valid as criminal liability of juristic persons is being introduced in European countries embedded in this culture. This is also the case in the Czech Republic where **the JPCL Act** came into effect on 1 January 2012. Since that moment, both human beings and juristic persons can be entities *who by their conduct* can commit criminal acts.

In every legal system into which criminal liability of juristic persons is implemented, this is bound to precipitate the need to answer the question: **what is the main difference between human beings and juristic persons as potential perpetrators of criminal acts?** A literally 'obvious' difference consists in their recognisability. Everybody is able to recognise, using their senses, who a human being and hence a potential perpetrator of criminal acts is. But can a juristic person also be recognised in this way?

Following our senses, a starting point for us can be what Viktor Knapp wrote in the Czech Republic in 1995. According to him, "the concept of the juristic person primarily expresses a certain form in which people associate"[7], adding that under Roman law, this associating of people for the purpose of joint activities was expressed by the **notion** of ***societas iuris civilis*.** We could deduce from this construct that we will always find an association of people, i. e. a contract of association, in the foundations of juristic persons and that, therefore, it would perhaps be possible to apply Roman law's principle of *societas delinquere non potest* to juristic persons.

[7] *Knapp, V.*: O právnických osobách.[On Juristic Persons] In: Právník, Vol. 1995/10-11, p. 980

The first problem with such a perspective is that it definitely is not possible to place the = sign between a contract of association– *societa* – and the concept of juristic persons, which did not even exist in Roman law as an abstract general concept. The formations that we denote as juristic persons today were always provided for on a case-by-case basis. The following terms can be taken into consideration as designations with a general content: *corpus* and *collegium*, and later *universitas*.[8] We can therefore infer that the concept of the juristic person only emerged from the exegesis of Roman law in the 19th century. It is usually thought to be the brainchild of F. C. Savigny. However, this is not quite accurate. It is true that Savigny imbued the concept of the juristic person with the content that has been determinant for this concept to this day. But Savigny did not create the concept of the juristic person as such. His predecessors, the Pandectists, did so earlier. In Otto von Gierke's history of private law, the initial introduction of the term juristic person is ascribed to **Georg Arnold Heise's** 1807 publication on the system of pandects.[9] However, according to Schnizer, the expression "juristic person" was used for the very first time by **Hugo**[10] in 1798, and Schnizer also ascribes the authorship of this term to him.[11] The author therefore believes that the concept of the juristic person cannot be claimed to have been already known in antiquity, and therefore the principle of *societas delinquere non potest*, which applied to the contract of association, also cannot be claimed to be applicable in relation to the concept of the juristic person, which did not exist at that time. This opinion is apparently also espoused by Janda, who says that in respect of the times when formations that we now view as juristic persons were punished, "we do not talk about juristic persons for the simple reason that we frequently do not even know what nature the particular societies, municipalities, guilds etc. had and whether they **had any legal personality**."[12] From this perspective, Jelínek's and Herczeg's claim that "Roman law's principle of *societas delinquere non potest,* i. e. that a company (juristic person, corporation) cannot act illegally*,* has taken control as a dogma over the new continental history of criminal law"[13] is incorrect. To wit, there is no question that the contract of association represents a group of people, but this group is not and has never been regarded as a juristic person.

In other words, the above suggests that **not every group is a juristic person, and therefore also that not every group has the capacity to be the perpetrator of criminal acts.** Thus, what matters is not only that certain conduct of a certain group fulfils the external elements of a criminal act but also **whether or**

[8] *Schnizer, H.* Die Juristische Person in der Kodifikationsgeschchte des ABGB. In: Festschrift zum 60. Geburtstag von Walter Wilburg, Graz, 1965, p. 146

[9] *Heise, A.* Grundriss eines System des Gemeinen Zivilrechts. Heidelberg, 1807, p. 8 *et seq*.

[10] *Hugo, G.* Lehrbuch des Naturrechts als einer Philosophie des Positiven Rechts. Berlin, 1798, p. 45

[11] *Schnizer, H.*: op. cit., p. 144

[12] *Janda, P.* Trestní odpovědnost právnických osob. [Criminal Liability of Juristic Persons] In: Právní fórum, 2006, No. 5, p. 169

[13] *Jelínek, J., Herczeg, J.*: Zákon o trestní odpovědnosti právnických osob. Komentář s judikaturou. [Law on Criminal Liability of Juristic Persons. Comments and Case Law.] 2nd edition. Prague: Leges, 2013, Introduction (hereinafter '**Jelínek, J., Herczeg, J.: Introduction, op. cit**.') p. 12

not this group is considered to be a juristic person. However, in implementing criminal liability of juristic persons, the Czech criminal law doctrine is also introducing a sort of a 'dichotomous' concept of criminal law, which differentiates between *individual criminal law*, i. e. criminal law for natural persons, and ***collective criminal law, which means precisely criminal liability of juristic persons.***[14] Jelínek and Herczeg state "the principle of individual criminal liability, i. e. natural persons' liability for their own conduct, has been regarded as the fundamental principle of Czech substantive criminal law. The new law brings a collective criminal liability for juristic persons, so far unknown."[15] The author believes that the above idea was accepted from Kratochvíl[16], who himself had accepted it from Austrian law, however (specifically referring to an Austrian textbook on the criminal liability of associations[17]). However, the very terminology with which the Austrian law on the liability of associations for criminal acts (*Bundesgesetz über die Verantwortlichkeit von Verbänden für Straftaten – Verbandsverantwortlichkeitsgesetz* **– VbVG-**BGBl 2005/151), which defines the prerequisites for the criminal liability of **associations** (*Verbänden*) in Section 1(1), works is problematic.[18] By virtue of its very substance and nature, an association does mean a certain group of people indeed, and from this perspective we could believe that Austrian lawmakers only codify criminal liability of associations as groups of people. However, when delving into the law we see that this is not so. To wit, Section 1(2) lays down that juristic persons as well as partnerships, registered for-profit companies and European Economic Interest Groupings fall under the term 'associations' within the meaning of this law.[19] The same textbook from which Kratochvíl quotes explains[20] that foundations are also subsumed under the term juristic persons, as they are in the Czech Republic. This suggests, in other words, that under the Austrian law on criminal liability of associations, a foundation is regarded as an association, on account of its being a juristic person. The terminology of the Austrian law on criminal liability of associations is obviously rather confused and misleading. In fact, this Austrian law definitely does not apply only to associations – groups of people, but to juristic persons in general, which do not have to consist of groups of people at all (in

[14] *Musil, J., Prášková, H., Faldyna, F.*: Úvahy o trestní odpovědnosti právnických osob de lege ferenda. [Considerations on Criminal Liability of Juristic Persons *de lege ferenda*] In: Trestní právo No. 3/2001, p. 11. *Fenyk. J.*: Návrh českého zákona o trestní odpovědnosti právnických osob a řízení proti nim. [The Czech Bill on Criminal Liability of Juristic Persons and Proceedings against Them] (2004). In: *Neckář, J., Radvan, M., Sehnálek, D., Váldhans, J.* (eds): Dny práva [Days of law /online/] Brno: Masaryk University

[15] *Jelínek, J., Herczeg, J.* Introduction, op. cit., p. 23

[16] *Kratochvíl, V.*: Trestní odpovědnost právnických osob a základní zásady trestního práva hmotného. [Criminal Liability of Juristic Persons and Key Principles of Substantive Criminal Law] In: Trestněprávní revue No. 9/2011, p. 249

[17] *Steininger, E.* Verbandsverantwortlichkeitsgesetz. Lehrbuch. Wien: Linde Verlag, 2006

[18] § 1. (1) Dieses Bundesgesetz regelt, unter welchen Voraussetzungen Verbände für Straftaten verantwortlich sind und wie sie sanktioniert werden, sowie das Verfahren, nach dem die Verantwortlichkeit festgestellt und Sanktionen auferlegt werden. Straftat im Sinne dieses Gesetzes ist eine nach einem Bundes- oder Landesgesetz mit gerichtlicher Strafe bedrohte Handlung; auf Finanzvergehen ist dieses Bundesgesetz jedoch nur insoweit anzuwenden, als dies im Finanzstrafgesetz, BGBl. Nr. 129/1958, vorgesehen ist.

[19] § 1. (2) Verbände im Sinne dieses Gesetzes sind juristische Personen sowie Personenhandelsgesellschaften, Eingetragene Erwerbsgesellschaften und Europäische wirtschaftliche Interessenvereinigungen.

[20] *Steininger, E.*: Verbandsverantwortlichkeitsgesetz. Lehrbuch. Wien: Linde Verlag, 2006, p. 44

particular in the case of foundations or one-member corporations). The author therefore regards both notions, i. e. the notion that **we can perceive a juristic person as a group of people** and the notion of **criminal liability of juristic persons as collective liability,** as incorrect.

But viewing criminal liability of juristic persons as collective liability is problematic, and not only because of the definition of the concept of juristic persons, which does not necessarily coincide with a group of people. Equally important, and perhaps even more important, are the substantive reasons, which Kocina explicitly points out in the Czech context; his arguments are based on the following notion: "Individual natural persons having a constitutionally guaranteed right to own property may not be penalised in proceedings that are not conducted against them or in proceedings failing to provide for their rights enabling them to protect their rights in a different procedural position…."[21] This suggests that, for example, shareholders, or members in general, who in fact make up the personal substrate of the most common juristic persons, i. e. corporations, should be afforded the opportunity to attend the public hearing of the case with the right to raise motions, consult files and lodge appeals against decisions that indirectly bear on their ownership rights.

Thus, since they do not have such rights, punishment for a criminal act committed by a juristic person constitutes an interference with the rights of third parties who have not participated in the perpetration of such criminal act in any respect. If we then understand criminal liability of juristic persons as collective liability, we will not be able to avoid all the arguments that are directed against such liability. The most valid of them will include the conflict between collective liability and the constitutionally guaranteed rights and freedoms of the individual (i.e., in particular, the right to own property) whose individual rights have been affected.

Summarily, reflections on juristic persons as perpetrators of criminal acts suggest that **the effort to identify a juristic person in the same way as a human being, i. e. through our senses as a group of people, are in vain and lead in the wrong direction.** Other entities (such as pooled assets–a mass of property) than groups of people can also be juristic persons, while not all groups of people can be viewed as juristic persons. Understanding criminal liability of juristic persons as collective liability is, in addition, accompanied by the considerable risk that collective liability of individuals is incompatible with the constitutionally guaranteed rights vested in these individuals. The author believes that constitutional courts would probably give an affirmative answer to Pavel Maršálek's[22] question of whether "the hitherto 'individualised' criminal law isn't just a diversion from an even older tradition, and the current introduction of criminal liability of juristic

[21] *Kocina, J.* Trestní odpovědnost právnických osob a práva třetích stran. [Criminal Liability of Juristic Persons and Third Party Rights] In: Dny práva 2008 [Days of law /online/], Brno, 2008, p. 2

[22] *Maršálek, P.*: Přetrvávající problém legitimity trestní odpovědnosti právnických osob. [The Persisting Problem of the Legitimacy of Criminal Liability of Juristic Persons] In: *Jelínek, J. et al.*: Trestní odpovědnost právnických osob – bilance a perspektivy. [Criminal Liability of Juristic Persons – A Stock-take and the Prospects]. Prague: Leges, 2013, p. 32

persons a return to something more original: the group's vouching for an individual, which existed in archaic law and sometimes also in traditional law". Yes, the present-day protection of rights, guaranteed to individuals, is probably incompatible with "the group's vouching for an individual, which existed in archaic and sometimes also in traditional law". The question of how to recognise a juristic person therefore remains open.

III. Criminal liability of juristic persons from the perspective of the theory of juristic persons

How, then, can we recognise a juristic person? Precisely because it is not 'physical' or 'natural' but 'juristic', a juristic person does not exist in the real world but in a notional world of legal norms. Thus, a juristic person is that which is laid down by legislation, a law, to be a juristic person. However, the fact *per se* that the law specifies a certain formation as a juristic person is not necessarily enough for such a juristic person to have the capacity to commit criminal acts. We can also ask the question of whether or not criminal liability of juristic persons is associated with a certain conceptual theoretical notion of juristic persons, which is subsequently associated with the construction thereof in a particular legal system. These rather too abstract questions can be elucidated in practice using the example of the twists and turns that accompanied the adoption of the JPCL Act in the Czech Republic and the discussions on the introduction of this liability.

Arguments against the introduction of criminal liability of juristic persons in the Czech Republic were summarised by Musil in 1995.[23] The first objection springs from the opinion that the juristic person is mere **fiction**, "an abstract construct incapable of figuring as a subject of criminal conduct or an object of criminal penalty."[24] Closely related to this objection is the second objection, because if the juristic person as such does not exist, it neither can have its own will, **but there is no guilt without will** and there is no criminal liability without guilt. According to Dědič and Šámal, this objection was "one of the most essential ones … because it involves the question of culpable conduct in the wake of the core principle of substantive criminal law, namely that one can only be held liable for one's culpable conduct ("there is no criminal act or punishment without guilt")".[25]

It is quite obvious that the arguments against criminal liability of juristic persons correspond to the theoretical notion of the juristic person as mere fiction that has no will of its own. Does it therefore mean that, in line with this theory, the juristic person is a sort of a 'shadow cripple without a will'? What kind of a theory can this

[23] *Musil, J.* Trestní odpovědnost právnických osob v novém francouzském trestním zákoníku. [Criminal Liability of Juristic Person in the New French Criminal Code] In: Kriminalistika, 1995, p. 309

[24] *Ibid,* p. 310

[25] *Dědič, J., Šámal, P.* Komentář k § 8 zákona o trestní odpovědnosti právnických osob. [Comments on Section 8 of the Law on Criminal Liability of Juristic Persons] In: *Šámal, P. et al.* Trestní odpovědnost právnických osob. Komentář. [Criminal Liability of Juristic Persons. Comments] 1st edition. Prague: C. H. Beck, 2012 (hereinafter '***Dědič, J. and Šámal, P., op. cit.***') p. 168

actually be if it explains legal persons in this tragicomic manner? Although this theory may appear to be strange at first sight, we in fact owe to it the very concept of the juristic person, and its author is none other than Friedrich Carl von Savigny. In 1840, he published his renowned work, *System des heutigen Römischen Rechts* (Volume II) [System of Contemporary Roman Law], in which he not only laid the foundations of the theory of fiction but also created the modern concept of the juristic person, a concept with which we are still working in continental law to this day. Let us therefore have a look at this theory in more detail.

1. The concept of juristic persons from the perspective of the theory of fiction

Savigny[26] himself based his reasoning on the following: "The original concept of a person or legal entity must coincide with the concept of man, and this original identity of the two concepts can be expressed through the following formula: each (individual) man and only the (individual) man has legal capacity."[27] However, he also said that legal personality could be extended to include artificial entities accepted as mere fiction. "We call such an entity a juristic person, i. e. a person that has been created solely for legal purposes *(angenommen)*."[28] However, Savigny emphasises that juristic persons' artificial legal capacity can only apply to circumstances under private law. This then suggests the nature of juristic persons, i. e. their nature falls solely under the law of property. The reason is that, unlike natural persons, juristic persons are unable to pursue their objectives otherwise than in property relations. This is why Savigny also defines the juristic persons as an "**artificially created (accepted = *angenommenes*) entity with legal capacity as to property.**"[29] This is also the reason Savigny uses the term juristic person. Through this term, he wants to express that this person only exists for a 'juristic' (read: private law) purpose. Savigny therefore also dismissed the term moral person, which until then had been used rather than the term juristic person and which we can also come across as a legal term in the General Civil Code of 1811.[30]

Juristic persons' property-related legal capacity is also the key to explaining the theory of fiction. This is because the acquisition of a property right usually presupposes legal acting. "However, acting itself presupposes a thinking and wishing being, an individual man, which a juristic person as mere fiction is not, and therefore an inherent conflict emerges here: an entity that has legal capacity in

[26] *Savigny, F. C.* System des heutigen Römischen Rechts (Vol. II). Berlin, 1840, p. 2

[27] "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 muβ der ursprüngliche Begriff der Person oder des Rechtssubjects zusammenfallen mit dem Begriff des Menschen, und diese ursprüngliche Identität beider Begriffe läβt sich in folgender Formel ausdrücken: Jeder einzelne Mensch, und nur der einzelne Mensch, ist rechtsfähig."

[28] *Savigny, F. C.*: System II, op. cit., p. 236

[29] *Savigny, F. C.*: System II, op. cit., p. 240

[30] Cf. *Beran, K.*: Proč byla morální osoba nahrazena osobou právnickou? (Přirozenoprávní kořeny pojmu „morální osoby"). [Why Was the Moral Person Replaced with the Juristic Person? (The Natural Law Roots of the Concept of 'Moral Person')] In: Právník No. 2/2012

property matters, but that cannot meet the conditions for acquiring property."[31] Wherever this conflict can be found (i.e. also in the case of individuals lacking legal capacity, for example), it has to be resolved with the help of an artificial institution – representation. Thus, according to Savigny the theory of fiction is not based on the juristic person having a 'fictitious will' but on **natural persons' conduct being deemed to be the juristic person's conduct, and this is what the fiction consists in. This is why a juristic person does not have a will** and therefore has to be compared to, perhaps most appositely, an individual lacking legal capacity, and its representative to that individual's guardian.

However, if according to this concept the juristic person does not have a will of its own, how can it be criminally liable? On this issue Savigny starts off by saying that criminal liability of juristic persons was already a topic of debate in his times. According to him, some authors excluded criminal liability of juristic persons completely, because "a juristic person has only an artificial existence through the privilege granted by the territorial lord [*Landesherr*], and this existence is given to it solely for the permitted purposes; thus, if it commits a crime, at such a moment it is not a juristic person at all, and therefore punishment cannot be imposed on it as such."[32] However, Savigny himself considered this argument to be erroneous. He disproved it using the following example: if a foreigner is accepted in the state and also takes the vassal's oath, and then breaches the oath, thereby violating the conditions under which he was accepted, he nevertheless does not lose his personality, let alone his criminal capacity.[33]

But Savigny was also one of the authors who ruled out criminal liability of juristic persons. According to him, the reason is the nature of criminal law, and also the very nature of juristic persons. As regards criminal law, Savigny says: "Criminal law has to do with natural people as thinking, wishing, feeling beings. But the juristic person is nothing like this, it is only a being that has property, and therefore is found completely outside the domain of criminal law. Its actual being is related to the representing will of certain individual people, and this representing will is attributed to the juristic person as its own will due to the fiction; but such representation, without its own will, can only be respected in civil law, and never in criminal law."[34] This also suggests that "**all that is regarded as a juristic person's crime is still a crime of its members or officers, i. e. individual people or natural persons;** it is also completely irrelevant whether or not the relationship to the corporation was the reason and purpose of the crime. Thus, if, for example, an official of a municipality, driven by excessive zealousness, steals money to mitigate the want of the national coffers, he himself personally is no less a thief for this. If we wanted to punish a juristic person's crime, this would breach the

[31] *Savigny, F. C.:* System II, op. cit., p. 282
[32] *Savigny, F. C.:* System II, op. cit., p. 310
[33] *Savigny, F. C.:* System II, op. cit., p. 311
[34] *Savigny, F. C.:* System II, op. cit., p. 312

basic principle of criminal law which is that the criminal and the punishee are one and the same."[35]

The fundamental reason for ruling out criminal liability of juristic persons is related to Savigny's analogy of juristic persons as people who are mentally ill and hence are not *sui iuris*. The similarity rests in the fact that in both cases we see an entity with legal capacity, which, however, lacks the natural capacity to act, and therefore they are represented by representatives who artificially create their will. According to Savigny,[36] in both cases a reason exists to vest an unlimited volitional capacity in both of them, which would mean that his ward is punished for the guardian's crime when, for example, the guardian deceives somebody or steals something in the interest of his ward.[37]

The fact that, due to legal dogma, Savigny rules out criminal liability of juristic persons definitely does not mean, according to him, that juristic persons were not **punished in antiquity in any way**. On the contrary, Savigny himself says that ancient Rome's history offers a number of examples of very harsh action against municipal polities, which he specifically illustrates using the case of the town of Capua. In the Second Punic War, the city ceded from Rome. Once it was seized again, not only were all the prominent burghers executed, but the town was completely deprived of all traits of the status of a city. However, Savigny says that this case definitely does not involve **criminal liability of a juristic person** – the town of Capua. The reason is that depriving Capua of its status as a city and other sanctions **did not have the nature of the application of law**. According to Savigny, this was a consequence of political action – a war.

The bottom line is that criminal liability of juristic persons is really incompatible with the theory of fiction and the creator of this theory himself explicitly stated he was against the application of criminal liability to juristic persons. Criminal liability of juristic persons would only be compatible with the theory of fiction if we did not regard punishment of juristic persons as the application of law by a court but as a military campaign.

2. The concept of juristic persons from the perspective of the organic theory

Precisely because the theory of fiction could not serve as a theoretical justification for criminal liability of juristic persons, the '**identification doctrine'**, which

[35] *Savigny, F. C.:* System II, op. cit., p. 313

[36] *Savigny, F. C.:* System II, op. cit., p. 316

[37] According to Savigny, everything that has been said about criminal liability of juristic persons also applies to capacity for delict in private law. Each true delict is assumed to entail intent or negligence together with sentiment (*Gesinnung*) and attributability. (*Zurechnung*), and therefore cannot come into consideration in the case of juristic persons, the same as in the case of people who are not *sui juris* or are mentally ill. However, it is different in the case of contracts between juristic persons, where the representing people's intent or negligence can come into consideration. The reason is that in such a case, the sentiment of the juristic person is as irrelevant as the sentiment of a natural person whose agent intentionally or by negligence causes the emergence of the delict. (*Savigny, F. C.*: System II, op. cit., p. 317)

is said to come from England of the early 20th century, was put forth in the Czech Republic to support the option of introducing criminal liability of juristic persons. Musil explains this theory as a "theory according to which juristic persons can be likened to human beings in many respects: they contain executive components that carry out mechanical operations, but they also contain leadership bodies expressing the ideas and interests of the juristic persons."[38] And he adds: "As an individual has a mental life, a juristic person has an internal spiritual climate filled with ideas and the will of the members of this commune, primarily those of the leaders."[39] Janda also believes that "according to this theory, a juristic person is [thought] to have a certain internal life, which is created by its members. Actuality is then seen in that members of such a juristic person are influenced by this internal life, which then persists in the juristic person for a long time even when its members are replaced."[40] On the basis of these reflections, Musil then concludes that "an analogous, subjectively psychological construct such as fault or guilt in the case of natural persons can also be conceived for juristic persons."[41] Criminal liability of juristic persons is said to be based on this concept in Belgium, where the underlying idea is that "a juristic person has real consistency and existence"[42] and also that "it has an autonomous will and pursues independent objectives distinct from the will of the individuals of whom it is comprised."[43]

The existence of an internal life of juristic persons must necessarily be the starting point for the **theory of a defective organisation of corporations**, which is, according to Huber, applied in the US, Australia, Denmark and the Netherlands. This model envisages that where a defect is found in the structure of an organisation which has resulted in a criminal act, "it is no longer needed to identify the individual perpetrator,"[44] since "no act or state of mind of an individual manager, stemming from an intention (negligence), is involved but organisational power and a certain collective intention (negligence) of the whole corporation, composed of a group of people, are involved."[45]

In addition to the above theoretical constructions, expediently coloured legal and political arguments have been voiced in favour of criminal liability of juristic persons: The argument that the juristic person is fiction, an artificial construct that has no real basis, and "it is therefore ruled out that it figures as a perpetrator of

[38] *Musil J.* Trestní odpovědnost právnických osob: Historický vývoj a mezinárodní srovnání, Pocta Otovi Novotnému k 70. narozeninám. [Criminal Liability of Juristic Persons: Historical Development and International Comparison. Homage to Oto Novotný on the Occasion of his 70th Birthday] Prague: Codex Bohemia, 1998, p. 81

[39] *Musil, J.*: (1995) op. cit., p. 310

[40] *Janda, P.*: Trestní odpovědnost právnických osob. [Criminal Liability of Juristic Persons] In: Právní fórum, 2006, No. 5, p. 175

[41] *Musil, J.*: 1998 op. cit. from Homage…, p. 81

[42] *Čentéš, J., Palkovič, J., Štoffová, Z.* Trestná zodpovednosť právnických osob v Belgicku. [Criminal Liability of Juristic Persons in Belgium] In: Justičná revue, 2001, No. 10, p. 992

[43] *Ibid.*, p. 992

[44] *Huber, B.* Trestní odpovědnost korporací (Požadavky v rámci mezinárodních konvencí a jejich aplikace v evropských zemích). [Criminal Liability of Corporations (Requirements under International Conventions and Their Application in European Countries)] In: Trestní právo, 2000, p. 4

[45] *Huber, B.*: op. cit., p. 4

criminal acts,"[46] has therefore allegedly lost some of its power and justification, mainly due to the development of societal structures, primarily in the economy. To wit, juristic persons act within society as real entities "that decisively influence society's development and individual natural persons' conduct in many respects and areas."[47] Baláž then even regards the claims of opponents to the introduction of criminal liability of juristic persons (such as the claim that "a juristic person does not have consciousness and will, nor an intention to commit a criminal act", and "juristic persons are unable to think and act independently") as mere phrases and says: "Even though lawmakers and certain opponents have rejected culpability of juristic persons, this does not mean that a majority of the society would not welcome such a notion. Criminal liability of juristic persons and its consequences also can, on the one hand, indirectly damage innocent persons, but on the other hand such persons also participate in the benefit derived from the criminal activity of the enterprise where they are employed."[48]

These arguments have then helped to disprove the conclusion that a juristic person is unable to act independently, with the following justification: "If juristic persons are in actual fact capable of independently being bearers of rights and duties then they also must be capable of acting either in a compliant manner, i. e. in compliance with the commands of law, or in an non-compliant manner, i. e. at variance with legal obligations. The fact that natural persons act in the name of juristic persons does not mean that the juristic person's capacity to act is excluded."[49] Gradually, this opinion was generally accepted in the Czech Republic and we can also come across it in the recent comments on the JPCL Act, i. e. in Dědič and Šámal, according to whom it is possible to imagine, on the basis of the development of jurisprudence, juristic persons' culpable delinquent conduct, while not only civil but also administrative jurisprudence envisages such conduct. "**Juristic persons are actually capable of acting,** both in compliance and contrary to the commands of legislation. It is not possible to infer from the fact that natural persons act in the name of juristic persons at all times that this rules out juristic persons' capability of culpable conduct, **because according to sociological research, juristic persons, as groups of people, have a will distinct from that of the persons of whom they are comprised,** which law acknowledges in relation to juristic persons in general."[50]

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[46] *Plangue, J.-C.* La Détermination de la personne morale pénalement responsable. Paris: L'Harmattan, 2003, p. 25

[47] *Jelínek, J.* Trestní odpovědnost právnických osob. [Criminal Liability of Juristic Persons] Prague: Linde Praha, 2007, p. 97

[48] *Baláž, P.* K problematice zavedenia trestnej odpovednosti právnických osôb do našich trestných kódexov. [On the Issue of Introducing Criminal Liability of Juristic Persons into Our Criminal Codes] In: *Záhora, J., Kert, R. (eds.)* Trestná zodpovednosť právnických osôb (zborník príspevkov z mezinárodnej konferencie konanej dňa 12. Novembra 2009) [Criminal Liability of Juristic Persons (Proceedings of an international conference held on 12 November 2009)] Bratislava: EUROKODEX, 2009, p. 184

[49] *Musil, J.* Trestní odpovědnost právnických osob – ano či ne? Koncepce nové kodifikace trestního práva hmotného České republiky. [Criminal Liability of Juristic Persons – Yes or No? The Philosophy of the New Codification of Czech Substantive Criminal Law] 1st edition. Brno: Masaryk University, 2000, p. 171

[50] *Dědič, J. and Šámal, P.* op. cit., p. 169

The author believes that we can conclude on the basis of the above reflections that criminal liability of juristic persons is necessarily based on the idea of a juristic person as an independent entity that has its own will, i. e. on the identification doctrine. The designation 'the identification theory of juristic persons' is a name that is rather unusual from the perspective of the traditional categorisation of the theories of juristic persons in continental law, and we do not often come across it. The antipole to the theory of fiction is usually thought to be the theory of 'a real person formed by association', i. e. the organic theory created in Germany by Otto von Gierke[51] at the end of the 19th and the beginning of the 20th centuries. The core idea of his theory is that a juristic person constitutes a 'spiritual organism', which manifests itself by having its own independent will, which it is capable of displaying externally. **In the author's opinion, the identification theory of juristic persons is therefore nothing other than the organic theory, which is, under a rather different name, used for justifying the permissibility of criminal liability of juristic persons.**

IV. Criminal liability of juristic persons under applicable Czech law

The answer to the above question of whether criminal liability of juristic persons is tied with a certain theory of juristic persons is, on the basis of the explication provided in the foregoing, very clear: criminal liability of juristic persons is tied to a theoretical concept of juristic persons, which is based on the 'organic theory of juristic persons'. The applicable legislation contained in the law on criminal liability of juristic persons therefore must necessarily be based on this theory. For this reason, the author does not agree with Dědič and Šámal's opinion that "the law on criminal liability of juristic persons does not explicitly avow to either the organic concept of juristic persons or to the theory of fiction."[52] If Dědič and Šámal themselves say that "according to sociological research, juristic persons, as groups of people, have a will distinct from that of the persons of whom they are comprised", then this is bound to mean that a juristic person has its own will and in terms of its underlying philosophy, the law on criminal liability of juristic persons therefore must be based on the organic theory. In this respect it is irrelevant whether the JPCL Act explicitly avows to this or that theory.

But it is true that the explanatory notes to the law on criminal liability of juristic persons are remarkably confused and packed with contradictions as regards the question of whether or not juristic persons have their own will and are independently capable of acting. Reading the notes, we first learn that "since the emergence and existence of juristic persons constitute a certain legal construct, law must also devise the manner in which juristic persons act as legal entities to the outside, because a **juristic person as a whole does not have its own will**, and therefore

[51] *Gierke, O.* Das Wesen der Menschlichen Verbände [The Nature of Human Associations]. Berlin, 1902, p. 27
[52] *Dědič, J. and Šámal, P.* op. cit., p. 179

cannot act according to its will or manifest its will to the outside.[53]" However, the very next sentence says that "our law therefore stipulates that **a juristic person's own conduct** is constituted by those manifestations of will which are made in the name of the juristic person by its certain bodies or officers as natural persons, and the legal consequences related to such manifestations of will (whether in the form of legal acts or in the form of illegal acts) are attributed directly to the juristic person as a legal entity."[54] However, if our law stipulates that certain conduct is 'the juristic person's own conduct', it cannot be claimed that the juristic person as a whole does not have its own will. The reason is that the persons who manifest this will do not manifest their own will but a distinct will – that of the juristic person, and that is precisely why these persons are the bodies of the juristic person. The fact alone that the authors of the explanatory notes to the law on criminal liability of juristic persons were not completely in the clear as to whether the construction of the juristic person in our law is conceptually based on the organic theory or on the theory of fiction is not so important. The important thing is **whether or not it is possible to conclude from the valid and effective wording of the law on criminal liability of juristic persons that the underlying philosophy of the law is the organic theory, which is also bound to be reflected in the terminology that the JPCL Act uses.**

Section 8(1) of the JPCL Act**, which provides for the attributability of criminal acts to juristic persons, can best serve for such analysis.** In that Section we learn that "a criminal act committed by a juristic person is an illegal act committed in its name or in its interest or as part of its activities, if […] acted so." Let us look at the very first words of this sentence. The law does not say, for instance, that "juristic persons shall be held liable for illegal acts" or "illegal acts committed [….] shall be regarded as criminal acts of juristic persons", but it says outright that "a criminal **act committed by a juristic person** is …". This linguistic expression is not used at random and has its meaning in terms of how the JPCL Act defines the juristic person in terms of its concept. **The construction of a juristic person that is independently, i. e. in its own name, capable of legal acting cannot rely on the theory of fiction but only on the organic theory.**

Accordingly, it would be possible to wrap it all up at this point, because what needed to be demonstrated has been demonstrated, i. e. that criminal liability of juristic persons arises from the organic theory, which is also, and quite logically, the basis for legislation contained in the law on criminal liability of juristic persons. However, there is a snag in the above statement: Is it possible to claim that the concept of juristic persons in Czech legislation is based on the organic theory just because the JPCL Act is based on the organic theory of juristic persons? In order

[53] Důvodová zpráva k vládnímu návrhu zákona o trestní odpovědnosti právnických osob a řízení proti nim. [Explanatory Notes to the Government's Bill on Criminal Liability of Juristic Persons and Proceedings against Them] Parliament of the Czech Republic, Chamber of Deputies, 6th election term. Parliament paper No. 285, p. 41

[54] *Ibid.*, p. 41

for this to be the case, the JPCL Act would have to provide not only for their criminal liability but also for their legal existence, i. e. the law would have to define what a juristic person is as a normative concept. But this is not the case in the Czech Republic and the author has great doubts that a legal system can exist in which criminal law is the basis for the legal codification of juristic persons. From the explanatory notes to this law, we only learn what is logical: "The bill does not explicitly define the concept of juristic persons, but leaves their definition to pieces of legislation under civil law and commercial law, and it therefore covers all juristic persons regardless of how they have come into existence, unless certain juristic persons are explicitly excluded from the applicability of the bill. Thus, criminal liability of a juristic person comprised of a single [natural] person (for example, a private limited company with a single member), is not ruled out, either."[55] Both Jelínek in his comments, saying that "the law on criminal liability of juristic persons provides for the conditions of criminal liability of juristic persons, but does not explicitly specify the juristic persons that will have criminal liability under this law, and leaves the specification thereof to civil law,"[56] and Dědič and Šámal[57] explicitly acknowledge the dependence of criminal law on private law.

A legal construction whereby the JPCL Act does not specify who the perpetrators under the JPCL Act actually are is, however, a significant exception from the perspective of criminal law as one of the fields of law. In the Czech Republic, criminal law is understood, to a considerable extent, as a closed system that is quite autonomous from other fields of law. Czech criminal law has its own terminology and also its own, and quite distinctive, interpretation of terms, which frequently differs from the interpretation of terms in private law. But it is not so in the case of juristic persons. The reason is that it is not very well possible for criminal law to 'create' the juristic person, i. e. to define it as a concept and to determine what shall and what shall not be a juristic person; closely related to this is also the question of what is, or is not, perceived as conduct of juristic persons. Thus, criminal law is bound to follow the definition of the concept of juristic persons in private law.

But in this respect, we are facing another complication in the Czech Republic: the complete overhaul, or the 're-codification', of Czech private law. The law on criminal liability of juristic persons was passed when the 1964 Civil Code was still in effect. As shown below, that civil code devised the juristic person as an entity that acted through its (governing) bodies, i. e. the code proceeded from the organic theory that vested juristic persons with their own will. However, the 1964 Civil Code was repealed as of 1 January 2014, and on that date the New Civil Code, which devises the juristic person completely differently, came into effect. The

[55] Důvodová zpráva k vládnímu návrhu zákona o trestní odpovědnosti právnických osob a řízení proti nim. [Explanatory Notes to the Government's Bill on Criminal Liability of Juristic Persons and Proceedings against Them] Parliament of the Czech Republic, House of Deputies, 6th election term. Parliament paper No. 285, p. 41

[56] *Jelínek, J.* Komentář k § 1. [Comments on Section 1] In: *Jelínek, J., Herczeg, J.* Zákon o trestní odpovědnosti právnických osob. Komentář s judikaturou. [Law on Criminal Liability of Juristic Persons. Comments and Case Law.] 2nd edition. Prague: Leges, 2013 (hereinafter '**Jelínek, J., Comments, op. cit**.') p. 31

[57] *Dědič, J. and Šámal, P.* op. cit., p. 171

explanatory notes to the New Civil Code explicitly comment on the question of the theoretical basis for this legislation on juristic persons, saying that the scheme of the New Civil Code relies on the *ius naturale* policy, as was the case with the General Civil Code (i.e. *ABGB* of 1811), "and therefore differentiates between the ways in which law views people as natural persons, and juristic persons as artificial (fictitious) entities."[58] The scheme therefore "dismisses the anthropomorphisation of juristic persons and adopts the view that juristic persons are artificial man-made formations created for the purpose of serving man's interests rather for being placed on a level with man in all respects; equality between natural and juristic persons can only be considered in property-related matters, and not all of them at that."[59]

How exactly is the theory of fiction manifest in the normative provisions of the New Civil Code? First of all, we can probably cite Section 20(1) NCC, under which "a juristic person is an organised formation on which the law stipulates that it has a legal personality, or the legal personality of which the law acknowledges. Irrespective of the object of its activities, a juristic person can have rights and obligations that are compatible with its legal nature." This provision sets out that juristic persons have a legal personality, i. e. the capacity to have rights and duties, but, in contrast to the case of human beings, the provision does not mention legal capacity in any way. The fact that juristic persons are not *sui juris* does not only arise from the fact that they are not vested with legal capacity in Section 20 NCC, but mainly from Section 151(1) NCC under which "the law shall lay down, or, as applicable, the founding legal acts shall determine the manner and scope in which members of the juristic person's bodies shall decide for it and **substitute its will**." If a juristic person does not have a will, it also cannot be *sui juris*, i. e. it cannot perform legal acts independently. This is also the reason why in the New Civil Code the juristic person is devised so that it does not act on its own but that a member of its governing body acts for it as its **representative** under Section 164 NCC.[60] The author believes that this construction fully confirms the application of the theory of fiction in Czech private law. **What the NCC regards as juristic persons, is precisely what we came across in Savigny, i. e., in reality, the 'representing conduct of its bodies' is actually considered to constitute the juristic person, and therein lies the fiction.**

However, if private law devises the juristic person so that it is not *sui juris* and is unable to act on its own, then the formulation in the JPCL Act, according to which "a criminal **act committed by a juristic person** is an illegal act…" etc. is obviously incorrect. For the JPCL Act to be congruent with the construction of juristic persons as fiction, the correct formulation should actually read, something like, "juristic persons shall be held liable for illegal acts" or "illegal acts committed [….] shall be regarded as criminal acts of juristic persons" or similar. As long as the

[58] *Eliáš, K. et al.* Nový občanský zákoník s aktualizovanou důvodovou zprávou. [The New Civil Code with Updated Explanatory Notes] Ostrava: Sagit, 2012, p. 76

[59] *Ibid.*, p. 77

[60] Section 164 NCC lays down that "a member of the governing body can represent the juristic person in all matters."

JPCL Act contains the formulation "a criminal **act committed by a juristic person**" it is justifiable to argue that the juristic person itself was incapable of committing the criminal act. It is prevented from doing this by its own nature constituted by its legislative construction in the NCC. It therefore cannot be held liable for criminal acts under the law on criminal liability of juristic persons.

This, however, is only the first of the consequences resulting from the essential conflict between the concept of juristic persons in the New Civil Code and in the law on criminal liability of juristic persons. To show what this essential conflict can lead to, the author will now analyse the general conditions for the attributability of criminal acts to juristic persons as these conditions are set out in the first sentence of Section 8(1) of the JPCL Act, which says that: "A criminal act committed by a juristic person is an illegal act committed in its name or in its interest or as part of its activities, if […] acted so." Specifically, the author will seek to answer the following questions:

Can a criminal act be committed in the name of a juristic person?

Can a criminal act be committed in the interest of a juristic person?

What problems can arise when examining the perpetration of a criminal act "as part of its activities"?

1. An act committed in the name of a juristic person

In practice, the hitherto organic concept of juristic persons was reflected in the construction of juristic persons' legal acts. Section 20(1) of the 1964 Civil Code laid down: "**Legal acts of a juristic person** are made, in all matters, by those who are authorised to do so in the agreement on the establishment of the juristic person, in the foundation document or in the law (governing bodies)." In compliance with this was also the second sentence of Section 13(1) of the Commercial Code of 1991, under which "**juristic persons act through their governing bodies**, or a representative acts for them." The unquestionable importance of these two normative sentences consisted in the fact that governing bodies, precisely because they are organs and not representatives, express the juristic person's will externally. This means that they are acting in the name of the juristic person. This is also why, for example, the first sentence of Section 191(1) of the Commercial Code of 1991 read: "The Board of Directors is the governing body that manages the company's activities and **acts in its name**."

The law on criminal liability of juristic persons fully follows up on this construction of the juristic person, and the construction of its legal acting, when in Section 8(1) it lays down that "A criminal **act committed by a juristic person is an illegal act committed in its name**[…]." This is also borne out by Jelínek's comment noting that "the governing body's acting is the juristic person's own acting."[61]

[61] *Jelínek, J.* Comments, op. cit., p. 71

This formulation of the JPCL Act was problematic from the perspective of the provisions, in force until recently, contained in the 1964 Civil Code, and is also problematic from the perspective of the New Civil Code. When the 1964 Civil Code was in effect, the problem consisted in the fact that exclusively its governing body, or a member thereof, was authorised to act in the name of the juristic person. Had Section 8(1) of the JPCL Act been interpreted literally, it would have necessarily meant that an act committed not by a member of the governing body but by a mere representative could not have met the condition of acting 'in the name' of the juristic person and for this reason could not have been regarded as a criminal act committed by the juristic person. The above formulation was a very obvious imperfection in the JPCL Act. Correctly, the *protasis* of Section 8(1) of the JPCL Act should set out: "A criminal act committed by a juristic person is an illegal act committed **for the juristic person** or in its name […]."The absence of a juristic person's conduct through representation comes to light mainly when considering Section 8(1)(a) of the JPCL Act, which differentiates between acting 'in the name of' and acting 'for' a juristic person. Dědič and Šámal have tried to overcome this obvious imperfection in the law through interpretation in their comments. As an argument they use Section 22(1) of the 1964 Civil Code, under which a representative is someone who is authorised to act for another in his name. This suggests that even a representative acts 'in the name of' the represented, although the representative acts 'for' the represented." Thus, a criminal act committed in the name of a juristic person should be understood, within the meaning of Sections 20 and 22 of the Civil Code, to be illegal acts of the persons who are its governing body or members thereof, and also the acts of the juristic person's representative."[62] A similar view is also espoused by Jelínek who writes that "a juristic person's own conduct is constituted by those expressions of will, which its certain bodies or its representatives as natural persons make, while the legal consequences associated with these expressions of will (whether in the form of legal acts or in the form of illegal acts) are attributed directly to the juristic person as a legal entity (*cf.* Section 8(1) and (2) of the JPCL Act)."[63]

The answer to the question of what is problematic in the above interpretation rests in the answer the question of **what the difference is between a juristic person's direct acting through its organ and its acting through its representative**. To simplify, an organ that acts in the name of the juristic person has, in principle, unlimited authorisation to act, and this organ's acting binds the juristic person regardless of whether or not the organ has overstepped the limitations stipulated in that person's internal regulations. This is what differentiates the organ from a mere representative who, if overstepping the limits within which he has purview on the basis of his authorisation to represent (typically a power of attorney), is not acting in the name of the represented but in his own name, thereby bearing full liability arising therefrom. The view that the governing body's acting

[62] *Dědič, J. and Šámal, P.* op. cit., pp. 191-192
[63] *Jelínek, J.* Comments, op. cit., p. 35

constitutes "the company's direct acting, as opposed to a juristic person's indirect acting through a representative,"[64] was also espoused by Bartošíková and Pipek. This is also why these two authors do not agree with the view that a juristic person does not have its own will, since will is expressed through a natural person.[65]

The above suggests that if a representative oversteps his authorisation to act, the authorisation for representing the juristic person is lacking and the latter is not bound either by a legal act (typically contractually) or by an illegal act, i. e. criminally.

For comparison, we can cite French legislation and its interpretation as described by Gibalová. She first of all writes that under art. 121-2 of the new French criminal code of 1992,[66] "With the exception of the State, juristic persons have criminal liability … for criminal acts committed on their account [*pour leur compte*] or by their organs or representatives [*par leurs organes ou représentants*]."[67] She then informs us that the law does not define juristic persons' representative, and the French Court of Cassation has therefore had to interpret the term. This interpretation has established a **representative** as a person possessing a power of attorney, or having a power of attorney granted by the juristic person. The criminal act must then be committed within the scope of such empowerment.[68] In line with the identification doctrine, "acts of a rank-and-file (not empowered) employee should not establish his employer's criminal liability."[69]

Dědič and Šámal also arrive at a similar conclusion when they say that in a situation where the **legal entitlement for representation is completely lacking** it is apparently not possible to apply Section 8(1)(c) of the JPCL Act:" An illegal act by a so-called unempowered acting person could be regarded as an act of a representative only subject to the conditions set out in Section 33(2)of the Civil Code, i. e. if the [relevant] body, or a person authorised to do so, approves such act later."[70]

From this angle, it is difficult to understand their argument that for a juristic person to have criminal liability, not only acts to which the representative is authorised but also acts "**on the occasion of which the representative oversteps the scope of his authorisation**" are relevant.[71] They explain their reasoning: "the wording 'the person who is authorised … to act for the juristic person 'might make it possible to infer that only acts on the occasion of which the representative does not exceed the scope of his authorisation to act are relevant". But according to Dědič and Šámal, it is not so." Section 8(1) refers to illegal acts

[64] *Bartošíková, M., Pipek, J.* Vztah obchodně právní a trestní odpovědnosti statutárních orgánů a členů statutárních orgánů. [Relationship between Commercial Liability and Criminal Liability of Governing Bodies and Members Thereof] In: Právní praxe v podnikání, 1999, No. 1, p. 1

[65] *Ibid.*, p. 14

[66] Le nouveau Code Pénal 1992 (NCP)

[67] *Gibalová, D.* Aplikace trestní odpovědnosti právnických osob ve Francii. [Application of Criminal Liability of Juristic Persons in France] In: Trestněprávní revue, 2011, No. 5, p. 137

[68] *Ibid.*, p. 140

[69] *Ibid.*

[70] *Dědič, J. and Šámal, P.* op. cit., p. 199-200

[71] *Ibid.*

rather than to legal acts. But this is not envisaged at all for any form of representation. In illegal acts, the representative would usually always overstep the limits of his authorisation and the provision would not be applicable in practice. **It is therefore only important whether the particular person has a legal entitlement** (even if invalid or ineffective) generating the authorisation to represent the juristic person, and it is not relevant whether or not the representative has, in acting under Section 8(1), **overstepped the scope of his authorisation to represent,** whether or not he acted alone although he should have acted together with another representative and whether or not his acting binds the juristic person under private law, or whether or not his acting is valid. Nor is it necessary to examine whether the particular person is actually a representative, i. e. whether or not he has a valid and effective legal entitlement for representation, because under Section 8(4)(c) this is legally irrelevant."[72]

The author regards the above argumentation as incorrect for the following reasons. The author believes that for the representative to be able to act in the name of the represented, a legal basis (empowerment) must exist. If the representative oversteps the limits of his empowerment, then no legal entitlement exists. The author believes that the limits of authorisation cannot be overstepped "a lot" or "a little", just as a woman cannot be "a little pregnant". If the legal entitlement for representation is lacking, then the consequences of legal acts, let alone the consequences of illegal acts, cannot be attributed to the represented. The conclusion reached by Dědič and Šámal actually means that the representative's act is, for all practical purposes, placed on a par with acts of the juristic person's organ. The main weakness of the above argumentation lies in that it is extremely vague. If an entitlement for representation is 'completely' lacking, then the juristic person is not represented at all, while if it is lacking 'less than completely' or perhaps lacking 'only a little', the juristic person is represented and commits the criminal act.

Another weakness consists in the limits to the permissible interpretation of the text of the law. Šámal and Dědič themselves say in their comments that the first sentence of Section 8(1) ofthe JPCL Act, i. e. that such an illegal act was committed by one of the persons, specified in the law's further text, 'in its name' or 'in its interest' or 'as part of its activities', basically constitutes a corrective [formulation] "intended to prevent the juristic person from being held liable for excesses of the persons specified in Section 8(1)(a), (b), (c) or (d), who do not have any required connection with the juristic person. The definition of these features in the law on criminal liability of juristic persons is broad enough to enable **prosecution of the juristic person without any broadening interpretation."**[73] The author believes that considering acts carried out in the name of a juristic person to be representative of the juristic person is not only an interpretation, but an analogy. A juristic person's direct acting through its governing body and a juristic person's representation by a representative are two different notions. **The author regards**

[72] *Ibid.*
[73] *Ibid.*, p. 190

as incorrect the claim that the governing body's direct acting under the old civil code is actually a certain type of representation. The author therefore believes that in this case, an analogy that extends the conditions for criminal liability has been used as an argument. However, such analogy is impermissible in criminal law.

If under the old civil code the imperfect formulation of the first sentence of Section 8(1)of the JPCL Act was problematic, then under the New Civil Code it is just fatal.

Conceptually, the New Civil Code is built on the premise that a juristic person *per se* is not *sui juris*:" members of the juristic person's bodies shall decide for it and substitute its will" (Section 151(1) NCC), while under Section 166(1) NCC members of the governing bodies "represent the juristic person in all matters". This leads to a conclusion that Šámal and Dědič have also arrived at: "**Under the New Civil Code, a juristic person will never act on its own, but will always be represented.** If the representative's acts are not regarded as illegal acts committed by the juristic person, then during the New Civil Code's period of effect the assumption that an illegal act was committed 'in the name' of the juristic person could never materialise."[74] Šámal and Dědič consider the above conclusion to be unacceptable and therefore regard the representative's acts as acts in the name of the juristic person. Although the author understands the reasons that motivate them to this interpretation, he considers that this interpretation is impermissible, as it operates *praeter legem*. Such interpretation actually broadens the assumptions for criminal liability. Thus, under such an interpretation it would not be the law setting out what a criminal act is, but a court's reflection on what should be regarded as a criminal act. In the author's opinion, such a 'constructive interpretation' should be dismissed, although it is motivated by good intentions, and the law should not be applied (because it cannot even be applied) and should be harmonised with the current legislation using the standard law-making procedure.

2. Acts committed in the interest of a juristic person

Another problem arises in the case of **illegal acts committed in the interest of a juristic person**. Let us therefore first ask the question of **what the interest of a juristic person is**. The law itself does not specify 'interest' in any way. Nevertheless, in reference literature and commentaries, we can find Jelínek's view that "we understand juristic persons' interest within the broadest meaning of this word (pecuniary or non-pecuniary interest, gaining influence on decision-making concerning the handling of property, interest in the participation of a person in the company's governing bodies, acquiring equities for a significantly lower price, interest in having the Police give up its interest in investigating the juristic person's illegal activities based on its governing bodies' corrupt activities etc."[75] Dědič and

[74] *Ibid.*, pp. 191-192
[75] *Jelínek, J.* Comments, op. cit., p. 75

Šámal hold a similar opinion, saying that an illegal act has been committed **in the interest of the juristic person**" if the juristic person derives either pecuniary benefit from the act, or any non-pecuniary benefit, or if it gains any advantage. Such an advantage can also be a better position on the market of products or services or on another market, or acquiring important information or knowledge, etc. Benefit also means financial or other pecuniary profit. Criminal acts against the environment also include, for example, the fact that the juristic person does not have to invest money in costly environmental measures or does not have to pay for waste disposal, etc. Such acts are also in the interest of the juristic person, which improve the position of the company's members or other persons in the company, including its employees, when, for example, as a result of the committed criminal act the company is able to pay higher wages to its employees, whereby the conditions for 'social peace' and better development of the juristic person (such as a business or other corporation) are created. Summarising these considerations, an act has been committed in the interest of a juristic person if it improves, or at least maintains, the juristic person's existing position in comparison with others, in the area in which it operates."[76]

An anthropomorphic concept of juristic persons is obvious from the above references. A juristic person is perceived as a human being who can have various possible interests, and therefore can also pursue his interests using ways and means that are punished by criminal law. However, for a person to have in the first place, and possibly also to pursue, his own interest he must have a will. However, under the New Civil Code a juristic person is conceived of so that it has no will of its own. An urgent question therefore arises as to whether a juristic person, which *per se* has no will of its own, can nonetheless have interests. Closely related to this is also the question of whether or not **juristic persons' interest as an abstract category** is completely identical with interest pursued by a particular person who acts for the juristic person. If we concede that a juristic person is capable of having an interest in committing a criminal act, then in the case of business corporations, this could even result in a situation where the governing body that has committed a criminal act 'for' the juristic person will not be liable for such an act under private law. The reason is the business judgment rule[77] provided for in Section 51(1) of the Business Corporations Act, which lays down that "one who acts carefully and with the required knowledge, when they could *bona fide* reasonably expect during business decision-making that he was acting in an informed manner and in the business corporation's defendable interest […]." Thus, if, for example, a member of the governing body bribes someone 'in his corporation's interest', such bribery could be regarded as an act that is "in the business corporation's defendable interest" and the member of the governing body would not be liable for it under

[76] *Dědič, J. and Šámal, P.* op. cit., p. 192-193

[77] On fiduciary care and the business judgment rule see also *Krtoušová, L.* Péče řádného hospodáře: odpovídá britskému konceptu duty of care, skill and diligence? [Fiduciary Care: Does It Match the UK Concept of Care, Skill and Diligence?] In: Obchodněprávní revue, 2013, No. 10, pp. 280-281

private law, while the corporation would incur criminal liability. The author regards this consequence as unacceptable. This is also one of the reasons why the author believes that from the perspective of the juristic person itself, committing a criminal act can never be in its interest. After all, a fiction created by a legal system cannot be interested in committing criminal acts, can it?

For the above reasons, the author considers that Jelínek's following statement will be true at all times, and not only intermittently: "Even if the natural person verbally states that they are performing a certain illegal act in the interest of the juristic person, while such act is in fact performed to the detriment of the juristic person and the juristic person would even be potentially liable for it, i. e. *de facto* against the juristic person's interests, this amounts to an excess for which the juristic person would not be liable, while the relevant natural person would solely be liable for the illegal act."[78] In other words, the author believes that if we perceive juristic persons as mere fictions without a will, then committing criminal acts can never be in their interest but can only be to their detriment.

The term interest should therefore be omitted, or at least substituted with another suitable term that will more aptly express the intended meaning. The author regards the approaches that we can find on other countries' legislations as inspirational. Criminal liability of juristic persons in **Austria**[79] has been described by Uhlířová, who says that in Austria, "a corporation has criminal liability for such criminal acts which are committed **for the benefit of the corporation or through which the corporation's duties have been violated**. […] A criminal act has been committed for the benefit of the corporation if the corporation has enriched or was to enrich itself through the criminal act or if due to the criminal act the corporation has saved or could save some costs or expenses."[80] Musil says that "the act must be committed **for the benefit** of the juristic person" also under **French** legislation.[81] Čentéš, Palkovič, and Štoffová inform us about the **Belgian** law on criminal liability of juristic persons, under whose (art. 5(1)) "every juristic person has criminal liability for such violation of the law, which is actually related to the performance of the object of its activities or to the protection of its interests, or where specific facts show that the violation of the law was **for its benefit**."[82]

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[78] *Jelínek, J.* Comments, op. cit., p. 74

[79] Section 3(1) of the Austrian law on liability of associations for criminal acts (Bundesgesetz über die Verantwortlichkeit von Verbänden für Straftaten Verbandsverantwortlichkeitsgesetz – VbVG-BGBl 2005/151) lays down: "Ein Verband ist unter den weiteren Voraussetzungen des Abs. 2 oder des Abs. 3 für eine Straftat verantwortlich, wenn die Tat zu seinen Gunsten begangen worden ist oderdurch die Tat Pflichten verletzt worden sind, die den Verband treffen."

[80] *Uhlířová, M.* Trestní odpovědnost právnických osob v Rakouské republice – komparace s českou právní úpravou. [Criminal Liability of Juristic Persons in Austria – Comparison with Czech Legislation] In: *Jelínek, J. et al.* Trestní odpovědnost právnických osob – bilance a perspektivy. [Criminal Liability of Juristic Persons – A Stock-take and the Prospects] Prague: Leges, 2013, p. 340

[81] *Musil J.* Trestní odpovědnost právnických osob: Historický vývoj a mezinárodní srovnání, Pocta Otovi Novotnému k 70. narozeninám. [Criminal Liability of Juristic Persons: Historical Development and International Comparison. Homage to Oto Novotný on the Occasion of his 70th Birthday] Prague: Codex Bohemia, 1998, p. 94

[82] *Čentéš, J., Palkovič, J., Štoffová, Z.* Trestná zodpovednosť právnických osob v Belgicku. [Criminal Liability of Juristic Persons in Belgium] In: Justičná revue, 2001, No. 10, p. 994

The author believes that other countries' legal provisions that use the word benefit are more apposite. Despite the fact that we will consider the juristic person to be a mere fiction that has no will of its own, we can nevertheless perceive it, from the perspective of a legal analysis, as a set of rights and duties that relate to a certain point identifiable by law. The specifics of the juristic person consists in that it acquires rights and duties on the basis of acting under private law, and the typical nature of such acting is usually a nature based on property rights. In other words, for a juristic person to become bound or entitled, property is needed at all times. A juristic person's interest must therefore ultimately have its property-related effect at all times. This already brings us to benefit, which is nothing other than a juristic person's interest in relation to property.

However, Dědič and Šámal in their comments expressly reject the use of the term benefit. According to them, the reason is that 'benefit for the juristic person' does not have to suffice at all times, "because the juristic person does not derive benefit from the criminal act in all cases since, on the contrary, only damage to somebody else may be caused; nor does the criminal act have to be the result of a breach of duties concerning the juristic person (*cf.*, in this respect, the features of blackmail under Section 175 of the Criminal Code and those of fraud under Section 209 of the Criminal Code)."[83] The author believes that the cases referred to by Dědič and Šámal, i. e. the cases where a juristic person's interest is pursued but the juristic person derives no benefit from this, do not actually involve any 'interest' of the juristic person but that of persons who use the juristic person as an instrument, and in such a case it is appropriate to punish solely and only those acting persons. The author believes that such cases involve a situation where the criminal act was committed to the detriment of the juristic person. From this perspective, the author completely agrees with Dědič and Šámal, according to whom in situations where the criminal act was committed to the detriment of the juristic person, it certainly is not the purpose of the law to hold the juristic person criminally liable, despite the fact that otherwise, the general principle that the juristic person is responsible for the choices of the persons authorised to act for it and the persons who work in its managing and supervisory bodies is certainly applicable. In examining acting persons' excesses the principle should be applied that if the "act was essentially committed against the interests or to the detriment of the juristic person, criminal liability of the juristic person so damaged cannot be inferred, and only the acting persons will be criminally liable."[84]

For the above reasons, the author therefore believes that 'interest' should be omitted from Section 8 of the JPCL Act, or at least replaced with the word 'benefit'.

[83] *Dědič, J. and Šámal, P.* op. cit., p. 190, footnote 184
[84] *Ibid.*, p. 191

3. Acts committed as part of the juristic person's activities

The third alternative condition that makes juristic persons' criminal liability possible is where "**the illegal act was committed as part of its activities**". Since the satisfaction of the two preceding conditions, i. e. the act has been committed in the name or in the interest of the juristic person, will be problematic (if not impossible), after 1 January 2014 this third condition will probably be the most frequent. What does it mean, then, that an illegal act has been committed as part of the juristic person's activities?

According to Dědič and Šámal, a criminal act is committed as part of the juristic person's activities "when the act is related to the object of its activities or business (the purpose of its existence), which is usually specified in legislation, the foundation document, and/or articles of association, but also in the relevant registers (the companies register etc.)."[85] The answers to the question of when the act can be viewed as an act carried out as part of the juristic person's activities will, according to Jelínek, "depend on the specific circumstances; i. e. we will proceed from what each particular juristic person does in its activities. The specification in the juristic person's articles of association or other similar documents can be used as an aid."[86] Let us note that Dědič and Šámal on the one hand, and Jelínek on the other hand, have rather different interpretations of the perpetration of a criminal act 'as part of the juristic person's activities'. In specifying the juristic person's activities, Dědič and Šámal proceed from the formally specified object of business or activities of the juristic person as set out in its foundation documents or in legislation. Related to this is also their opinion that "the attribute 'as part of its activities' should be interpreted restrictively and from the perspective of the meaning and purpose of the law on criminal liability of juristic persons and proceedings against them. A broader interpretation cannot be applied here, and therefore the interpretation does not cover, for example, acts of the treasurer or other employees who in their activities at the juristic person commit fraud against another person, on the basis of which they enrich themselves as natural persons. Nor does it cover acts of a member of the governing body who accepts, as part of the juristic person's activities, a bribe to cause a failure of the juristic person, as part of the activities in which he was acting, to perform its obligation, and the juristic person therefore has to pay a contractual penalty. Such conduct certainly cannot establish criminal liability for the juristic person affected."[87] However, Jelínek is more cautious when he says that it will all depend on what the particular juristic person does in its activities, while specifications thereof in the juristic person's articles of association or another similar document constitutes only an aid for him. This means that not only the normative specification of the juristic person's activities but also **the juristic person's actual activities** (it is the latter that in fact can consist of illegal criminal activities) will be decisive.

[85] *Ibid.*, p. 193
[86] *Jelínek, J.* Comments, op. cit., p. 75
[87] *Dědič, J. and Šámal, P.* op. cit., p. 193

Agreeing with Jelínek, the author believes that juristic persons' activities will have to be judged by what the juristic person actually does and not only by what it states to be its activity or object of business. In any case, however, Czech legislation is relatively unspecific and vague. This lack of specificity transpires in clear light when we compare Czech and Swiss law. Pošíková notes[88] that "to be able to hold a juristic person criminally liable, the criminal act must be committed in the performance of its business activities *(in Ausübung geschäftlicher Verrichtung)* under its business plan *(im Rahmen des Unternehmenszwecks)*." This formulation entails two restrictions. First, it excludes associations that were not set up for business purposes from criminal liability, and second, a nexus must exist between the criminal act and the juristic person's business activities. "This formulation is intended to exclude liability for excesses of the juristic person's employees or members, which are unrelated to the juristic person's business."[89]

Regardless of whether we take its actual activities or its normatively stipulated activities as the juristic person's activities, the above precondition is also problematic, and precisely from the perspective of the New Civil Code. The reason can be found in Section 167 NCC: "An illegal act committed in respect of a third party by a member of an elected body, employee, or another representative of the juristic person when carrying out their assignments shall bind the juristic person." In line with this provision, the interpretation can be that under private law, the juristic person will only be criminally liable for illegal acts committed in performing "**their assignments**" by its governing bodies, employees, or other representatives. However, the JPCL Act ascribes criminal liability to acts occurring **during the activities of the juristic person**. The grammatical interpretation of the words 'activities of the juristic person" and the words 'performing their assignments', i. e. assignments of the persons who represent the juristic person, results in the conclusion that the JPCL Act broadens juristic persons' capacity to commit delicts beyond the framework of the New Civil Code. This is because it is not possible to rule out the interpretation that if the governing body diverges from its assignments but at the same time commits a criminal act 'during the activities of the juristic person', the juristic person will be criminally liable for such criminal act. But this will already be untrue in the case of liability under private law, because the act will no longer be an illegal act committed by the governing body in performing its assignments and instead have become an excess. This interpretation is also supported by Dědič's and Šámal's views: "The attributability of illegal acts (the causing of damage) under the old and the new civil codes **is not specified identically** to the attributability of the perpetration of a criminal act in Section 8(2). But this [phenomenon] only entails the specification of the attributability of the consequences of illegal acts in the domain of private law, which has no influence on the specification of the attribut-

[88] *Pošíková, L.* Trestní odpovědnost právnických osob ve švýcarské právní úpravě. [Criminal Liability of Juristic Persons in Swiss Legislation] In: *Jelínek, J. et al.* Trestní odpovědnost právnických osob – bilance a perspektivy. [Criminal Liability of Juristic Persons – A Stock-take and the Prospects] Prague: Leges, 2013, p. 355

[89] *Ibid*., p. 355

ability of a criminal act to a juristic person under the law on criminal liability of juristic persons. **It can therefore happen that the criminal act will be attributed, under Section 8(2), to a certain juristic person, but that person will not be liable for the damage caused by that criminal act**."[90]

Such disharmony between the New Civil Code and the law on criminal liability of juristic persons is, however, directly at variance with the principle of the subsidiarity of penal repression. After all, Dědič and Šámal themselves say in their comments that "the recognised principle of the rule of law, i. e. perceiving penal repression as an *ultima ratio* means, suggests that **legal assets should primarily be protected using the means of civil law,** commercial law or administrative law, and only where such protection is ineffective and where the violation of the protected relationships exhibits the external elements of a particular criminal act is it appropriate to apply criminal liability."[91] Bohuslav also expressly agrees with this opinion when he says that "criminal law, as the *ultima ratio*, should not be applied, as regards the conditions for criminal liability, in a broader group of cases than it is applied to general – civil – liability for culpable acts."[92]

If the concept of the criminal act is actually to be interpreted also for juristic persons in conjunction with **the principle of subsidiarity of penal repression**, as specified in Section 12(2) of the Criminal Code under which the criminal liability of the perpetrator, i. e. the juristic person, can only be applied in cases detrimental to society in which it does not suffice to apply liability under a different law, it is then **not possible for juristic persons' criminal liability to be broader than liability for delicts in private law.**

It is true that at first sight, the line of reasoning can indicate that the functions of criminal and civil liability, and also the objects protected by criminal law and civil law, differ so much that the question of subsidiarity does not arise at all when applying them. In other words, mere reimbursement consisting of compensation for damage as the main purpose of civil liability can never be conceptually *a priori* sufficient to punish the perpetrator, because it does not pursue the purpose of punishing the perpetrator at all. However, as Janeček correctly observes with reference to the Czech Constitutional Court's case law, the satisfaction (compensatory) function is not always the only function at play in compensation for damage. Private law of delicts also contains a punitive (penalising) function, although in the overwhelming majority of cases it is eclipsed by the compensatory function.[93] The dividing line between civil and criminal liability is not completely distinct in this sense.[94] The author therefore believes that under certain conditions, the subsidiarity of penal repression can also be applied to civil delicts.

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[90] *Dědič, J. and Šámal, P.* op. cit., p. 179

[91] *Ibid.*, p. 188

[92] *Bohuslav, L.* Přičitatelnost trestného činu právnické osobě. [Attributability of Criminal Acts to Juristic Persons] In: *Jelínek, J. et al.* Trestní odpovědnost právnických osob – bilance a perspektivy. [Criminal Liability of Juristic Persons – A Stock-take and the Prospects] Prague: Leges, 2013, p. 150

[93] *Janeček, V.* Sankční náhrada škody. [Punitive Damages] In: Právník. Vol. 152, No. 10, 2013, pp. 992-993

[94] On the intertwining of civil and criminal liability please see also *Janeček, V.* K přípustnosti sankční náhrady škody. [On the Admissibility of Punitive Damages] In: Právní rozhledy. No. 5, 2013, pp. 156-157

In this connection another important question is being asked, specifically concerning **the extent of compatibility between the principle of subsidiarity of penal repression with the principle of concurrent criminal liability of natural and juristic persons,** on which the JPCL Act is based.

Jelínek and Herczeg write that "in fact, natural persons' criminal liability does not depend on juristic persons' liability, and *vice versa*. The two types of liability are independent, which follows from the different conditions for their liability following from the specificities of juristic persons and the law on criminal liability of juristic persons."[95] Kratochvíl notes that this is one of 'the most painful' points in criminal liability of juristic persons: "The reason is that attention was being drawn to the fact that this 'concurrence' of the two types of criminal liability was in conflict with the principle of *ne bis in idem*."[96] However, Kratochvíl comments on this issue similarly to Jelínek, i. e. that there is no breach of the prohibition of '*ne bis in idem*' because the perpetrators are two different entities (a juristic person and a natural person), even though within one and the same criminal act. To support his views, Kratochvíl refers to Ackermann in his earlier treatise[97]: "The personally uninvolved members profited from the juristic person's own interests. The existence of a conflict with the prohibition of double punishment must be dismissed, because double punishment is not entailed here; the only thing entailed is the concurrence of a general disadvantage and the punishment of the physical perpetrator, who is being punished because he has deserved punishment due to his own culpable act."[98]

However, Dědič and Šámal also emphasise that "the approach based on criminal law is the ultimate (subsidiary) means for protecting the legal system, because even after the adoption of the law on criminal liability of juristic persons and proceedings against them, natural persons' criminal liability continues to constitute the foundations and, we can say, the primary criminal liability, while criminal liability of juristic persons only complements this fundamental philosophy of criminal law."[99] After all, nor does Jelínek challenge the application of this principle in any way when he says that the principle is applied 'without any other conditions' in the application of criminal liability of juristic persons.[100]

The author therefore believes that the foregoing suggests that criminal liability of natural persons and criminal liability of juristic persons are not 'completely' con-

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[95] *Jelínek, J., Herczeg, J.* Introduction, op. cit., p. 23

[96] *Kratochvíl, V.* Trestní odpovědnost právnických osob a základní zásady trestního práva hmotného [Criminal Liability of Juristic Persons and Key Principles of Substantive Criminal Law] In: Trestněprávní revue, 2011, No. 9, p. 252

[97] *Kratochvíl, V.* Zákaz dvojího potrestání na pomezí trestní odpovědnosti právnických a fyzických osob (evropské, rakouské a české pohledy) [Prohibition of Dual Punishment in the Borderland between Juristic and Natural Persons' Criminal Liability (European, Austrian and Czech Views)] In: Dny práva 2008 [Days of law /online/], Brno: Masaryk University, p. 3

[98] *Ackermann B.* Die Strafbarkeit juristischer Personen im deutschen Recht und in ausländischen Rechtsordnungen. Frankfurt am Main, Bern, New York: Peter Lang Verlag, 1984, p. 243. Cited from *Kratochvíl, V.* Zákaz dvojího potrestání na pomezí trestní odpovědnosti právnických a fyzických osob (evropské, rakouské a české pohledy).[Prohibition of Dual Punishment in the Borderland between Juristic and Natural Persons' Criminal Liability (European, Austrian and Czech Views)] In: Dny práva 2008 [Days of law /online/], Brno: Masaryk University, p. 5

[99] *Dědič, J. and Šámal, P.* op. cit., p. 186

[100] *Jelínek, J.* Comments, op. cit., p. 36

current but 'subsidiarily concurrent', which means that the primary need is to focus on punishing perpetrators who are natural persons, and only when this does not suffice to proceed to criminal liability of juristic persons. In this connection, what Fenyk says in his comments can be inspirational: "Only a juristic person can be the subject of the criminal act. However, the act of a different entity, i. e. a natural person specified in subsection 1(a) to(d), or subsection2(b) is actually being attributed to the juristic person. We then talk about the **primary entity** (the juristic person), and the **secondary entity** (persons specified in subsection 1(a) to(c)) and, if applicable, a tertiary entity (the employee, subsection 1(a) to(c))."[101] The author believes that it actually is possible to consider a primary and a secondary entity in relation to criminal liability of juristic persons. However, in line with the principle of subsidiarity of penal repression the author believes that a human being, a natural person, should be the primary entity, while the juristic person should be the secondary entity. However, the law on criminal liability of juristic persons does not reflect the principle of subsidiarity of penal repression from this perspective at all.[102] The possibility that the law will be impugned with reference to the Supreme Court's and the Constitutional Court's case law therefore cannot be ruled out.

In respect of this issue the Swiss legislation can again be inspirational: it reflects the subsidiarity of penal repression directly in the text of the criminal code as regards criminal liability of juristic persons, as Section 102(1) StGB lays down: "If a crime or misdemeanour was committed in the performance of the business activities under the juristic person's business plan, and this act cannot be attributed to any natural person because of the defective organisation of the juristic person, the crime or misdemeanour shall be attributed to the juristic person."[103] As Pošíková correctly says, in this case criminal liability of juristic persons is really conceived as subsidiary liability. It is only "when liability for a criminal act committed in the performance of business as part of the company's business purposes cannot be attributed to any particular natural person that the juristic person shall be liable for the criminal act."[104] Thus, the juristic person's criminal liability is a consequence of an organisational failure, for which a particular perpetrator cannot be identified in the juristic person's structure. "The State therefore in fact makes the juristic person co-liable for the fact that it is unable to discover the real culprit." In this case, the juristic person cannot even be relieved of liability by proving that it has done all that was necessary to prevent the act.[105]

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[101] *Fenyk, J., Smejkal, L.* Zákon o trestní odpovědnosti právnických osob a řízení proti nim. Komentář. [Law on Criminal Liability of Juristic Persons and Proceedings against Them. Comments.] Prague: Wolters Kluwer, 2012, p. 31

[102] The question of the subsidiarity of criminal liability, as a criminal policy guideline for lawmakers, was recently discussed by Musil. See *Musil, J.* Trestní odpovědnost jako prostředek ultima ratio. [Criminal Liability as an *ultima ratio* Means] In: *Gerloch, A., Šturma, P. (eds.)* Odpovědnost v demokratickém právním státě. [Liability in a Democratic State Governed by the Rule of Law] Prague: PF UK, 2013, p. 55

[103] *Pošíková, L.* op. cit., p. 351

[104] *Ibid*., p. 353

[105] *Ibid*., p. 354

V. Conclusion

In conclusion, we can summarise the various findings as follows: A juristic person as a perpetrator of a criminal act differs from a human being precisely by the fact that its external form, i. e. the form of a group of people, is not relevant for determining whether or not we have a juristic person in front of us. **To wit, not every group is a juristic person, which suggests that not every group has the capacity to be the perpetrator of a criminal act.** Entities other than groups of people can also be juristic persons (pooled assets – mass of property), while not every group of people (for example, a group established by a contract of association – *societa*) can be regarded as a juristic person. It therefore does not depend only on the fact that a certain act of a certain group exhibits the external elements of a criminal act, but also on **whether or not this group is regarded as a juristic person. Efforts to identify a juristic person in the same way as a human being, i. e. through our senses as a group of people, are therefore futile and heading in the wrong direction.** In addition, perceiving juristic persons' criminal liability as collective liability of the individuals who make up juristic persons is probably incompatible with the constitutionally guaranteed rights vested in such individuals.

The simplest answer to the question of how we can recognise a juristic person is that a juristic person is that which is stipulated to be a juristic person in a piece of legislation, i. e. the law. However, the fact *per se* that the law specifies a certain formation as a juristic person is not necessarily sufficient to say that the juristic person has the capacity to commit criminal acts. For this, the juristic person must be conceived of as an independent entity having its own will distinct from that of the people who make up the juristic person. The theoretical basis for such a construction of juristic persons is then the identification theory, or the **organic theory**. However, a juristic person can be devised in legal systems in such a way that it has no will of its own. In such a case, its representatives' will is deemed to be its will, and we are talking about the **theory of fiction.** As demonstrated in the foregoing, the theory of fiction is really incompatible with criminal liability of juristic persons, and the author of the theory himself, F. C. Savigny, expressly voiced his opposition to applying criminal liability to juristic persons.

It is therefore only logical that the *lex lata* contained in the law on criminal liability of juristic persons is based on the organic theory. However, although the JPCL Act provides for criminal liability of juristic persons, it leaves the normative definition of the term juristic person to private law. Thus, a juristic person can only be the perpetrator of a criminal act if this is made possible by its construction in private law. However, the Czech Republic is currently facing an interesting situation where the JPCL Act was enacted during the effectiveness of the 1964 Civil Code, which conceived of the juristic person as an entity that acts through its (governing) bodies, i. e. the code proceeded from the organic theory that vests juristic persons with a will of their own. Private law existing until then was therefore based on a theory that was conceptually congruent with criminal liability of

juristic persons. This has changed as of 1 January 2014, however. The New Civil Code conceives of the juristic person as 'fiction without its own will and legal capacity', which therefore cannot have capacity for culpable acts. The theory of fiction on which the construction of juristic persons relies in the NCC means in practice that a juristic person's acting is regarded as the 'representative conduct of its bodies'. Since, as of late, the juristic person is conceived of so that it never manifests its own will and does not act independently but rather is acted for by its representative at all times, the represented entity (i.e. the juristic person), which has no will of its own, is actually punished for its representative's conduct under the JPCL Act.

To show the implications of this analysis of the concept in question, the author has focused on analysing the general conditions for criminal acts to be attributable to juristic persons, as laid down in the first sentence of Section 8(1) of the JPCL Act, which says: "A criminal act committed by a juristic person is an illegal act committed in its name or in its interest or as part of its activities, if […] acted so." And in doing so, the author has arrived at the following conclusions:

- If under the New Civil Code a juristic person **is not *sui juris*** and as such cannot act independently, then the statement that a criminal **act committed by a juristic person** is an illegal act etc. does not make any reasonable sense. For the JPCL Act to be in line with the construction of the juristic person as fiction, the correct formulation should actually read, for example, as follows: "juristic persons shall be held liable for illegal acts" or "illegal acts committed [….] shall be regarded as criminal acts of juristic persons";
- If, under the New Civil Code, members of the governing bodies never act in the name of the juristic person, but decide for it and substitute its will (Section 151(1) NCC), then juristic persons will never act on their own and will always be represented, and for this reason an illegal act can never be committed in the name of a juristic person. A correct formulation might read, for example, as follows: "An illegal act committed for the juristic person […] shall be regarded as a criminal act of the juristic person." A 'constructive interpretation', which regards the acting in the name of a juristic person as representation, is incorrect in the author's opinion, because it can only be applied in some cases. The author also believes that it is not an interpretation but an analogy, and the analogy broadens the conditions for criminal liability in an impermissible manner.
- If under the New Civil Code the juristic person has no will of its own, it then cannot have an interest either, let alone an 'interest' in committing criminal acts. Thus, criminal acts will always be committed to the detriment of the juristic person and never in its interest. The author therefore believes that 'interest' should be omitted from Section 8 of the JPCL Act, or at least replaced with 'benefit'.
- If under Section 167 NCC "an illegal act committed in respect of a third party by a member of an elected body, employee, or another representative of the juristic person when carrying out their assignments shall bind the juristic

person," but the JPCL Act attributes criminal liability for acting that has occurred **in the activities of the juristic person**, it then can happen that the juristic person will be liable for the criminal act, but will not be liable for the damage under private law. Such incongruence between the New Civil Code and the law on criminal liability of juristic persons is, however, directly at variance with the principle of subsidiarity of penal repression. In line with this principle, expressed in Section 12(2) of the Criminal Code, **it is not acceptable for juristic persons' criminal liability to be broader than liability for delict in private law**.

Summarily, the author therefore believes that at present (i.e. 1 January 2015), the JPCL Act can be applied in the Czech Republic only at the cost of courts', when applying it, having to adopt an interpretation that completely diverges from the literal wording of the law, and so is found *praeter legem*. This approach is, however, extremely undesirable in the case of criminal law, because it will not then be the law that determines what conduct constitutes criminal acts, but it will be a court's constructive interpretation. This approach then conflicts with the foundations on which our current State is based, i. e. a State subject to the rule of law.

There are two ways out of this situation: Either the normative construction of juristic persons can be changed in private law so as to make criminal liability of juristic persons possible, i. e. a return to the organic theory of juristic persons. This however would require an overhaul of the philosophy of private law in the Czech Republic and a thorough re-thinking of the construction of juristic persons in the applicable law.

Another option is to amend the law on criminal liability so that at least in terms of terminology, it is compatible with the philosophy of the New Civil Code. In such a case, the first sentence of Section 8(1) of the JPCL Act could read substantially as follows: "An illegal act committed for a juristic person or for its benefit shall be regarded as a criminal act of the juristic person if […] acted so in carrying out his/her assignments." But this approach will not remove the conceptual incompatibility between the theory of fiction and criminal liability of juristic persons.

However, Czech legislature has not yet done either of the above. Only the future will show what approach it will adopt in the end, and also whether such approach will be operational.