

Imperfect Personality in Commercial Law

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Abstract

In the theory of law, legal personality (the terms “legal person” and “legal personality” are used in this text in their continental sense, i.e. describing both non-human and human entities and their legal capacity) is usually seen as a simple quality having only values, true or false. The existing theories of legal personality were, therefore, trying to find such characteristics of legal personality, which will fully describe all legal persons existing in practice. Such an effort had to fail or, more precisely, the process of search for such a common denominator had to result in the disappearance of all the key characteristics necessary for understanding of the phenomenon of legal personality.

The exploration of legal personality must hence begin with the finding that legal personality is not a quality having only values – true or false – but rather a full scale of values from nil to a (rarely seen) full legal personality, moreover appearing in many dimensions. In order to duly explain the phenomenon, the theory must not search for a common denominator of existing persons, but describe the concept of full legal personality and explain the consequences of imperfection of existing legal persons in any of such qualities.

Those requirements cannot be fulfilled by using the usual empirical process starting with the observation of existing legal persons and then proceeding to a deduction of key characteristics of the theoretical notion by abstraction. Rather, an opposite approach must be adopted, i.e. to deduce the content of the notion of full legal personality from other basic notions of the law and from the notion of the law itself. Existing legal persons can then be used only to verify the validity of such deductions.

I start the said deduction by observing the basic mechanisms of the functioning of law and determining the role of legal persons in law. Legal person is, in this observation, identified as a fundamental agent of transcendence, causing the transmission of legal reality into extralegal reality,

i.e. the conformation of extralegal reality (the reality of the tangible world) to the legal reality (which is a virtual reality, existing actually or potentially in the minds of persons applying the law). The functioning of such agent of transcendence is provided by rights and obligations which, by their existence in legal reality, motivate legal persons to interact with the non-legal reality, adapting it in line with the content of such rights and obligations.

Law, right and obligation are hence the three basic notions needed for the deduction of the characteristics of full or perfect legal person, i.e. a person which (i) will not cause any logical contradictions by its existence in the legal reality and (ii) will fully transmit the rights and obligations into extralegal reality. Those two basic dimensions of legal personality must be carefully distinguished as the consequences of their imperfections are fundamentally different: an imperfection of legal person in the dimension of conditions of existence in the legal reality will lead to failures in intellectual operations used to create and discover the legal reality and hence to *internal* dysfunctions of law; an imperfection as to the conditions of transcendence into extralegal reality will cause the law to fail in its role of influencing extralegal reality and hence will lead to *external* dysfunctions of law (the law will not meet its external criteria such as the requirement of justice or economical effectiveness).

As for conditions of non-contradictory existence of person in legal reality, I see three: (i) the capacity of the person to have rights, including a transferable patrimonial right (ii) the capacity to have obligations, (iii) the procedural capacity reflecting the material capacity.

I also see three conditions of transcendence into extralegal reality: (i) the existence of own sphere of interest containing an interest of preservation of self-existence superior to all other interests, (ii) a will formed in such a way that ensures the preservation and absolute priority of interest of preservation of the self-existence, (iii) the capacity of the authors of the will of the person to know the content of its sphere of interest.

None of those conditions is new and I do not see the benefit of my theory in their enumeration. Rather, I see it in explaining the grounds of such conditions, which directly imply the consequences of their partial or complete absence, and in the very enunciation of this imperfection of real persons.

In the light of a careful analysis, also the prevailing dogma that a person cannot be at the same time a subject matter of law does not stand. Introduction of the notion of an *imperfect* personality makes it possible to overcome this dogma and ascertain that a legal person is a subject matter of rights of other person exactly in the extent in which it is not a perfect legal person.

The application of the deductive theory of legal personality on the phenomenon of groups of companies displays that companies of the group show important imperfections in the extralegal component of their legal personality and, at the same time, that the group itself fulfils to a large extent the extralegal conditions of legal personality; therefore, it seems to be a social entity eligible to become a legal person. Both of those facts inevitably lead to dysfunctions of law. By the introduction of the notion of an imperfect legal personality, an *overlap* of legal personality is possible, treating a company belonging to a group both as a legal person and, simultaneously, a component of a wider legal person – the group. The fundamental objection against the personality of the group thereby falls off and it is pertinent to analyse whether the introduction of the personality of a group would not eliminate or reduce the above mentioned dysfunctions of law. An opening investigation of this question shows that it is possible in such case to formulate six basic rules of functioning of the overlapping personality, which would eliminate many of actual problems without apparently creating new ones. Those rules are:

1. Every company of the group can pursue the interest of the group and prefer it over its own interest with the later exception.
2. In creating a company, the group must provide it with sufficient capital to pursue its purpose. The company must preserve at least this level of capital the whole time it pursues this purpose. It shall not cause its capital to decrease under this threshold by preferring the

interest of the group under the sanction of an obligation of the group to replenish the capital at the end of the accounting period. Should the capital decrease for other reasons, the company would be prohibited from preferring the interest of the group until the capital increases again over the mentioned threshold.

3. If the company contracts in the extent of its own autonomy, in its own interest, it binds only itself.
4. If the company contracts in the interest of the group, it binds the whole group.
5. If the company creates an impression that it acts in the name of the group or adopts obligation *intuitu personae* that it is unable to fulfil without the assistance of other companies of the group, it binds the group.

Legal obligations are attributed to the company, to the group or to both depending on their purpose.