# CONFERENCES AND REPORTS

## Report from the Conference titled "Legal Transactions and Legal Responsibility of Juristic Persons after Recodification of Czech Private Law"

On Friday 24 May 2019, the Faculty of Law of Charles University hosted a conference titled *Legal Transactions and Legal Liability of Juristic Persons after Recodification of Czech Private Law*, organised by *Doc. JUDr. Karel Beran, Ph.D.*, in co-operation with JUDr. Pavel Ondřejek, Ph.D., and *JUDr. Katarzyna Žák Krzyžanková, Ph.D.*, his colleagues from the Legal Theory Department of the Faculty of Law of Charles University. The conference was held as part of joint projects PROGRES Q02, Q03 and Q04 implemented at the Faculty of Law of Charles University. The conference was attended by over 80 guests, including members of various Czech and Slovak law faculties, as well as practicing lawyers.

The main topic discussed was an issue crucial for the current Czech legal theory and practice. The legislation governing juristic persons has undergone several conceptual amendments in recent years, which primarily consisted of the 2014 private law recodification, but also the rather recent piece of legislation concerning criminal liability of juristic persons, adopted in 2012, and a new regulation of infractions of 2017. Indeed, the legislative amendments substantially affected the manner in which juristic persons act and bear liability for their acts, and introduced fundamental theoretical challenges, as well as several novel considerations for understanding the actual meaning of the term "juristic person".

The aforementioned challenges call for an informed academic discussion and the conference offered a venue for such a debate. The conference's unusual structure was designed to facilitate discussion, where each of the panels addressed one of the chapters of the recently published monograph titled *Legal Transactions and Legal Responsibility of Juristic Persons after Recodification of Czech Private Law*[1] (hereinafter the "Monograph"). In the chosen format, a speaker's presentation of the main paper was followed by a thorough discussion, where short contributions submitted in advance as well as the audience's opinions were considered. At the end, the author of the respective chapter of the Monograph had an opportunity to respond to the arguments raised.

The opening speech delivered by *prof. JUDr. PhDr. Michal Tomášek, DrSc.*, Vice-Dean of the Faculty of Law of Charles University for Science, Research and Editorial Activities and the coordinator of the PROGRES Q02 programme, was followed by the first panel discussion on the **capacity of a juristic person to "engage in legal acts" and "bear legal liability"**. The main paper was a response to the Monograph's first chapter by *doc. Beran* and was presented by the lead author of the new Civil Code, *prof. Dr. JUDr. Karel Eliáš* of the Trnava University. He agreed with doc. Beran's conclusion that a juristic person represents a "personified unity of interests" and emphasised that the legal personality of juristic persons is narrower than that of individuals. The Civil Code approaches juristic persons as entities lacking the power of reasoning and their own will. Their will is supplied by the individuals who represent juristic persons. However, as Antonín Randa, a great Czech expert on civil law once said, if a juristic person derives profit from the acts of its representatives, it must also bear a loss from the same. In the follow-up discussion, *JUDr. Vlastimil Pihera, Ph.D.*, joined the debate on whether or not juristic persons enjoy legal capacity. He believes that the question is essentially

[1] See BERAN, K., ČECH, P., DVOŘÁK, B., ELISCHER, D., HRÁDEK, J., JANEČEK, V., KÜHN, Z., NOVOTNÁ KRTOUŠOVÁ, L., ONDŘEJEK, P. *Právní jednání a odpovědnost právnických osob po rekodifikaci českého soukromého práva* (*Legal Transactions and Legal Responsibility of Juristic Persons after Recodification of Czech Private Law).* Prague: Wolters Kluwer, 2018.

irrelevant because juristic persons are not acting independently at all. *Doc. JUDr. Ondřej Frinta, Ph.D.,* then embraced doc. Beran's argument presented in the Monograph, i.e. that the notion of an entity endowed with rights but no capacity to bear legal responsibility is indeed an absurd one. *JUDr. Petr Čech, Ph.D., LL.M.,* then presented some arguments supporting a theory of reality according to which juristic persons are not a mere legal fiction, but actual persons. In particular, he emphasised the existence of a juristic person's will that can potentially differ from the will of its incumbent representatives. In the final part, doc. Beran noted that the law cannot attribute legal personality to just about everything; the organisation of an entity as mentioned in the Civil Code must be understood as a specification of the ways in which the entity, i.e. a juristic person, acts *vis-à-vis* third parties. The chair of the panel, *doc. JUDr. Kateřina Ronovská, Ph.D.,* of the Faculty of Law of Masaryk University then concluded the discussion by pointing out that, in some cases, legal practice can manage regardless of whether or not an entity has legal personality. This is demonstrated by e.g. the functional concept of an undertaking (enterprise) in the case law of the Court of Justice of the EU.

*JUDr. Pavel Ondřejek, Ph.D.*, the author of the relevant chapter of the Monograph, was the guarantor of the second panel. The discussion topic covered the **effects of fundamental rights on legal relationships of juristic persons**. The main paper was presented by *JUDr. Martin Hapla, Ph.D.,* of Masaryk University, who first drew attention to the abstract formulation of the rights guaranteed at the constitutional level in the Charter of Fundamental Rights and Freedoms. According to JUDr. Hapla, it is useful to endow juristic persons with certain fundamental rights, the scope of which is determined by their nature. This means that juristic persons cannot be vested with rights such as the right to life and dignity. *JUDr. Hapla* thus moved towards the utilitarianism of J.S. Mill and expressed some reservations to the generally accepted Kantian ethics. In the following contribution, the author and chair of the panel, *JUDr. Michal Šejvl, Ph.D.,* of the Institute of State and Law of the Czech Academy of Sciences, dealt with the existence of a juristic person's will that is independent on the will of its members, which would determine the capacity of juristic persons to be endowed with fundamental rights. He also argued using the "List-Pettit theorem", which proves that even rational actors following a rational decision-making process can arrive at a conclusion that none of them supports, despite it being a result of a previously determined procedure. The final contribution in the panel was presented by *JUDr. Jakub Kříž, Ph.D.*, attorney-at-law. Using the example of the Hobby Lobby case from the United States, he showed that if natural persons pursue their interests through juristic persons (a corporation in the given case), these juristic persons must be endowed with fundamental rights (religious freedom in the mentioned case). In the follow-up discussion, *doc. Beran* reminded the audience that the will of juristic persons is created differently than that of natural persons, where *JUDr. Ondřejek* added that Czech case law follows the German legal doctrine and endows juristic persons with fundamental rights only where their nature allows this (there is no consensus on the capacity of public-law corporations to be endowed with fundamental rights). He advocated a careful formulation of fundamental rights with respect to juristic persons, arguing that a strengthening of fundamental rights of juristic persons could weaken the fundamental rights of natural persons (also with regard to dealing with potential conflicts of rights). At the same time, an additional protection could be awarded to juristic persons through the application of more traditional means under sub-constitutional law.

After a short break, the conference continued with the third panel discussing the **business judgement rule in relation to the liability of members of the governing bodies of juristic persons**. The author of the associated Monograph chapter is *Mgr. Lucie Novotná Krtoušová, Ph.D.* The main paper was presented by *doc. JUDr. Bohumil Havel, Ph.D.,* of the Institute of State and Law of the Czech Academy of Sciences and the author of the synopsis of the Corporations Act, who addressed the issues related to due managerial care *(péče řádného hospodáře)*. According to *doc. Havel*, contents and the minimum standard of due managerial care exerted by members of governing bodies of juristic persons must be linked with the corporation's life cycle stage and its financial health; the contents and standards are significantly modified especially if the corporation faces insolvency or has become insolvent. He also raised an important and topical concern regarding the uncertain definition of due

managerial care in cases where sophisticated computer algorithms or even artificial intelligence are used as a basis for corporate decision-making. Finally, *doc. Havel* suggested that the application of the business judgment rule as laid out in the Corporations Act does not reduce the standard of due managerial care, but confers protection to reasonably acting members of corporate governing bodies against *ex post facto* questioning of their actions. The second contribution in this block was presented by *JUDr. Lucie Josková, Ph.D., LL.M.* She believes that the business judgment rule exists to protect corporations themselves rather than members of their governing bodies. A major part of her presentation dealt with formulating individual requirements on the exact framing of the business judgment rule and in the conclusion, she proposed a more accurate definition of the rule. A detailed discussion on the application of the business judgment rule followed, also with the participation of the panel's chair, *prof. JUDr. Stanislava Černá, CSc.*, who pointed out that the business judgment rule primarily protects members of governing bodies and its purpose is to shift the burden of proof in determination of liability for an offence. *Doc. JUDr. Kateřina Ronovská, Ph.D.,* then drew attention to a difference between the business judgment rule as applied to corporations and the general requirement of due managerial care applicable to all kinds of juristic persons. According to *doc. Ronovská*, the business judgment rule is associated with business and should only apply to private corporations. Further contributions to the debate were offered by *JUDr. Ing. Aleš Borkovec, Ph.D., JUDr. Robert Pelikán, Ph.D.,* and *JUDr. Jan Lasák, Ph.D., LL.M.* The final contribution was presented by *dr. Novotná Krtoušová*, who responded to the panellists' arguments and added to the previous discussion that application of the business judgment rule was possible also with regard to non-entrepreneurial entities in cases where the relevant decision in fact concerns business or operational activities.

The topic of the fourth panel were **acts performed by a member of the juristic person's governing body regarded as representation *sui generis*.** The panel was chaired by *doc. JUDr. Michaela Hendrychová - Zuklínová, CSc.* The opening paper was presented by *JUDr. Robert Pelikán, Ph.D.*, who addressed especially the unique character of decision-making processes in large corporations, which he attributed *inter alia* to the corporate culture. He argued that specific decisions in large corporations are hardly attributable to specific persons; consequently, the same applies to attributing liability to specific persons. *JUDr. Pelikán* understands the purpose behind distinguishing legal and contractual representation as dependent on whether or not the will of the represented entity is independent on the will of the representative. Representation of a juristic person by its governing body is distinct because a will of the juristic person, albeit existent, is not complete and separate (the representative is not merely manifesting the juristic person's will *vis-à-vis* third parties, but co-creates it as well). The next contribution was presented by *JUDr. Kateřina Eichlerová, Ph.D.*, who addressed the specific problem of admissibility of joint representation of a corporation by (a member of) its governing body and a corporate agent *(prokurista)*. Established case law of the Supreme Court of the Czech Republic does not permit such persons to act jointly. Therefore, *JUDr. Eichlerová* proposed to modify the rules and introduce the possibility of joint representation by two members of a governing body (or two governing bodies), or by one member of a governing body together with a corporate agent. In the following paper, *doc. JUDr. Radim Boháč, Ph.D.,* focused on representation of a juristic person in the tax administration system. Within tax proceedings, a juristic person is represented by its governing body, which *JUDr. Boháč* understands as direct acting rather that representation. The Supreme Court judge *JUDr. Bohumil Dvořák, Ph.D., LL.M.*, expressed a similar opinion regarding acting for a juristic person within civil procedure. The discussion block was concluded with a presentation of the author of the relevant Monograph chapter, *JUDr. Petr Čech, Ph.D., LL.M.*, who argued that the will of the person authorised to act for a juristic person can differ from the will of said juristic person. He also opposed *JUDr. Eichlerová's* proposal concerning simultaneous acting by an executive director and a corporate agent, emphasising the different nature of acting for a corporation, representing a corporation and internal limitations applicable in a corporation.

The afternoon part of the conference started with opening remarks of *prof. JUDr. Aleš Gerloch, CSc.*, Vice-Rector for Academic Appointments at Charles University and coordinator of the PROGRES

Q04 programme, and *prof. JUDr. Jan Dvořák, CSc.*, Vice-Dean for the Doctoral Study Programme and Rigorosum Procedure at the Faculty of Law of Charles University and coordinator of the PROGRES Q03 programme. Both speakers welcomed the participation of so many experts from a wide range of legal specialisations. The conference then continued with the fifth block with the Monograph chapter authored by *doc. JUDr. PhDr. David Elischer, Ph.D.,* and *JUDr. Jiří Hrádek, Ph.D., LL.M.,* dealing with the question **of what can be imputed to juristic persons on the grounds of fault based liability and no-fault liability.** The main paper was presented by the Supreme Court judge *JUDr. Petr Vojtek*. He drew attention to the fact that determining civil liability is significantly influenced not only by distinguishing between no-fault liability and liability based on fault, but also distinguishing between the subjective and objective perception of culpability or negligence. He then addressed in detail the issue of responsibility of persons acting for a juristic person: there is no doubt that if their acts result in a damage, the juristic person is obliged to compensate said damage; however, the issue remains whether a parallel liability arises on the part of the acting person (representative or assistant). While the legal regulation applicable until 2013 explicitly excluded the assistant's liability, the current legal regulation includes no such explicit provision. However, according to JUDr. Vojtek, the exclusion of the parallel liability of the assistant can be inferred by means of interpretation. A number of contributors to the discussion responded to this opinion. *Doc. Beran*, the chair of the panel, pointed to German law where the assistant is independently liable for the damage caused alongside the person for whose benefit the assistant acted. *Doc. JUDr. Filip Melzer, LL.M., Ph.D.,* of the Faculty of Law of Palacký University Olomouc then noted that he did not see any material or legal reasons to exclude the assistant's liability as long as this does not follow from the wording of the law. A limitation of liability could be considered for moral reasons in cases where a juristic person is represented by its employee. *JUDr. Čech* then noted that prior to 2014, it was the case that if an executive director of a limited liability company had been considered as the assistant, the exclusion of his liability practically resulted in the impossibility to seek compensation for damage caused by his acts. The discussion on the assistant's liability was also joined by *Mgr. Luboš Brim* of the Faculty of Law of Masaryk University in Brno, who presented his views on the liability of employees of public authorities acting in the role of assistants. The relation between subjective and objective perception of negligence was also discussed by *doc. JUDr. Tomáš Doležal, Ph.D., LL.M., JUDr. Petr Šustek, Ph.D., JUDr. Bc. Václav Janeček, Ph.D., M.St.,* and the authors of the relevant chapter *doc. Elischer* and *JUDr. Hrádek*.

The following panel was chaired by *prof. JUDr. Jiří Jelínek, CSc.,* dealt with **liability of juristic persons for an offence under public law** in reference to the Monograph chapter by *prof. JUDr. Zdeněk Kühn, Ph.D., LL.M., S.J.D.* The main paper was presented by *doc. JUDr. Helena Prášková, CSc.,* the head of the Department of Administrative Law and Administrative Science of the Faculty of Law of Charles University. Similarly to *prof. Kühn*, she mainly analysed the new legal regulation of infractions applicable since 2017. She noted that the new regulation does not fully deserve to be called a "reform of the infraction law". She also warned against blurring the lines between infractions and criminal offences, *inter alia* due to the conception of criminal charges in the case law of the ECtHR. This leads to many trivial infractions being subjected to the same complicated procedure as if they constituted criminal offences. She also criticised the expansion of administrative punishments and severe penalties that are often disproportionate to the typical gravity of the offence – she believes that both these things are often a result of the transposition of the EU law, which calls for effective sanctions. In the subsequent discussion, *prof. JUDr. Richard Pomahač, CSc.,* commented on the liability of public-law corporations for public-law offences, while *JUDr. Ing. Josef Staša, CSc.*, made a few notes regarding the matter of the authorised recipient of acts of administrative authorities made towards a juristic person. *JUDr. Vladimír Pelc, Ph.D.*, then presented his contribution to the discussion where he advocated the view that criminal liability of juristic persons must be considered a liability based on fault rather than no-fault liability. While legal practice faces certain difficulties in dealing with the culpability of a juristic person, these problems can be resolved by distinguishing between the originary culpability of a person acting for the juristic person and the derived "culpability" of the juristic person itself. The discussion concluded with notes presented by *Mgr. Pavel Švásta, Ph.D.,* and

*prof. Kühn,* the author of the relevant Monograph chapter, on the conditions of exoneration of a juristic person from liability for public-law offences, concluding that the case law of the Supreme Administrative Court has defined the conditions rather narrowly.

The seventh and final panel followed up on the chapter titled "**Responsibility and liability of juristic persons**" written by *JUDr. Bc. Václav Janeček, Ph.D., M.St.,* which was based on his earlier publication titled "Criticism of Legal Responsibility"[2]. The final discussion thus concerned an inspiring and somewhat controversial topic, as *JUDr. Janeček* proposes to further specify Czech legal terminology and distinguish between the notions of "*odpovědnost*" (*responsibility* based on natural law) and "*zavázanost*" (*liability* based on positive law). *JUDr. Janeček* believes that juristic persons are, on account of their nature, only subject to "delegated liability". While the author refers to the common law concept of *vicarious liability*, he reaches his conclusion independently based on the history of the concepts of responsibility and liability in Central Europe. Aside from the aforementioned, *JUDr. Janeček* suggests to abolish the trichotomic approach to legal norms and adopt a dichotomic one. The main paper was presented by *Mgr. Pavel Pražák* who closely adhered to the format of the conference and provided a detailed summary and critique of *JUDr. Janeček's* theses. He especially objected to the term "*zavázanost*" (liability), which he believes could be misleading; while he did not have any reservations to the dichotomy of legal norms from the perspective of legal theory, he noted that legal practice requires a trichotomic structure. *JUDr. Barbora Grambličková, PhD. LL.M.* of the Faculty of Law of the Trnava University and *JUDr. Peter Lukáčka, PhD.* of the Faculty of Law of Comenius University in Bratislava then presented their collaborative contribution on the application of the due managerial care rule in cases where the governing body of a juristic person acts in accordance with the rules of a socially responsible business, albeit at the expense of the corporation's profits and against the will of its shareholders. Both see a solution to the problem in stipulating the principles of a socially responsible business in the law. The final contribution in the block belonged to *JUDr. Ing. Jan Broulík, LL.M., Ph.D.,* who presented economic arguments for applying the concept of vicarious liability. *JUDr. Broulík* argued that it would improve the position of a juristic person in terms of prevention and the psychology of the wrongdoer, who lacks the motivation to at least partially compensate the damage caused by his acts if the amount of damage significantly exceeds his assets. This was followed by a short discussion where certain economic arguments against vicarious liability were raised.

The conference was concluded by the closing address delivered by *doc. Beran* in which he thanked the co-organisers as well as students who participated in the organisation of the conference. He praised the fact that the conference provided a venue for a rational debate and arguments on a number of complex topics. The closing address rings true since the conference fully achieved its goal, which was to stimulate expert discussion over the Monograph's conclusions and the topics it raised. The conference's format was chosen well to enable a to-the-point, informed, lively and open debate. This ensured that it not only contributed to the understanding of legal transactions and legal responsibility of juristic persons in present-day Czech law, but served as an inspiration for similar future events.

Jan Chmel*, Václav Podhorský**

[2] See JANEČEK, V. *Kritika právní odpovědnosti* [Criticism of Legal Responsibility]. Prague: Wolters Kluwer, 2017.

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