

THE PERSON AT LAW FROM THE POINT OF VIEW OF PURE LEGAL SCIENCE

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Abstract: *The person as a legal term is traditionally derived from a human being, either from an individual or a group of people. Hans Kelsen maintains that no such substance really exists. “The person exists only insofar as he “has” duties and rights; apart from them the person has no existence whatsoever.” This is why a human being is construed as an abstract holder of subjective rights rather than the person in a legal sense. This conception results in the normative construction of a person. The person is considered to be a mere point, an ideal and never real fact. Kelsen designates this point as “personification of the set of norms” regulating the conduct of a human being. However, such an entity as the personification of legal norms does not exist in the outer, real world. The legal order may attach legal personality to any segment of the outer world, even to an imagination of something non-existent in the outer world. The relationship between this abstract point and the addressee of duties is called “assignability”. This is why the person in a legal sense is, in the normativist perspective, considered to be “a point of assignability”. The aim of this article is to describe the approach of pure legal science to a person as a personified set of legal norms or as a point of assignability.*

Keywords: *person, personified set of legal norms, point of assignability, pure legal science, legal normativism*

1.1 Kelsen’s conception of a person at law

While defining persons at law, Viktor Knapp¹ assumed that “*what is understood by the concept of the natural (physical) person is a human being who is the person at law since his birth to his death*”.² Jiří Boguszak also maintains that “a natural person is a human being”. However, he also mentions that a natural person does not automatically have the possibility of becoming a party to all legal relationships, but “*within every single legal institution, the positive legal norm provides requirements or assumptions under which a natural person may become a party to legal relations of a certain type*”.³ This is the conception upon which the new Czech Civil Code has been built (Act No. 89/2012 Sb., hereinafter referred to as NCC); section 19, subsection 1 of NCC provides that “*each human being has inherent natural rights, recognizable by reason and by sense, and therefore considered to be a person. The law provides only the limits of application of natural rights of a human being and the mode of their protection.*” At the same time, however, NCC provides in its section 15, subsection 1, that “*legal personality is the capacity to have rights and duties within the legal order.*” Legal personality is not granted only to natural persons, but also to juristic persons. Unlike natural persons, juristic persons are not usually regarded as “*persons in a natural sense of the term*”.⁴

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¹ KNAPP, V. *Teorie práva*. Praha 1995, p. 72.

² The Charter of Fundamental Rights and Basic Freedoms provides in Article 5 that “everyone has the capacity to possess rights.”

³ BOGUSZAK, J. *Subjekty práva*. In: BOGUSZAK, J. – ČAPEK, J. – GERLOCH, A. *Teorie práva*. Praha, ASPI Publishing, 2004, p. 136.

⁴ *Ibid*, p. 138.

From a more abstract perspective taken by Hans Kelsen, the juristic person represents a legal substance to which rights and duties belong as its legal quality. *“The idea, that “the person has” duties and rights, involves the relation of substance and quality.”*⁵ In Kelsen’s opinion, this assumption maintained by traditional jurisprudence is inaccurate, or even wrong. The legal rule cannot determine the whole existence of a human being. A human being may be a person “at law” only with respect to a certain extent of acting or forbearance.⁶ Where the conduct of a human being is not the subject of legal rights and duties the human being is in no relation to the legal order. *“To be a person” or “to have legal personality” is identical with having legal obligations and subjective rights. The person as a holder of obligations and rights is not something that is different from the obligations and rights, as whose holder the person is presented - just as a tree which is said to have a trunk, branches, and blossoms, is not a substance different from trunk, branches, and blossoms, but merely the totality of these elements. The physical or juristic person who “has” obligations and rights as their holder, is these obligations and rights – a complex of legal obligations and rights whose totality is expressed figuratively in the concept of “person”.*⁷ Kelsen maintains that the mistake of traditional legal thinking subsists in seeking “something”, i.e. a certain substance to which the duties and right belong. That is why the human conduct (as a certain quality) is misunderstood as substance, i.e. the subject of legal duties and legal rights.⁸ In Kelsen’s opinion this concept is characteristic of the primitive mythological thinking which is typical of attributing the soul to every object while this soul rules them (the animism). However, as Kelsen claims, this is not the case. *“The person exists only insofar as he “has” duties and rights; apart from them the person has no existence whatsoever. To define the physical (natural) person as a human being is incorrect, because man and person are not only two different concepts but also the results of two entirely different kinds of consideration. Man is a concept of biology and physiology, in short, of the natural sciences. Person is a concept of jurisprudence, of the analysis of legal norms”.*⁹

If we consider the natural (physical) person as a mere set of legal rules, then the common assertion that the duties and rights belong to the human being cannot make sense. This would imply that the set of duties and rights has duties and rights. This would be a meaningless and empty tautology.¹⁰ *“That the human being is a legal subject (subject of rights and obligations) means nothing else, as has been emphasized, but that the human behaviour is the content of legal obligations and legal rights - nothing else than that a human being is a person or has personality.”*¹¹ Thus the person is not natural reality, *“but a legal construction, created by the science of law – an auxiliary concept in the presentation of legally relevant facts.”*¹² If the physical person is a mere construction of legal thinking

⁵ KELSEN, H. *General Theory of Law and State*. New Brunswick (U.S.A.): Transaction Publishers, 2007 [quoted as “Kelsen, H. *General Theory*”], p. 93.

⁶ KELSEN, H. *General Theory*, p. 94.

⁷ KELSEN, H. *Pure Theory of Law*. California (U.S.A.): University of California Press, 1967 [quoted as “Kelsen, H. *Pure Theory*”], p. 172.

⁸ KELSEN, H. *General Theory*, p. 93.

⁹ *Ibid*, p. 94.

¹⁰ *Ibid* p. 95.

¹¹ KELSEN, H. *Pure Theory*, p. 172.

¹² *Ibid* p. 174.

and is therefore entirely different from the concept of man in his physical existence, then in fact the physical person must be “the juristic person”. Logically, it follows that there cannot be a fundamental conceptual difference between the physical person and juristic person.¹³ The Kelsen’s argumentation is: *“If in the case of the juristic person rights and obligations can be “held” by something that is not a human being, then also in the case of the so-called physical person that which holds the rights and obligations (and which the juristic person must have in common with the physical person, since both are “persons” as “holders” of rights and obligations) cannot be the human being, who is the “holder” in question, but something which the human being and the “juristic person” have in common.”*¹⁴

The fact that the human being is or has legal personality means that something from his acting or forbearance forms the contents of norms. Thus, with regard to the distinction between the human being and the person, the assertion that law entitles or obliges persons is not correct. Those are the people who are entitled or obliged. The conduct of men forms the contents of legal norms and forms therefore the contents of duties and rights. The acting of men becomes part of the contents of legal norm. *“In reality, however, the juristic person is not a separate entity besides “its” duties and rights, but only their personified unity or – since duties and rights are legal norms – the personified unity of a set of legal norms.”*¹⁵

1.2 A subjective right as a legal rule

From the contemporary point of view, the conception of “person” as the personification of a set of legal norms may be confusing. Today, the duties and rights, whose holder is the person, are understood to be the subjective rights and duties rather than legal norms. In order to understand the normativist conception of a person at law, it is entirely essential to clarify the conception of subjective rights as legal norms. It is not as simple as it appears to be. The approach of pure legal science to the concept of subjective rights has changed, as has the normativist legal science. We distinguish two stages which are separated from each other by Merkl’s teaching on the gradual development of the legal order.

The first stage is mostly characterised by the **static perspective** though which the legal order appears to be *“something completed, stiff which does not and cannot know changes”*.¹⁶ This conception is to be discovered in earlier works of the founders of normativist theory: in Kelsen’s “Hauptprobleme der Statslehre” (Tubingen 1911), in Weyr’s “Foundations of Legal Philosophy” (Brno 1922). At that stage, Kelsen derived subjective rights from the law and perceived it as a subjective phenomenal form (“Erscheinungsform”) of the legal norm.¹⁷ The legal norm meant to him something permanent, whereas subjective rights started to exist only when a norm of the law rendered it possible as a relevant legal fact. The subjectivisation of the legal norm into an entitlement was possible only if that norm required the expression of will of an actor as the pre-requisite of its application, e.g.

¹³ KELSEN, H. *General Theory*, p. 95–95.

¹⁴ KELSEN, H. *Pure Theory*, p. 172.

¹⁵ KELSEN, H. *General Theory*, p. 93.

¹⁶ WEYR, F. *Základy filosofie právní*. Brno 1920 [quoted as “Weyr, F. Základy”], p. 138.

¹⁷ KELSEN, H. *Hauptprobleme der Staatslehre*. Tübingen 1911 [quoted as “Kelsen, H. Hauptprobleme”], p. 626.

a petition to court. Only then the consequence assumed by the legal norm could arise (in the form of enforcement or punishment). At that time, Kelsen maintained that *“the subjective right is a legal rule in its relation to a person upon whose disposition the conditional will of the state to mend the consequences of injustice is dependent. Therefore, there is no identity between the legal rule and the subjective right.”*¹⁸ The legal rule is permanent, whereas the duration of the subjective right is limited. At this stage, Weyr did not even admit the normativist construction of the term *entitlement*. He considered the subjective right to be an issue of the application of law. Application from the static perspective is a change, and the concept of the subjective right would exceed the given normativist frame into something “metanormative”.¹⁹ The **problem of the application and intertemporality** of law was resolved by Merkl in *“his teaching on the gradual development of the legal order.”*²⁰ The principles of abrogation and delegation enabled him to see the legal order dynamic, i.e. as a hierarchically organized set of legal rules in which various legal rules emerge, change or disappear. What the normativist theory had considered as the legal fact became a derived legal norm. As a result, Kelsen²¹ ceased to derive a subjective right from the law; he understood the law only as a system. The subjective right meant to him a possible, but not always indispensable, condition for the creation of “an individual legal norm of the judicial judgement”. The expression of will of a person was the condition without which the judgement could not be issued. A subjective right appears just to secure the participation in rule-making that gives rise to a particular norm. Thus, Kelsen’s conception enables to transmit every right into the law.

Weyr also objectivised all the law. In addition, he replaced the original static distinction between the law and the subjective right with a new dynamic one. This puts the general and particular legal norms against each other. **“A subjective right is a norm, but the norm, which is concrete and derived.”**²² It may be assumed that there is no distinction between Weyr’s and Kelsen’s understanding of a right. But the opposite is true. The distinction was explicitly mentioned by Jan Matějka, who subjected to criticism *“voices denying the necessity, or even a possibility to construct a subjective right.”*²³ What he meant was Kelsen’s conception of a subjective right as “concretisation of a general norm”. Matějka maintains that Kelsen wrongly assumed that *“the difference between a subjective right and the law has its roots in the natural law environment construing inherent and imprescriptible rights of an individual, which should create an absolute borderline against positive law.”*²⁴ However, as Matějka claims, this is not the case. When it is said that “a subjective right is derived from the law”, it means that no subjective right may exist without the existence of the law as a system, and also that the existence of a subjective right does not precede the existence of the law. The law should not be only identified but also applied. Matějka maintains Weyr’s assumption that *“the understanding of the legal order as a whole requires the understanding*

¹⁸ Ibid.

¹⁹ Compare with WEYR, F. *Základy*, p. 138.

²⁰ MERKL, A. *Die Lehre von der Rechtskraft, entwickelt aus dem Rechtsbegriff*. Leipzig – Wien 1923.

²¹ KELSEN, H. *Reine Rechtslehre*. Leipzig – Wien 1934 [quoted as „Kelsen, H. Reine“], pp. 47–52.

²² WEYR, F. *Teorie*, p. 171.

²³ MATĚJKA, J. Pojem veřejnoprávní korporace. In: *Sborník věd právních a státních*. Praha 1929, p. 15.

²⁴ Ibid, p. 18.

*of many concepts which cannot be construed (defined) in a normativist way, primarily the concept of a subjective right (entitlement) and its person.*²⁵ This conception of the subjective rights is very close to the conception of Jan Krčmář.²⁶ Krčmář maintains that the function of the legal order is the regulation of coexistence of people and the protection of their reasonable interests against each other. In order to achieve these objectives the legal order imposes duties on people provided that particular factual circumstances exist. Should a breach of such duties occur the legal rule imposes a sanction. Krčmář states that “*the earlier legal terminology characterized this arrangement so that it granted the entitlement (the subjective right) to the holder of an interest*”. The more recent terminology distinguishes between the claim and the subjective right. “*The claim is adjudicated for the benefit of the person who has the initiative to achieve the restoration of the existing situation violating the legal norm*”. Krčmář claims that the subjective right is “*determined as a situation created by legal norms, which gives rise to a claim if the duties imposed by legal rules are violated*”.²⁷

1.3 Weyr’s conception of the person at law

Even though Kelsen requires that a strict distinction should be made between “*human being*” and “*person*” he is aware of their inseparability when saying: “*The physical (natural) person is the personification of a set of legal norms which by constituting duties and rights containing the conduct of one and the same human being regulate the conduct of this being*”²⁸. Weyr sees here an indication that Kelsen is leaving his original dualist conception distinguishing between the world as *it is* and the world as *it should be*. Weyr claims that in the normativist world there is not much space for individuals but only for normativist points of assignability. That is why Weyr²⁹ remains consistent with respect to his distinction of a person under “*abstract normology*” on the one hand, and the application of law on the other. Weyr states that “*the logical concept of a holder of subjective duties and rights should be understood as a mere abstract term, having no corresponding counterpart in the outer world and being a geometric point to which individual duties are directed by the legal order*.”³⁰ Sovereignty of the legal order results in that anything may be designated as this point. It means that the legal order may assign legal personality to any piece of the outer world or even to an idea of something non-existent in the outer world. The legal order directs individual duties to this abstract point; the relationship between this point and the object of duties is called “*assignability*” by both Weyr and Kelsen.

Weyr in his conception claims that the person at law is such who is obliged to execute the norm, i.e. ***the contents of what should be***.³¹ From the normativist point of view such person must also be abstraction – the point of assignability. “*Such person (Rechtssubjekt) subject to duties becomes a so called juristic person in legal theory*.”³² However Weyr admits

²⁵ Ibid, p. 20.

²⁶ KRČMÁŘ, J. *Právo občanské I*. Praha 1927, p. 69.

²⁷ Ibid.

²⁸ KELSEN, H. *General Theory*, pp. 94–95.

²⁹ WEYR, F. *Teorie*. p. 112.

³⁰ WEYR, F. *Základy*. p. 173.

³¹ WEYR, F. *Teorie*. p. 112.

³² Ibid.

that we should realize that the concept of person is purely normativist. In the real world there are neither natural nor juristic persons. **“The normativist concept of person can only suggest either a norm-maker or a person subject to duties.”**³³ In either case this is subjectivisation, i.e. subjective understanding of a norm. *“Instead of an objective norm (what should be) a norm-maker is at issue (one who wants something to be), or a person subject to duties (one obliged and responsible for what should be).”*³⁴ However, the subject remains unchanged – a subjectively construed norm (as a norm-making person or person subject to duties) remains by its nature a norm.³⁵

The normativist view of the legal order was expanded by Sedláček; he introduces the distinction among pure concepts (formal requirements of legal cognition), concepts dealing with content (the contents of law) and new systematic concepts (systemization of the legal order with respect to individual moral, economic or other interests). The concept of a juristic person can thus be understood not only purely formally or content-based but also it can help us reveal the borderline between the normativist system and other systems – as a systematic concept.³⁶ Therefore Weyr³⁷ considers legal personality as not only a theoretical regulatory concept but also a systematic concept. A person at law as a systematic concept leads us to the practical function of a norm subsisting in *“its application in the outer world – duties can be owed only by an individual (but not by all – such as a madman or a baby, etc.) being a natural and biological unit since only the individual is competent to become psychologically aware of these duties and act accordingly, i.e. to comply with them.”*³⁸

1.4 Slezák’s theory of person as “a norm-making unit”

There is a certain weakness in the understanding of the person as a mere point of assignability. First, the term is so wide that, conceptually, it can cover almost anything. The point of assignability can be a state, state agency or an individual. Since the person at law is conceived in the same way as the *“point of assignability”* there are *“no features distinguishing this person from another and this concept itself cannot be subordinated to any superior one”*.³⁹ However, for practical reasons, there should be certain supporting points in the application of law, which can be relied on by a person applying the law regardless of subjectivisation of legal norms. Therefore Josef Slezák attempted to discover a systematic concept in Sedláček’s sense that would be common to the highest possible number of other legal concepts. He states that *“this concept cannot be a legal person as the point of assignability by itself, but it should be a narrower concept, with richer contents where legal person will be just one conceptual element in addition to other elements, none of which may be of a causal or teleological nature.”*⁴⁰ Since Slezák failed to find such concept he de-

³³ Ibid., p. 113.

³⁴ Ibid.

³⁵ This position helps us understand the normativist identification of the state with the legal order. If we maintain the normativist identification of a norm-making person, or person subject to duties, with a legal norm then normativist cognition of a state must in fact mean the normativist cognition of its legal order.

³⁶ SEDLÁČEK, J. *Občanské právo československé. Všeobecné nauky*. Brno 1931, p. 40 ff.

³⁷ WEYR, F. *Teorie*. p. 114.

³⁸ Ibid.

³⁹ SLEZÁK, J. *Normotvorná jednotka*. Praha 1947, p. 62.

⁴⁰ Ibid.

cided to define it by himself in his work whose title was the same as the newly developed concept to replace the term “*legal person*” (or a person at law). The concept is termed a “**norm-making unit**”. I entirely agree with J. Hurdík that the work is a remarkable piece of knowledge, not only for the conception of a person as such, but particularly for its normativist view on the juristic person.⁴¹ Even though Slezák’s concept was not widely accepted and appreciated, his work is valuable from the point of view of normativist analysis of what we can understand by the concept of a person at law. Since Slezák’s efforts deserve attention I will shortly outline the conception of his “norm-making unit”.

1.4.1 Dynamic perspective

Slezák primarily focuses on the **dynamic view of a norm-making unit**, i.e. the view from which the legal order is continually being changed due to continuing creation of new legal norms. He builds his approach on the fact that “*empirical and general legal norms usually possess just abstract substance (...) but they delegate on another actor – a body – powers to express in concrete terms the abstract concepts contained in the substance of a general norm, respecting certain rules.*”⁴² This delegated norm-making person links abstract requirement with a new normativist content; what happens is, in Slezák’s terminology, “**concretizing norm-making**”. Considering the general/delegating norm, Slezák understands concretization as substance but “because this substance is expression of what should be it is a legal rule at the same time, which derives its normativist relevance from the delegating norm.” The delegating norm with its abstract hypothesis must define:

1. The norm-making person subject to delegation;
2. the definition of assignability;
3. the forms of norm-making procedure (formal determination); and
4. the competence of a norm-making person (material determination).

Where all four conceptual elements are defined the minimum requirement for the creation of a valid legal norm is satisfied. Slezák’s **definition of a norm-making unit** is as follows: “*This is a set of norms determining to which person they are assigned, by whom, in which manner, form and within what competence framework the expression of what should be may establish a legal norm.*”⁴³ A norm-making unit is represented directly by its person whose designation denotes the whole unit with all its parts and elements. “*The more elaborated these elements are, the lower level of normative relevance they may be found at, and the more generally these elements are expressed, the closer they are to the highest norm.*”⁴⁴ However, not all elements of a norm-making unit need be contained in one law – just to the contrary. Individual elements may be taken from superior legal norms. In a particular norm determining the respective norm-making unit, it suffices to define a person and its competences. The person in a norm-making unit creates, by its norm-making, a partial set of norms which Slezák considers “*particularly relevant in property law where the con-*

⁴¹ HURDÍK, J. Příspěvek normativisty Josefa Slezáka k vývoji koncepcie právnických osob. In: *Místo normativní teorie v soudobém právním myšlení*. Brno 2003, pp. 175–180.

⁴² SLEZÁK, J., p. 64.

⁴³ Ibid, p. 65.

⁴⁴ Ibid, p. 66.

*struction of a norm-making unit is a means by which the legal order provides property autonomy to people.*⁴⁵ But how can we distinguish one particular norm-making unit from another? Slezák claims this is a matter of interpretation. Generally we speak about a norm-making unit as an abstract construct acquiring concrete appearance in concrete cases. To identify it we should find, in the whole legal system, *“elements logically attached to it (...) and reconstruct it from these elements.”*⁴⁶

The first element is a **norm-making person** *“who is assigned as relevant ideological contents concretizing the abstract substance of a delegating norm.”*⁴⁷ The delegating norm should, in its hypothesis, determine primarily **the norm-making person**. The identification in a norm may vary. A norm-making person subject to duties is usually established directly by the delegating norm (a court, a body, etc.) unlike a person not subject to duties, whose creation is usually bound to a particular substance defined in the delegating norm even without direct intervention by obligatory norm-making (such as the birth of an individual). Slezák emphasizes that particularly concrete norms should contain concrete designation of a person through which the concretization of a norm is executed. He emphasizes the normative significance of the name (of an entity or individual), which *“are verbal expressions concretizing persons to such an extent that concretization turns to individualization.”* However, what applies in all cases is that a norm-making person is the abstract point of assignability in a normativist sense of the term, *“which may be projected by the norm anywhere to the outer world.”*

Due to the fact that juristic person represents a mere ideological construction, it is necessary that we can assign to it ideological expressions. Slezák, similarly as Krčmář, refers to the fact that only *“a logical intellect of an individual is capable of synthetic judgements whose expression is a vehicle for concretizing norms.”*⁴⁸ Mostly it is assigning ideological contents of the intellect of an individual to his own norm-making person that is designated by law as a natural person. However, what expressions should be assigned to someone who actually cannot have any (a legal entity, the insane, etc.)? This must be determined by a delegating norm. *“An explicit provision for **assignability** should be used where a person has not been projected into a psychophysical individual. The technical solution is that so called bodies are construed with respect to a norm-making person composed of people whose expressions are assigned to that person.”*⁴⁹ However, this applies just to acting on behalf, but not to acting for a norm-making person.

Another essential element of a norm-making unit is **formal determination** covering both **the norm-making process** itself and the **form of a final norm**. **The norm-making process** determines what formal requirements should be met so that the expression, assigned to a norm-making person and concretized by the delegating norm, can be relevant (e.g. rules of order, civil or criminal procedure codes, etc.). **The form of a final norm** determines the form of a regulation intended to contain the concretizing norm-making. The form of a norm encompasses legal acts ranging from constitutional acts to executive regulations and to, for example, a contract. Primary norm-making covers constitutional and

⁴⁵ Ibid, p. 67.

⁴⁶ Ibid.

⁴⁷ Ibid, p. 69.

⁴⁸ Ibid.

⁴⁹ Ibid.

ordinary legislation as well as decrees. Secondary norm-making includes administrative acts, judgments, arbitral awards, etc. Norm-making in private law typically contains contracts, testaments, etc.⁵⁰ Slezák also mentions, the so called **duty to determine duties** applicable to only some juristic persons, primarily those who have a duty to make norms. It seems logical that all elements relevant for the creation of a concretizing norm should be clearly and precisely defined.⁵¹

Material determination, i.e. the definition of competences of a norm-making person, is the last essential element of every norm-making unit. Slezák understands competence as “*a set of material conditions of delegated norm-making*.”⁵² A delegated person does not possess unlimited norm-making competence. The legislature determines the material framework within which the substance of ideas assigned to a particular person is relevant. It is the **competence of a norm-making person** which is determined as to its content by provisions of a law. What applies is that the lower the level of norm-making may be, the narrower the competence of a person will be. In addition, norm-making units can be determined by other substantive elements such as the principle of the earning capacity of a unit in business norm-making, the purpose of norm-making by business companies and societies.

1.4.2 Static perspective

The static view of the legal order focuses not on the manner in which norms are created but on the issue of whether the duty linked with a legal norm is valid and enforceable. Taking such a view Slezák describes a norm-making unit as “a unit of rules for creation and of requirements for a valid norm as interpretive material.”⁵³ Thus it should be ascertained whether all the above-mentioned conceptual elements of a norm-making unit are part of the valid legal order. If so, a norm-making unit has significance primarily as a condition for the validity of another legal norm. The existence of a concrete legal norm without a norm-making unit should not be allowed.⁵⁴ A norm-making unit must be established for every norm-making activity: “*a constitutional act entitles parliament to pass norms in the form of a law, a civil code entitles a man to create contracts, a commercial code entitles a merchant to enter into business transactions (...). Therefore we can discover a normologic structure in all legislation*.”⁵⁵ Using general (not partial) legal norms means their concretization, application and execution. “*A set of legal norms regulating the use of a general norm shall be termed the **realization frame** of such norm*.”⁵⁶ A norm-making unit delegated by these norms (courts, administrative bodies) produces concrete norms based upon empirical norms, and its norm-making is termed application norm-making.⁵⁷ At this stage, a norm-making unit applies the conditional substance

⁵⁰ Ibid, pp. 69–70.

⁵¹ Ibid, p. 70.

⁵² Ibid, p. 71.

⁵³ Ibid, p. 72.

⁵⁴ This leads to the requirement of a Grundnorm and to a possibility that a norm-making person can be found for every existing concrete norm, and this person can identify, through the norm-making unit, whose conduct is assigned to this person.

⁵⁵ SLEZÁK, J., p. 64.

⁵⁶ Ibid, p. 73.

⁵⁷ Ibid, pp. 73–74.

to causal situations and acts; this substance serves to evaluate them and the result (concordance or discordance) is expressed by the unit in the form of enforceable legal norms. Realisation frames can have different structures. The difference lies in whether its conditioning substance remains without delegation or whether it is delegating. This leads to the distinction between norms with one norm-making unit and norms with two norm-making units respectively.

Norms with one norm-making unit express their substance as certain particular conduct having its denotation in the real world. They do not designate a derived norm but clearly describe what unconditionally must happen so that the norm-making unit could create a norm. *“Concrete substances are pure substances and not derived norms at the same time.”*⁵⁸ The result of evaluation is expressed in the form of secondary norms whose purpose is to concretize the substances that are conditional or setting conditions, and are enforceable.⁵⁹ The category of norms with one norm-making unit is explained by Slezák using a criminal norm. A norm-making unit is a criminal court acting as *“person subject to application norm-making determined by duties.”* The court concretizes both the conditioning substance (a particular crime committed by a particular individual) and the conditional substance (imposing a particular punishment) in the form of a particular criminal judgment – a norm. There is a direct sequence of application norm-making followed by its execution.⁶⁰ Norms with **two norm-making units** contain a delegating and conditioning substance which is *“confined to the construction of a norm-making unit and leaves to its norm-making to stipulate, within its delegation, what concretely should be, and to conceptually express concretisation of an abstract substance in the form of a delegated norm for individual cases.”*⁶¹ Activities of such a delegated norm-making unit can be termed **concretizing (individualizing) norm-making**. An administrative court can be a good example of such construction: it delegates its executive body to execute its concrete norms. Hypotheses of norms applied by the executive body have the form of “if the court so decided”, which is the delegation. Norms with more than two norm-making units may be taken into consideration. In such a case we can speak about norm-making units of the second, third or the next instance (e.g. the system of courts). However, the existence of a final and ultimate norm-making unit is necessary, for example the Supreme Court, whose role is *“to keep all norm-making in the state in a uniform line.”*⁶²

Unfortunately, in empirical norms the conditioning as well as conditional substances are very often expressed in a rather complex way. Substances with and without delegation are frequently placed together within one external unit. For example, in the Civil Code we can find delegating substances in the area of obligations, whereas property rights have *“their conceptual picture quite clearly set in their statutory substance and it is not necessary to complement it with any other ideological content so that it can be used*

⁵⁸ Ibid, p. 74.

⁵⁹ Ibid, p. 74–75.

⁶⁰ Ibid, p. 75.

⁶¹ Ibid, p. 76.

⁶² Ibid, p. 80.

to evaluate the reality,”⁶³ thus this substance is without delegation. Examples of claims, contracts, etc. show that the systematic concept of a norm-making unit corresponds to the reality at the normative level. Slezák demonstrates this with a claim brought to court, which is not only substantial for the commencement of application norm-making but also for the concretization of competences in application norm-making in that particular case. Empirical norms in application norm-making can have more norm-making units – **instances**. They are always formally and conceptually determined and their activities are essentially identical with the activities of application norm-making against concretizing norm-making.⁶⁴

1.4.3 Natural and juristic person

Having defined the concept of a norm-making unit from both dynamic and static perspectives Slezák moves to the basic issue, namely dispensability or indispensability of the concept of a person in the legal order. He builds his opinion on the assumption that a person subject to norm-making is the person as projection of a human being (i.e. natural person) or otherwise (termed juristic person). Slezák claims that the prima facie clear distinction between these two “persons” diminishes should we consider them both as norm-making units. If we accept in the case of a natural person that *“the person in a norm-making unit is assigned legally relevant expressions of ideological content of that man”* then *“the expressions of discursive and concretizing ideological content...”* of a group of people associated in a norm-making unit *“...are assigned not to these individuals but to the person of a norm-making unit, which is termed juristic person by legal theory.”*⁶⁵ Slezák argues that such understanding leads us to a comparison of a natural and juristic person as norm-making units having one differentiating factor – the type of person. They are individualized in the course of concretizing norm-making through the name of a person in the norm-making unit. However, there are differences between natural and juristic persons. In concordance with Křičmář, Slezák admits that bodies of a juristic person should be established, whose expressions are assigned to that person; at the same time he excludes the exercise of, for example, family and matrimonial rights from the competence of a juristic person. Slezák sees another distinction between the natural and juristic persons in so-called property coverage of norm-making. He considers this to be one of the modes by which the legal order regards the implementation of norms. The requirement of property coverage exists primarily in property law with respect to norm-making units, whose persons acquire particular property obligations. Intensiveness of such requirement can be graded in various ways in the legal order – the softest way exists regarding a natural person who can dispose of their norm-making competence and mental and physical employment capacity.⁶⁶ A preventive form of the property coverage of norm-making exists with respect to juristic

⁶³ Ibid, p. 78.

⁶⁴ Ibid, p. 79–80.

⁶⁵ Ibid, p. 81.

⁶⁶ Legislation regulating the law of inheritance provides that as soon as a natural person terminates its existence the reservoir of values serving as property coverage of its norm-making could be transferred to the assets of others.

persons due to the requirement for a certain reservoir of values to cover obligations resulting from their norm-making. Sometimes empirical norms bind the creation of a juristic person to such reservoir.⁶⁷

Slezák's division of juristic persons into corporations and foundations is based on "*what kind of relations to the values of assets of the juristic person remain for its founders.*"⁶⁸ The **foundation** is determined by its objective and its property coverage is of a preventive nature since the norm-making relating to the foundation is reduced to the assets separated from the assets of its founder. By contrast, the assets of the **corporation** belong to its members who usually do not dispose of the relation to these values. This is also reflected in the relation to its norm-making. As for the corporation we can distinguish between the **external** norm-making (the relations between corporation and third persons), which is similar to the norm-making of the foundation, and the **internal** norm-making, which regulates the relations between the corporation and its members rather than the relations among the members themselves. Thus the corporation is a norm-making unit with dual competence. This is, as Slezák emphasises, the most apparent during its termination when the external competence is determined by the liquidation objective. By accomplishing this objective this competence is gradually being reduced. On the contrary, with the process of liquidation the internal competence of norm-making with respect to the division of assets between the members of the

Vychutnejte si atmosféru expozice Corporation is extending.

It follows from Slezák's interpretation that the existing concepts of a juristic as well as a natural person can be by-passed by a systematic concept of a norm-making unit, which can span the whole range of legal situations where neither concept is sufficient by itself. The legal order facilitates the concretizing norm-making of private law as a means of economic autonomy of people "*not only as individuals but also as a group of individuals who may use for their purposes the concept of a norm-making unit, the person of which is projected to none of them. Interests pursued by these individuals through the norm-making unit are practically applied in that they become bodies, or members of collective bodies, of such unit; as a result, expression of discursive and concretizing ideological contents are assigned not to individuals themselves, but to the person of the respective norm-making unit called a juristic person by jurisprudence. They execute its norm-making but obligations resulting therefrom are not covered from their individual property but from the assets of the juristic person.*"⁶⁹ However, Slezák considers as minor the distinction between a natural and non-natural person. "*Where an individual is fully deprived of his capacity causal acts of concretizing norm-making process, the result of which are concrete norms assigned to the person projected in this man and individualized in norms on his behalf, are essentially identical to analogical acts of a juristic per-*

⁶⁷ It must also be transferred to other property upon the termination of a juristic person: this is regulated by liquidation legislation. The property of a juristic person is usually created from the property of its founders, and as soon as the juristic person terminates its existence this property is returned to them in the form of a respective liquidation share.

⁶⁸ SLEZÁK, J., p. 64.

⁶⁹ Ibid, p. 81.

son.”⁷⁰ This is why Slezák introduces the **idea of dispensability of the concept of juristic person** which often leads to problems where disputes occur over whether an association of individuals is at issue (a society) or whether a juristic person has been established (corporation). Slezák claims that **“the concept of a norm-making unit is sufficient with respect to all legal persons.”**

1.5 Conclusion

The person as a legal term is traditionally derived from a human being, either from an individual or a group of people. From an abstract point of view it means that a juristic person represents a legal substance which is assigned the rights and duties as its own quality. Hans Kelsen maintains that no such substance really exists. *“The person exists only insofar as he “has” duties and rights; apart from them the person has no existence whatsoever.”* This is why a human being is construed as an abstract holder of subjective rights rather than the person in a legal sense. Unlike the traditional doctrines, normativism considers rights as legal norms. This conception results in the normative construction of a person. The person is considered to be a mere point, an ideal and never real fact. **Kelsen** designates this point as **“personification of the set of norms”** regulating the conduct of a human being. The concept of the person cannot encompass anyone else but those who may set legal duties, i.e. the “norm-makers”, or, on the other hand, those obliged to fulfil the duties, i.e. “norm-takers”. However, such an entity as the personification of legal norms does not exist in the outer, real world. The legal order may attach legal personality to any segment of the outer world, even to an imagination of something non-existent in the outer world. The relationship between this abstract point and the addressee of duties is called “assignability”. This is why the person in a legal sense is, in the normativist perspective, considered to be **“a point of assignability”**.⁷¹

There is a certain weakness in the understanding of the person as a mere point of assignability. First, the term is so wide that, conceptually, it can cover almost anything. The point of assignability can be a state, state agency or an individual. Thus it could be said that legal normativism has not achieved any significant progress, if compared to the traditional doctrine, since it appears to have made quite unclear contours of the person in a legal sense even more opaque. It should be noted that relatively unknown Czech normativist **Jan Slezák** made substantial advancement in making these contours more visible from the point of view of pure legal science. Slezák attempted to analyse the person in a legal sense with respect to requirements set by the legal order so that the point of assignability may create a valid legal norm. As a result he designated the point as a **“norm-making unit”**. The norm-making unit encompasses the body of legal norms required for that unit to be allowed to impose legal duties upon other persons (including “particularizing norm-making” covering the creation of rights). A norm-making unit must receive a delegation to make norms and the delegation must be in the form of a rule defining the following issues:

⁷⁰ Ibid.

⁷¹ Ibid, p. 87.

1. The norm-making person subject to delegation;
2. The definition of assignability;
3. The forms of norm-making procedures (formal determination);
4. The competence of the norm-making entity (material determination).

These factors qualify every point of assignability, i.e. the person in a legal sense. Slezák concluded that the concepts of natural and juristic persons may be replaced by the concept of a “norm-making unit”. He saw the advantage of this concept particularly in that it could be used even in situations where the term “juristic person” appeared to be insufficient, for example, with respect to the contentious (at his time) features of the legal nature of an unlimited company.