

Value of the Fiction Theory for Understanding the “Legal Person”

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Abstract: This article discusses a number of conceptual approaches associated with finding answers to the question of what the legal person is in legal science. A conceptual chain is made, revealing the formation of concepts about the “legal person”. Much attention is paid to the analysis of the legal aspects of the legal person, identification of its specifics. The value of concepts of “legal personality” and “legal person” is elaborated. The meaning of the fiction theory is analyzed to develop a theoretical structure of a legal person as a means, by which it is possible to identify an organization as a necessary subject of legal relations. The article justifies the essential concept of “fiction” for understanding the phenomenon of legal structure considered as a concept, by which real life events are included in the legal field. A conclusion is made that the concept of “legal person” (much like a “physical person”) is a meaning-formative structure for subsequent determination of the subjects of legal relations.

Key words: Persona • Physical persons • Legal persons • Fiction theory • Artifacts of legal activity • Legal “fictions”

INTRODUCTION

One of the main directions of development of the Russian and foreign jurisprudence in modern conditions is the theoretical research of the problems of a legal person [1-7] and meaning-formative structures associated with the doctrine of the legal person [8], [9, pp. 15-47], [10]. In some studies, significant attention is given to the concept of a legal person, the definition of its scope and the relation with the concept of collective legal persons [11-12]. At the same time, as it was noted by foreign researchers, the post-communist countries in transition witness a strange and unsatisfactory discrepancy between theory and practice: legal persons are an integral part of their social life, and yet there is no clear approach to the theoretical scope of this concept, as well as the criteria for determining its contents [13-14].

MATERIALS AND METHODS

The concept of a legal person performs on the theoretical and methodological level, among others, two main functions, aimed at addressing the two kinds of problems: to reflect the subject of study in its cognized borders and to be the tools of constant expansion of the already reached limits of knowledge. In this regard, the method of hermeneutic analysis is used to describe and establish the “fictional” field of the aforesaid term. The historical (historical forms of justice) and logical (logical fictionalism) paradigms of the expression of scientific cognition outcome are important in the interpretation of the stated topic. The issue of cognoscibility of legal facts (including the “paradox of cognoscibility” by F. Fitch, saying that the acceptance of thesis of the potential cognoscibility of any fact leads to absurdity [15]) is considered in the context of the overall difficulty of epistemology as a science.

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The definition and meaning of a “legal person” is also analyzed from the standpoint of the “as if” principle of fundamental importance for scientific knowledge with the intention of making significant clarifications of the “ontic” structure of justice.

The Main Part: The analysis of this concept is advisable to start with the interpretation of the term that denotes it, because term (from Lat. terminus) or phrase is the name of the concept expressing its meaning and relation to other concepts linguistically within the defined cognoscible area.

Legal reality, which is described by the term “person”, is already apparent in the etymology of the word. Originally, the term “person” (Greek-prosopon) belonged to actors’ masks, guises that were assigned to certain types of actors in the ancient theater. Subsequently, the word has come to mean the actor and their role, certain type of character. In the Roman theater, the actor’s mask was called *persona*, mask, i.e. face turned to the audience. In Latin, the word “*persona*” was derived from the combination of “*per sonare*”, which meant “voice coming through a mask.” Actors of the ancient theater used masks to mark both the parts that they played and to increase the strength and vibration of their voices. Hence the mask was called “*persona-ae*”, i.e. the thing that sounds loud [16]. Gradually, this term has moved from the stage to the real life and has come to refer not only to the actors in the theater, but also in court and everyday situations. They began to denote all those who bore a function in real life, and began to be used to identify that function and position, status of the corresponding subject.

In this case, to personalize (impersonate) meant (and still does now) to appear as oneself, and as any other particular subject. Accordingly, the word “person” was used by the Romans necessarily indicating certain social functions (roles): a person of a judge, a person of the king, father, etc. [17]. Thus, gradually the term “person” began to denote an individual himself, possessing a certain status, quality. This term has gained a formally generalized nature and became used to indicate certain generic, formal features of subjects as social and legal figures (actors). In the Middle Ages, during the reception of Roman law, the term “*persona*” (person) has been gradually applied to both individual participants of legal relations, individuals (physical persons) and their organized groups, which eventually became known as “legal persons” [18, pp. 213-234]. The study of abstract

theoretical “person” structure allowed ignoring excessive, minor details in the characterization of participants of legal relations and label them as independent subjects of law, with segregated standing.

In this sense, the term “person” is used today to refer to two main types of entities in the legal field. In the Latin language family countries the individuals and entities are designated by the term derived from the Latin word “*persona*” [19]. In English, the term “person” is used primarily to refer to human beings, but is also used in legal and technical sense to refer to the subject of legal rights and obligations. The Anglo-Saxon law recognizes two types of persons: physical persons and artificial persons, i.e., unnatural creatures, legal entities created by law that exist only in the field of law and not in the biological sphere [20].

Unlike English and Romance languages, the word derived from the Latin term “*persona*” is not used in Russian language in the legal and technical sense. However, the Greek term “*prosopon*” and the Latin term “*persona*”, as noted in the literature, are essentially close to the Russian word “*lichina*” (mask) [21, p. 117-144].

In the old times, this word meant the “combat helmet visor attached to the helmet’s top part” protecting the face of a warrior. Under this guise it was difficult to know the true face of a man. Hence the word in XVIII-XIX centuries meant in the Russian language nothing other but “a guise that hides the face, a mask.”

However, neither the Latin word “*persona*”, nor the Old Russian word “*lichina*” were in demand in the Russian language to refer to the subjects of law. The word “*litso*” (face) is used as a general term to refer to them in a generalized sense of formal legal “appearance” (or “look”), which characterizes the quality of a specific legal entity that enters into a legal relationship, its legal significance and role.

Technically, the term “person” is a concept of “legal person”, and the word “legal” acts as its predicate. The adjective “legal” defines the nature of the noun “person”. It can be explained as related to specific social relations, the shape and scope of implementation of which are determined by the law, established by the state. Thus, it is the adjective that limits the defined notion from another notion of a person as a legal entity, namely from the concept of a physical person.

Along with this adjective, the jurisprudence of many countries refers to a person other than an individual using other predicates. In particular, they are referred to as “moral persons” (in French law), “collective” (in

Portuguese and Mexican law), “artificial” (in the Anglo-Saxon law), “supernatural”, “fictional”, “abstract”, “ideal”, “universal”, “organic”, “compound”, etc. [22, pp. 228-229]. The use of these predicates is explained, on the one hand, by the complex non-biological nature of these entities, and on the other- by the existence of a number of concepts developed to explain the legal nature of these entities.

In France there are two basic types of entities: physical persons (*personnes physiques*) and legal persons (*personnes juridiques*). However, as a synonym for the predicate “legal” the adjective “moral” is often used [23]. That said, there is often a distinction at the doctrinal level between these two adjectives. The concept of “moral person” is interpreted in its scope as broader than a legal entity. Thus, according to L. Michoud, a human community only becomes a moral person when it has two qualities: a) its own interest, which does not coincide with the interests of the individual participants, and b) an organization capable to express the collective will in legal relations. According to this author, the property of being the legal entity does not stem from human nature itself (the proof of that is the slaves in ancient Greece and Rome, the civil penalty, entailing the loss of the quality of the subject). Similarly, an organization that may be the subject of rights and duties and be a moral person (*personnalite morale*), need not be a legal person (*personnalite juridique*). However, L. Michoud posits that a legal environment should recognize the existence of the organization as a person [24, p. 121]. On the other hand, since the concept of identity is inseparable from social behavior, it is clear that not all organizations with legal personality must necessarily be defined as legal persons [25, pp. 231-264].

In this context, we cannot but draw attention to the fact that, along with the concept of a legal person, both the foreign and the domestic literature are increasingly using the concept of a legal personality. We must say that in the domestic literature foreign terms “*personnalite juridique*”, “*personalidad juridica*” are often mistranslated as “legal person” rather than “legal personality.” In fact, foreign authors regard the terms “legal personality” as a generic ability of any person (physical or legal) to acquire rights, incur obligations and act as a subject of legal relations. In this case, legal personality is nothing other than a “legal invention”, legal value, legal attribute of any legal entity. It has not a natural, but a legal nature [26, p. 198]. Consequently, legal personalities are attributes of both physical persons (from birth) and organizations

(since their registration as legal persons or their recognition as such by law). In this case, in our opinion, the concept of a “legal personality” is a synonym to the concept of “juridical personality” adopted in our jurisprudence.

The specific feature of the legal entity, therefore, is not that it has a legal personality, but in peculiarities of its legal nature-legal entity.

Legal science has been, particularly intensely since the XIX century, making an effort to identify the nature of legal persons. Various conceptual approaches have been developed that attempt to address this issue from methodological positions. All of these approaches can be subdivided into two great schools: a) concepts denying the reality of the subjects with the properties of a legal person, and b) concepts stemming from the thesis of the reality of legal persons both as real and not fictitious entities. These are the so-called realistic theories of the legal person [27].

The representatives of the first school presume that the starting point of the definition of an entity is a biological person, because he is a real person, a creation of nature, while collective entities, organizations (institutions) are a legal fiction (*fictio juris*). For practical reasons, the legislator assumes that these organized entities are somewhat real, and treats them as such. However, in reality there are only individuals and inter-individual relations, while a legal person is an artificial product of the legislative practice [28].

The abstract distinction between legal persons and physical persons in the fiction theory was made possible largely due to the so-called theory of personification, or impersonation, according to which, as soon as a legal person is a fiction, a phenomenon that does not exist in real life and is artificially created by the legal techniques, its representative is the appropriate body-a nominative subject of law. It's them who are legally capable, as they have been created for organizational and representational purposes. Within this theory, Fr. Kroon, explaining the nature of the legal person, emphasizes that it is a personification of a concept that does not exist as a separate corporeal thing [29, p. 87-110].

Resorting to impersonation, jurisprudence examines associations of people and institutions as independent entities participating in public circulation. After all, if the right is the measure of power owned by a person, there can be no right without a subject. However, the practical necessity compels us to ascribe unions and institutions of law the rights other than the rights of their members

and stewards. Consequently, it is necessary to resort to fiction and disseminate the concepts of persons to corporations and institutions, which thus become artificial subjects of law [30, pp. 44-66].

Assuming the two conditions, namely: first, the existence of a material underlayer or a subject (i.e. the aggregate of persons or property), and secondly, the decision of positive law, declaring that the subject is a person, we, according to the fiction theory, thus include specific artifacts of legal activity in the context of laws and regulations: associations, institutions, corporations, etc. [30, p. 91].

It should be noted that the concept of fiction is widely used in law [31]. It is mainly used in the following cases: as a way to overcome the situation of uncertainty; as a means of legal economy and utility; as a way to spread the legal regime of one object to another object, etc. Proponents of the fiction theory used the term fiction not in the sense in which the word “fictio” was used by the Romans [32-33].

In Roman law “fictio” was always a contradiction between the law and the reality (for example, if the reality says that the object is white and the law argues that it is black). However, there is no contradiction if the law creates an object that does not exist in reality, and endows it with certain properties, but the reality does not express its attitude to the object, i.e. does not endow it with the opposite properties. A different understanding of fiction (it’s something that does not exist in reality) entails recognition of all that is created by the human consciousness as fiction, and in this case we would have to call fiction the concepts not only in the field of law but in other spheres of human activity [34, pp. 241-251].

Recognizing the legal person as a real object, we cannot, however, deny its fictional existence [35]. Based on the concept of the legal fiction, it is quite acceptable to justify the possibility of using claims for compensation for moral damage as a way to protect its business reputation. The determination of guilt of a legal person in the administrative and tort law is referred to the same kind of fictions.

CONCLUSIONS

In modern conditions the fiction theory plays an important role in revealing the essence of the legal person. This theory, despite strong criticism, continues to exert considerable influence on the development of legislation and jurisprudence in European and American countries.

Commending the contribution of the fiction theory in the disclosure of the legal nature of the legal person, we should recognize its heuristic value. This can be seen in the following provisions:

- As legal persons do not exist by themselves, but only by the definition of the law, their occurrence is possible only at the behest of or with the permission of the public authorities. Thus, this provision laid the foundations of the theory of registration of the legal person of private law;
- Legal persons as legal fictions lack of will and reason, and therefore the ability to act independently. They can only act through their representatives-the competent authorities, the legal status of which shall be determined by law;
- Legal persons are not able to carry the non-contractual liabilities. The individuals who are directly associated with them are held responsible for illegal actions in criminal (punitive) order.

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