2. WHAT DOES IT MEAN TO BE A PERSON UNDER THE LAW?

2.1 How can a person be approached in terms of methodology?

To understand the concept of juristic person, it is first necessary to explain the notion of "person" as such.[10] In civil (continental) law, "person" is understood as a general term which includes natural persons and juristic persons as two basic sub-categories. The practical implication is that the Civil Code often refers to "persons" in general, rather than specifically to natural or juristic persons, because what applies to persons in this generic sense applies automatically to both juristic persons or natural persons. This need not be repeated every time.

The fact that both natural and juristic persons are subsumed under a single general concept of "person" indicates that they must have something in common. If a human being is considered to be a natural person, on the one hand, and a giant corporation, such as Microsoft or Walmart a juristic person, on the other hand, the question begs whether these "persons" have actually anything in common and what that might be. What they do have in common is their legal personhood, i.e. potential capacity to bear rights and obligations, and thus constitute a person in the legal sense.[11] Indeed, a person and a personhood are always mutually inseparably linked—a person is considered to have a personhood, and at the same time, anything that has a personhood is deemed to be a person under the law. This definition, however, has little, or rather no, practical implications. It is a classical tautology (circular definition). We can learn nothing about what it means to be a person, and why a human being should be considered a person, without breaking this vicious circle.

Indeed, there are two possible ways to explain the concept of "person".[12] One of them starts with legal personhood as a set of rights which we attribute to a certain

[10] Cf., in this regard: BROŽEK, B. The Troublesome 'Person'. In: KURKI, V., PIETRZYKOWSKI, T. (ed.) *Legal Personhood: Animals, Artificial Intelligence and the Unborn.* Cham: Springer, 2017, p. 3.

[11] Both a juristic person, e.g. a corporation, and a natural person, i.e. a human being, have legal personhood, which enables them, for example, to conclude contracts and thus enter into legal relationships.

[12] Cf., in this regard: KIRSTE, S. Die beiden Seiten der Maske—Rechtstheorie und Rechtsethik der Rechtsperson. In: GRÖSCHNER, R., KIRSTE, S., LEMBCKE, W. (ed.) *Person und Rechtsperson: Zur Ideengeschichte der Personalität.* Tübingen: Mohr Siebeck, 2015, p. 345.

"bearer" (i.e. a legal entity), while the other is based on the concept of "human being" and his/her natural substance, which in itself implies the existence of some degree of legal personhood. In other words, the question stands whether legal personhood follows *a priori* from the fact that someone is a human being or whether one should be considered a person if he/she is granted legal personhood by the legal order.[13]

Both these paths are permitted by jurisprudence and both have been taken by the currently applicable Civil Code in the Czech Republic. However, completely different methodologies are used in the two cases.[14] If a human being is used as a starting point, i.e. as a fact established in advance under the law, then certain natural rights associated with that human's personhood will be inferred from the *a priori* understanding of the natural character of the human being. Natural rights of a human being are manifested in the legal order primarily by the fact that a human being enjoys a legal personhood, which cannot be alienated or waived, and cannot even be restricted beyond a certain scope following from the law, good morals or public policy. The method of learning is thus deductive.

However, one can also follow a completely different train of thought and start from the legal personhood of a human being, or a person, which notion can be perceived in this case purely in legal terms as a legal entity, without regard to that person's archetype in the form of a human being. In that case, legal personhood as a potential set of rights vested in a person will serve as the "starting point" for any further considerations. When defining the concept of "entity" (or "subject"), we thus follow from the legal order and use an inductive approach to arrive at the concept of "person". Legal personhood is therefore what determines who will be regarded as a person under the law.

This already brings us to the core of differentiation between a human being and a person. The distinction can also be clarified with reference to the relevant purpose and the means of achieving it. If we follow from the concept of person, the purpose lies in the "person" as such while personhood serves as a means enabling that person to function within the legal order. On the other hand, if we start with personhood (i.e. a potential set of rights) and consider this the basic purpose, then a "legal entity" will only be a means, i.e. a geometric point with which such rights are associated. I believe that both the concept of "person" and the term "legal entity" denote a holder (or "bearer") of rights who is granted legal personhood in law. From this point of view, the concept of "person" and that of "legal entity" appear interchangeable. But the terms we use attest simultaneously to the methodological approach we take to explain the concept of person in law. While we can follow *a priori* from legal personhood as laid down by the law, we can also take the opposite route and use a human being as the starting point. In this case, we will assume that every human being must

[13] Cf., in this regard: NAFFINE, N. Legal Persons as Abstractions: The Extrapolation. of Persons from the Male Case. In: KURKI, V., PIETRZYKOWSKI, T. (ed.) *Legal Personhood: Animals, Artificial Intelligence and the Unborn.* Cham: Springer, 2017, p. 15.

[14] Cf., in this regard: KNAPP, V. *Vědecká propedeutika pro právníky [Introduction to Science for Lawyers].* Prague: Eurolex Bohemia, 2003, p. 72.

naturally have some rights and thus also legal personhood.[15] The historical roots of the concept of person in the legal sense imply—and this is only logical—that the original sequence of considerations started with a human being endowed with certain rights as a real being. The objective of the following two sub-chapters is therefore to describe the *a priori* approach to a person which is based on its archetype, i.e. a human being.

2.2 A priori concept of "person" and its historical development

It is usually assumed that the notion of "person" *("persona")* finds its roots in ancient times. This term, however, was definitely not the only one used in ancient history to denote a human being and his/her roles in social life.[16] The original term for a human being in ancient Greek was ***"anthropos"***. The word ***"soma"***, used in Hesiod's times, expressed the object of other people's observation or designated a person in the legal sense. And there also appeared the word ***"prosopon"***, which originally meant a theatre mask. This meaning, however, eventually transformed into many different forms. To mention one example, it was used to designate a human being represented by a certain type of mask. *"The ultimate meaning which ancient Greek attached to the word '*prosopon'* was the designation of an individual in the sense of the current term 'person'."*[17] According to J. Hurdík, ancient Latin adopted the Greek terminology together with its developmental tendencies; this is how the concept of ***"persona"***, which had also originally meant a "mask", became the predominant expression identifying an individual and his/her qualities (or at least some of them).[18] The term was also used to describe a social role, a person in the legal sense, the character of an individual, and the philosophical notion of person. *"The word 'person' is generalised and, in principle, expresses a human individual equipped with reason."*[19] But Lübtow[20]

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15 Cf., in this regard: KOBUSCH, T. Person und Handlung. Von der Rhetorik zur Metaphysik der Freiheit. In: GRÖSCHNER, R., KIRSTE, S., LEMBCKE, W. (ed.) *Person und Rechtsperson: Zur Ideengeschichte der Personalität.* Tübingen: Mohr Siebeck, 2015, p. 1.

16 Cf., in this regard: HURDÍK, J. Pojem osoba a geneze jeho obsahu jako základ konstrukce osob v právním smyslu [The Concept of Person and Genesis of its Contents as a Basis for the Construction of Persons in the Legal Sense]. *Časopis pro právní vědu a praxi.* 2000, No. 3, p. 307.

17 Ibid. The word *"prosopon"* was probably first used in this sense by Polybos in the 2nd century BC.

18 Cf., in this regard: ŠEJVL, M. Subjekt práva jako maska [Legal Entity as a Mask]. In: HAVEL, B., PIHERA, V. (eds.) *Soukromé právo na cestě. Eseje a jiné texty k jubileu Karla Eliáše [Private Law in Transition. Essays and Other Texts on the Occasion of Karel Eliáš' Birthday].* Pilsen: Vydavatelství a nakladatelství Aleš Čeněk (publishing house), 2010, p. 314 et seq.

19 HURDÍK, J. Pojem osoba a geneze jeho obsahu jako základ konstrukce osob v právním smyslu [The Concept of Person and Genesis of its Contents as a Basis for the Construction of Persons in the Legal Sense]. Časopis pro právní vědu a praxi. 2000, No. 3, p. 308. Cf., in this regard: NÉDONCELLE, M. Prosopon et persona dans l'Antiquité classique. *Revue des sciences religieuses*. 1948, p. 227 et seq.

20 LÜBTOW, U. Zur Theorie des Rechtssubjektes und ihrer geschichtlichen Entwicklung. In: WOLF, E., BICKEL, D. *Recht und Rechtserkenntnis: Festschrift für Ernst Wolf zum 70. Geburtstag*. Köln: Heymann, 1985, p. 448 et seq.

emphasises that the term *"persona"* need not be understood solely as a "mask" used by actors in theatre—other meanings are possible as well. The same expression was also used to denote the role played by the given actor's mask. The word *"persona"* thus evolved into meaning a "human being" in that it was taken from the world of theatre into social world, where it referred to a person who played—in his/her social life—the role of a citizen, freeman, father, son, etc. Indeed, only humans could assume all these roles.

But when considering the concept of "person" as used in ancient times, we must not forget that what we are after are the roots of the abstract concept of "person", i.e. person as the bearer of legal personhood. It might seem at first sight that ancient Roman law worked with a dual meaning of the word "person". This term was apparently used to denote human beings, i.e. freemen and slaves, on the one hand, and persons in the legal sense, i.e. individuals other than slaves, on the other hand. The terms "person" and "human being" were not identical as slaves were not regarded as persons. It might thus appear that—for this very reason—Roman law needed to develop an abstract notion of "legal entity" (or "legal subject"), which it sought precisely in the concept of "person".

But legal Romanists will agree that such an abstract concept of "person" was not known to classical Roman law.[21] This follows, *inter alia,* from the fact that Gaius conceives slave law as *"ius quod ad personas pertinet"* and clearly refers to a *"persona servilis"*[22] and a *"persona servi"*.[23] But it certainly is not in contradiction with this verbal use if he includes slaves among *"res corporales"*. The term *"persona servilis"* can also be found*,* in various forms, in the Digest[24]

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[21] Ibid., p. 421 et seq.

[22] Gai Institutiones, 1.121: In: eo solo praediorum mancipatio a ceterorum mancipatione differt, quod personae serviles et liberae, item animalia, quae mancipi sunt, nisi in praesentia sint, mancipari non possunt…

Nebo Iustiniani Institutiones, 4.4.7: …nam secundum gradum dignitatis vitaeque honestatem crescit aut minuitur aestimatio iniuriae: qui gradus condemnationis et in servili persona non immerito servatur, ut aliud in servo actore, aliud in medii actus homine, aliud in vilissimo vel compedito constituatur.

[23] Gai Institutiones, 3.189: …sed postea inprobata est asperitas poenae, et tam ex servi persona quam ex liberi quadrupli actio praetoris edicto constituta est.

[24] Dig. 11.1.20 pr. (Paul. lib. 2 quaest.): Qui servum alienum responderit suum esse, si noxali iudicio conventus sit, dominum liberat: aliter atque si quis confessus sit se occidisse servum quem alius occidit, vel si quis responderit se heredem: nam his casibus non liberatur qui fecit vel qui heres est. nec haec inter se contraria sunt: nam superiore casu ex persona servi duo tenentur, sicut in servo communi dicimus, ubi altero convento alter quoque liberatur: at is qui confitetur se occidisse vel vulnerasse suo nomine tenetur, nec debet impunitum esse delictum eius qui fecit propter eum qui respondit: nisi quasi defensor eius qui admisit vel heredis litem subiit hoc genere: tunc enim in factum exceptione data summovendus est actor, quia ille negotiorum gestorum vel mandati actione recepturus est quod praestitit: idem est in eo, qui mandatu heredis heredem se esse respondit vel cum eum alias defendere vellet.

Dig. 23.3.46pr. (Iul. lib. 16 Dig.): Quemadmodum invito domino servus stipulatus adquirit, ita, si dotem domini nomine sibi promitti patiatur, obligatio domino adquiritur. sed neque periculum dominus praestare debebit (si forte debitor mulieris dotem promiserit) neque culpam. traditione quoque rei dotalis in persona servi vel filii familias facta dos constituitur ita, ut neque periculum nec

and the Institutes[25]. The word "slave" must therefore carry both these meanings, i.e. a person and a thing. According to Carolsfeld, in ancient times, the notion of *"persona"* did not refer to a legal *entity* (or legal *subject*), but was rather commonly used for a *"human being"*, and thus had no legal-technical meaning.[26]

However, the same mistake as for a natural person is being made with regard to a juristic person. Sedláček[27] even claims that *"all the big literature dealing with*

culpam dominus aut pater praestet. igitur hanc dotem periculo mulieris esse dico, quamdiu dominus vel pater ratam promissionem vel donationem habuerit: ideoque etiam manente matrimonio res quas tradiderit condictione repetituram, item incerti condictione consecuturam, ut promissione liberetur.

Dig. 31.82.2 (Paul. lib. 10 quaest.): Servo alieno posse rem domini legari valens scribit: item id quod domino eius pure debetur. cum enim servo alieno aliquid in testamento damus, domini persona ad hoc tantum inspicitur, ut sit cum eo testamenti factio, ceterum ex persona servi constitit legatum. et ideo rectissime iulianus definit id demum servo alieno legari posse, quod ipse liber factus capere posset. calumniosa est enim illa adnotatio posse legari servo et quamdiu serviat: nam et hoc legatum ex persona servi vires accipit: alioquin et illud adnotaremus esse quosdam servos, qui, licet libertatem consequi non possunt, attamen legatum et hereditatem possunt adquirere domino. ex illo igitur praecepto, quod dicimus servi inspici personam in testamentis, dictum est servo hereditario legari posse. ita non mirum, si res domini et quod ei debetur servo eius pure legari possit, quamvis domino eius non possent haec utiliter legari.

Dig. 35.2.21.1 (Paul. lib. 12 quaest.): Si ego et servus meus heredes instituti simus ex diversis partibus nec a servo erogatus dodrans, his quibus a me legatum est contra falcidiam proderit quod ex portione servi ad me pervenit supra falcidiam eius portionis. ex contrario si servo meo servus et mihi decem legata fuerint, servi falcidia ex et decem mihi legatis non tenetur exemplo eodem falcidiae: nam quartam retineo ex persona servi, quamvis de mea portione nihil exhaustum sit.

Dig. 39.6.23 (Afr. lib. 2 quaest.): Si filio familias mortis causa donatum sit et vivo donatore moriatur filius, pater vivat, quaesitum est, quid iuris sit. respondit morte filii condictionem competere, si modo ipsi potius filio quam patri donaturus dederit: alioquin, si quasi ministerio eius pater usus sit, ipsius patris mortem spectandam esse. idque iuris fore et si de persona servi quaeratur.

Dig. 50.16.215 (Paul. lib. l.S. ad l. fuf. canin.): "potestatis" verbo plura significantur: in persona magistratuum imperium: in persona liberorum patria potestas: in persona servi dominium. at cum agimus de noxae deditione cum eo qui servum non defendit, praesentis corporis copiam facultatemque significamus. in lege atinia in potestatem domini rem furtivam venisse videri, et si eius vindicandae potestatem habuerit, sabinus et cassius aiunt.

Dig. 50.17.22pr. (Ulp. lib. 28 ad sab.): In personam servilem nulla cadit obligatio.

Dig. 47.10.15.44 (Ulp. lib. 77 ad ed.): Itaque praetor non ex omni causa iniuriarum iudicium servi nomine promittit: nam si leviter percussus sit vel maledictum ei leviter, non dabit actionem: at si infamatus sit vel facto aliquo vel carmine scripto puto causae cognitionem praetoris porrigendam et ad servi qualitatem: etenim multum interest, qualis servus sit, bonae frugi, ordinarius, dispensator, an vero vulgaris vel mediastinus an qualisqualis. et quid si compeditus vel male notus vel notae extremae? habebit igitur praetor rationem tam iniuriae, quae admissa dicitur, quam personae servi, in quem admissa dicitur, et sic aut permittet aut denegabit actionem.

[25] Inst. 4.7.1 Quia tamen superius mentionem habuimus de actione quae in peculium filiorumfamilias servorumque agitur: opus est ut de hac actione, et de ceteris quae eorundem nomine in parentes dominosve dari solent, diligentius admoneamus. et quia, sive cum servis negotium gestum sit, sive cum his qui in potestate parentis sunt, fere eadem iura servantur, ne verbosa fiat disputatio, dirigamus sermonem in personam servi dominique, idem intellecturi de liberis quoque et parentibus, quorum in potestate sunt. nam si quid in his proprie observetur, separatim ostendemus.

[26] CAROLSFELD, S. *Geschichte der juristischen Person*. München: C. H. Beck Verlag, 1969 (reprint of the 1933 edition), p. 53.

[27] SEDLÁČEK, J. Právnická osoba. Legislativní problém občanského zákoníku [Juristic Person. Legislative Issue of the Civil Code]. *Právník.* 1933, No. 11, p. 330.

juristic persons is nothing else than a variation on the concise interpretations of the concept of 'juristic person' found in the Digest of Justinian." This view is also supported by the current concept of textbooks on Roman law, which use the notion of "juristic person" with absolute ease as if this term were perhaps a product of Roman jurisprudence. As an example, we can mention J. Kincl,[28] who states that *"juristic persons are artificial bodies, persons that are merely fictitious, only existing in the law, and they are therefore sometimes also designated as mystical or moral persons"*. But at the same time, he claims that a corporation is formed as an association of persons to pursue a certain common goal and is governed in its activities by pre-determined articles of association (statutes, by-laws). Such a corporation is independent of the individual persons forming it. *"This nature of the corporation is fittingly defined by Roman lawyers; e.g. if something is owed to a community, this is not owed to individuals; if a community owes something, the same is not owed by individuals (Ulpianus). This means that the property of a corporation is not owned (or co-owned) by its members and* vice versa*: a corporation has no rights whatsoever to the property of its members."*[29] Similar considerations regarding juristic persons have been expressed by K. Rebro,[30] who states that juristic persons are represented in Roman law especially by corporations, where *"a corporation is understood as an organised unity of natural persons (universita, personarum, collegium, corpus) which forms a separate legal entity that is altogether different from its members."* This approach followed by legal Romanists is by far not only a product of current thinking. A similar conception can be found in the work of O. Sommer, according to whom *"[j]uristic persons are social bodies to which the law grants capacity to bear rights although they are not natural persons (hence the older terminology: persona ficta, mystica, moralis)"*.[31] Analogously, J. Vančura uses the concept of juristic person as a term which was commonly used in Roman law, as he states:

"Private corporations are called associations, universitates*, colleges,* soladici*; according to the Law of the Twelve Tables, they were formed as juristic persons if several persons associated based on statutes (pactio), which could not comprise anything immoral or unpermitted; no official permit was required."*[32]

I believe, however, there was no **abstract term for juristic persons** in classical Roman law.[33] Bodies that we now denote as juristic persons were always regulated only on a case-by-case basis. The following terms could be used as a designation with

[28] KINCL, J. In: KINCL, J., URFUS, V., SKŘEJPEK, M. Římské právo *[Roman Law]*. 1st edition. Prague: C. H. Beck, 1995, p. 80.

[29] Ibid.

[30] REBRO, K. In: REBRO, K., BLAHO, P. *Rímske právo [Roman Law]*. 3rd ed. Bratislava: Iura Edition, 2003, p. 181.

[31] SOMMER, O. *Učebnice soukromého práva římského – Obecné nauky [Textbook on Private Roman Law—General Teaching]*. Prague, 1933, pp. 197–203.

[32] VANČURA, J. Úvod do studia soukromého práva římského *[Introduction to the Study of Private Roman Law]*. Prague, 1923, p. 72.

[33] Cf., in this regard: DUFF, P. W. *Personality in Roman private law*. New York: Augustus M. Kelley, 1971; KURKI, V. *A Theory of Legal Personhood*. Oxford: Oxford University Press, 2019, p. 32.

general contents: *corpus* and *collegium*, and later *universitas*.[34] Lübtow also claims that the concept of juristic person was not created by Romans, and notes that Roman law was not even familiar with the abstract notion of "state"; instead, Romans used the phrase *Populus Romanus (the Roman nation)*.[35] What was therefore decisive was not the formalistic concept of "state" as known today, but rather a "nation" as a live unity superior to individual citizens, comprising the variety of its generations; shortly *universitas civium succedentium.* Similarly, such concepts as city or town *(municipium)* and association *(collegium)* were also considered a unity—*universitas*.[36] Classical Roman law and German mediaeval law did not separate *universitas* from its members, but rather associated them in a community; they considered it a "unity", without creating a new legal entity. At the same time, however, *universitas* was unaffected by any changes of its members and a clear line was drawn between its collective sphere and the spheres of the individuals.[37]

Let us therefore return to Sedláček, who believed that *"the quotes in the Digest concerning juristic persons were a piece of positive general law that was applicable in Western Europe until the end of the 18th century, became established by repetition and was considered valid based on reason itself"*.[38] While this is true to a large extent, it must be borne in mind that the concept of juristic person was developed only in the 19th century based on exegesis of Roman law, and it thus certainly cannot be claimed that this concept was already known in ancient times. **I thus believe that an abstract notion of "person" in the legal sense was unknown in ancient times, whether it concerned a natural person or a juristic person**. I agree in this regard, e.g., with Lübtow, according to whom the notion of *"**'legal capacity'** was unknown to Roman law, just like the term 'legal entity'"*.[39]

2.2.1 Mediaeval concept of *"corpus mysticum"*

According to Schnizer, the abstract concept of "person"—even if much more in theological than in legal sense—began to appear in mediaeval teachings of the 13th century. The notions of *"persona ficta", "persona mystica"* and *"repraesentata"* also

[34] SCHNIZER, H. Die Juristische Person in der Kodifikationsgeschichte des ABGB. In: WILBURG, W., BEITZKE, G. et al. *Festschrift zum 60. Geburtstag von Walter Wilburg*. Graz: Leykam, 1965, p. 146.

[35] LÜBTOW, U. Zur Theorie des Rechtssubjektes und ihrer geschichtlichen Entwicklung. In: WOLF, E., BICKEL, D. *Recht und Rechtserkenntnis: Festschrift für Ernst Wolf zum 70. Geburtstag*. Köln: Heymann, 1985, p. 448.

[36] Ibid.

[37] Ibid., p. 450.

[38] SEDLÁČEK, J. Právnická osoba. Legislativní problém občanského zákoníku [Juristic Person. Legislative Issue of the Civil Code]. *Právník.* 1933, No. 11, p. 330.

[39] LÜBTOW, U. Zur Theorie des Rechtssubjektes und ihrer geschichtlichen Entwicklung. In: WOLF, E., BICKEL, D. *Recht und Rechtserkenntnis: Festschrift für Ernst Wolf zum 70. Geburtstag*. Köln: Heymann, 1985, p. 440.

originated in that period.[40] It is beyond doubt that the mediaeval understanding of the notion of "person" was determined by theology.[41] According to Hurdík, Christianity introduced a new, enriched meaning of the concept of "person", using it to designate the triune God as the sole divine substance *("tres personae, una substantia")*. A person is thus confronted with its own substance *(substantia)* and represents a transformed (external) form of the phenomenon of a single divine substance. *"At the same time, the Christian teaching on the Holy Trinity uses the notion of 'person' to designate an individual existing in him/herself, who is not further reducible and defined vis-à-vis the surrounding environment."*[42] Hurdík agrees in appreciating the significance of Christian theology, for example, with E. Bernatzik,[43] who notes that mediaeval theology considered *"not only a saint and an angel, but also the triune God"* to be legal entities in the sense of bodies capable of ownership. It thus appears that Jan Hurdík derives from the mediaeval Christian dogmas the foundation for an abstract concept of "person" in the legal sense, as something which is confronted with its substance. This means a human being as a substance, and a person as his/her transformed form.

Nonetheless, the influence of mediaeval theology on the abstract concept of "person" in the legal sense is overestimated in my opinion. I can offer the following arguments against this hypothesis. Primarily, it is uncertain to what extent this is really an abstract concept of "person" and to what degree it is a human, anthropomorphic view which has its roots in the mythological perception of the world. From this point of view, the pagan understanding of gods as legal entities does not differ much from the Christian concept. An argument in favour of this opinion relates to the formation of church institutions as juristic persons. But how do these institutions differ from the personhood of old pagan gods? Indeed, the old pantheon was understood as a set of unique persons similar to individuals. This is also why the gods could "own" their church buildings, which served for worship. However, Christian church based its faith on a single God and this unity therefore had to be transferred to property-law relationships.

We must not forget either that Greek and Roman mythologies were anthropocentric, manifested primarily in the fact that, in spite of all their superhuman powers, pagan gods also had common human qualities. As stated by Bernatzik,[44] the Italian moralist

40 SCHNIZER, H. Die Juristische Person in der Kodifikationsgeschichte des ABGB. In: WILBURG, W., BEITZKE, G. et al. *Festschrift zum 60. Geburtstag von Walter Wilburg*. Graz: Leykam, 1965, p. 146.

41 Cf., in this regard: SCHAEDE, S. Person und Individualität in der Spätscholastik Von der Unmitteilbarkeit über die Unabhängigkeit zur personalen Repräsentanz. In: GRÖSCHNER, R., KIRSTE, S., LEMBCKE, W. (ed.) *Person und Rechtsperson: Zur Ideengeschichte der Personalität.* Tübingen: Mohr Siebeck, 2015, p. 31.

42 SCHNIZER, H. Die Juristische Person in der Kodifikationsgeschichte des ABGB. In: WILBURG, W., BEITZKE, G. et al. *Festschrift zum 60. Geburtstag von Walter Wilburg*. Graz: Leykam, 1965, p. 146.

43 BERNATZIK, E. Kritische Studien über den Begriff der juristischen Person und über die juristische Persönlichkeit der Behörden insbesondere. In: *Archiv für öffentliches Recht.* 1890, No. 5, p. 64. [Also as Reprint, in: *Forschung aus Staat und Recht*, Wien, 1996.] Unless "Reprint" is mentioned, the quote applies to the original edition of 1840.

44 Ibid., p. 67.

Filliucius already fittingly commented on this issue more than 300 years ago, when he stated in his work *De statu ecclesiae*:

"As if anyone who is to be an actual civil person should be a political person who can share our civil lives and human society with others. Indeed, civil dominium is, by its nature, adapted to social life, which consists in mutual giving and accepting. But Christ is not such a person."[45]

It thus seems that it was not unusual for either ancient times or the Middle Ages to attribute human qualities to supernatural beings, just like gods and saints were granted legal personhood. As noted by Bydlinski,[46] archaic legal orders even considered animals, trees and objects of daily use to be beings with their own value, i.e. persons in a weak sense. Legal personhood was thus granted not only to the triune God, but also to animals. They were considered to have a will analogous to the will of a human being. This also enabled to introduce punishments for animals, as well as animal trials, which—according to Gierke—took place in the territory of Germany even during the Middle Ages.[47]

If we are to seek the roots of the abstract notion of "person" in the legal sense in the Middle Ages, we should perhaps prefer the concept of *"corpus mysticum"*, which comprises the community of believers.[48] In this regard, it might be interesting to inquire into the legal personhood of church authorities at a time when monastic orders began separating themselves within the church, in opposition to bishops and the church as such. A problem arose when the church property was to be divided. According to Bernatzik, canon law differed from Roman law in this respect, and followed on rather from German law. Canon law of the time thus granted legal personhood not only to unions of canons and bishops, but even to all church authorities. At that time already, the question arose as to how it was possible that the church formed a single legal entity, one juristic person, while consisting of many such juristic persons. This question was dealt with by lawyer Sinibaldus Fliscus (1195–1254), who later became known as Pope Innocent IV. He noticed that when clergymen sued someone, they did so in the name of the church. But what can one expect from a dispute where the adversaries are entities belonging to a single juristic person—the church? Such a dispute ultimately cannot bring advantages or disadvantages to anyone. Innocent IV therefore came up with a construct where he granted legal personhood not only to church authorities, but even to church assets, which he called "special church", in

45 *"Ut quis sit verus dominus civilis debeat esse persona politica, quae vitam nobiscum civilem societatumque mutuam cum aliis exercere possit. Dominium enim civile ad vitam socialem quae consistit in mutuo commercio dandi et accipiendi natura sua est ordinatum. Sed Christus non est hujusmodi persona."*.

46 BYDLINSKI, F. Die "Person" im Recht. In: KALSS, S., NOWOTNY, Ch., SCHAUER, M. (eds.) *Festschrift Peter Doralt zum 65. Geburtstag*. Wien: Manz, 2004, p. 81.

47 GIERKE, O. *Deutches Privatrecht. Erster Teil: Allgemeiner Teil und Personenrecht*. Leipzig: Duncker & Humblot, 1895, p. 265.

48 SCHNIZER, H. Die Juristische Person in der Kodifikationsgeschichte des ABGB. In: WILBURG, W., BEITZKE, G. et al. *Festschrift zum 60. Geburtstag von Walter Wilburg*. Graz: Leykam, 1965, p. 146.

contrast to the "common church". According to Bernatzik,[49] it is owing to canon law that an authority was acknowledged as a person in the legal sense because it had been connected permanently with property.

I consider, however, that the term "person" was not yet known as an abstract concept in the Middle Ages. But it can perhaps be admitted that late Middle Ages developed the doctrine of corporations and created thereby certain prerequisites for modern-time rationalism and its concept of juristic person. Nonetheless, before we proceed with any further considerations regarding juristic persons, we first have to clarify the inception of the concept of "natural person". While it might seem surprising, it appears that a common foundation for both natural and juristic persons was laid by the early modern-time concept of "moral person".

The notion of moral person, as developed by Pufendorf, Wolff and Nettelbladt, was the very origin of the current abstract concept of "person" in the legal sense.

2.2.2 Modern concept of *"persona moralis"*

2.2.2.1 Samuel Pufendorf

Any considerations regarding the concept of moral person must start with **Samuel Pufendorf (1632–1694)**,[50] whose work *De iure naturae et gentium libri octo*[51] of 1672 is generally considered the foundation for the later construct of moral person. Pufendorf belonged to a group of pioneers of natural law as he followed in his work from Grotius and Hobbes. Although he never won as much recognition as some of his contemporaries and successors,[52] his importance can be clearly seen in

[49] BERNATZIK, E. Kritische Studien über den Begriff der juristischen Person und über die juristische Persönlichkeit der Behörden insbesondere. In: *Archiv für öffentliches Recht.* 1890, No. 5, p. 64. [Also as Reprint, in: Forschung aus Staat und Recht, Wien, 1996, p. 12.]

[50] **Samuel von Pufendorf** (originally Samuel Pufendorf; he was ennobled in 1684) was born in 1632 in Saxony, close to the border with the Czech Kingdom, in the family of a Lutheran pastor. He initially studied theology at the University of Leipzig, but soon moved to Jena, where he graduated in law. After graduation, he became a tutor in the family of the Swedish ambassador to Denmark. Pufendorf was later arrested during a crisis in the relations between Sweden and Denmark (together with other ambassadors and staff). During his captivity in Denmark, Pufendorf laid the foundations for his future work Elementa jurisprudentiae universalis libri duo, issued in Leiden in 1661. He dedicated the work to Charles I Louis, elector palatine (1617–1680), who established a new chair of "law of nature and nations" at the University of Heidelberg specifically for Pufendorf. It was in Heidelberg that he wrote further important works, namely De jure naturae et gentium libri octo in 1670, and De officio hominis et civis five years later. Later he worked as historiographer at the Swedish and Brandenburg courts, and died at the latter in 1694.

[51] PUFENDORF, S. *De iure naturae et gentium libri octo*. Frankfurt, Leipzig, 1759, lib. I cap. I § XII–XIII.

[52] His contemporary, Leibniz, even declared that he was a "legal adviser and not a philosopher"—cited according to HUGH, Ch. (ed.) *Encyclopædia Britannica.* 11th ed. Cambridge: Cambridge University Press, 1911.

the influence he had on many lawyers and philosophers in years to come, including personages such as John Locke, William Blackstone and Charles de Montesquieu.

Moral persons actually play an important role in Pufendorf's system as they have to be regarded as one of the forms of "moral entities" *(entia moralia)*.[53] *"For Pufendorf* 'entia moralia' *are the essence of substances that manifest themselves through conduct which provides them [those substances] with certain values based on volitional self-determination—self-determination of the one who is acting. They are based on objective values of natural law.* 'Entia physica' *are then physical and mental entities of the substance."*[54] *Entia moralia* thus represent moral and philosophical postulates and requirements that combine in themselves legal duties and moral imperative and thus create a basis for the system of natural law (it is through these entities that a human being creates, by his/her reason, the world of physical entities in an arranged whole). Although moral entities are separated from physical entities because their cause is human will, they can only be perceived through physical entities *(entia physica)*. This means that from the cognitive point of view, moral entities are inseparable from the world of physical entities as they are not discernible without them. According to Pufendorf, *entia physica* are interchangeable with the substance *(substantia)* or the creator's entity, i.e. with the world created by God, while moral entities have their validity thanks to the decision-making freedom of a human being. The postulate of moral entities' independence of God's act of creation is the core of teaching on moral entities.[55] Precisely in this very conditional nature of perception of moral entities, Lipp sees the subsiding effect of the scholastic tradition of Thomism on Pufendorf's part *("intellectus in actu et intelligibile in actu sunt unum")*.[56] On the other hand, in the understanding of all physical naturality as being "moral" in the sense of the possibility of its arrangement by human will into moral entities, he perceives a fundamental distinction from the mediaeval legal philosophy, which seeks order in the substance of nature itself, rather than in human will. According to Lipp, we can note that moral entities mean an objective order of human life in its overall versatility.[57] In order to understand Pufendorf's concept of moral person, it is also important to bear in mind the way he distinguished four classes of these entities: *status; moralis persona; quantitas;* and *qualitas. "Just like physical substance has physical and mental qualities—i.e.* entia physica*—a person*

[53] Cf., in this regard: AUER, M. Die Substanz der Freiheit; Pufendorfs Begriff der moralischen Person. In: GRÖSCHNER, R., KIRSTE, S., LEMBCKE, W. (ed.) *Person und Rechtsperson: Zur Ideengeschichte der Personalität.* Tübingen: Mohr Siebeck, 2015, p. 81.

[54] PUFENDORF, S. *De iure naturae et gentium libri octo*. Frankfurt, Leipzig, 1759, lib. I cap. 1 § III.

[55] LIPP, M. "Persona moralis", "Juristische Person" und "Personenrecht" – eine Studie zur Dogmengeschichte der "Juristischen Person" im Naturrecht und frühen 19. Jahrhundert. In: *Quaderni Fiorentini*. 1982/83, No 11/12, pp. 223–226.

[56] AQUIN, T. Summa contra gentiles, lib. II cap. LIX. Cited according to S. AQUINATIS, T. O*pera omnia iussu edita Leonis XIII. P. M*. Romae, 1918, Tom. 13, p. 415.

[57] LIPP, M. "Persona moralis", "Juristische Person" und "Personenrecht" – eine Studie zur Dogmengeschichte der "Juristischen Person" im Naturrecht und frühen 19. Jahrhundert. In: *Quaderni Fiorentini*. 1982/83, No 11/12, p. 230.