

# »Persona Sine Anima« – Towards an Innovative Classification of Legal Persons

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## **Purpose:**

In this article, the author defines legal entities (in title as »*personas without soul*« according to pope Innocent IV.) and classifies them by applying interest theory and an adapted method of system analysis, also taking into account the legal personality of legal entities. An innovative classification that is applicable not only for *ad hoc* legal-economic analyses but also for a practical classification of legal entities when establishing their personality, concerning both private and public law, is demonstrated in an original manner.

## **Design/Methods/Approach:**

The research approach of this article is theoretical and uses comparative analysis. The author's goal was to prove that legal entities can be classified in a legally-correct and economically-applicable manner, according to the interest and classical theories of systems, and not only through the forms of legal entities recognised in law. The classification originates in the ancient Roman classification of legal entities as corporations and foundations (*universitas personarum, universitas bonorum*) and classifies them according to the criteria of authoritativeness, functionality, and voluntary association. The approaches are compatible and can easily be arranged in a schematic form.

## **Findings:**

The *thema probandi* of this article is to prove that legal entities can be classified in a legally-correct and economically-applicable manner also according to the interest and classical theories of systems and not only through the forms of legal entities recognised in law. The approaches are compatible and can easily be arranged in a schematic form. Such classification of legal persons is appropriate for security studies, as well as for broader economic and legal research.

## **Originality/Value:**

The value of this article is that it proposes a new and original classification of legal entities. This is applicable, in a practical sense, universally and globally. In Slovenia it is applicable in its entirety, and can be partly applicable, however, in cases in which the legal order of a state determines the personality of legal entities, differently than is the case in Slovenia. In such an instance, the table can be easily and quickly adapted, as the criteria for the classification of legal entities into authoritative, functional, and associative, are, in the opinion of the author, universal.

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**Keywords:** legal entity, personality of a legal entity, systemic theory, interest theory, profitability, unprofitability

## »Oseba brez duše« – nasproti inovativni klasifikaciji pravnih oseb

### Namen prispevka:

Avtor je v pričujočem prispevku pravne osebe klasificiral z vidika uporabnosti nove in inovativne tabele za raziskovalne in praktične namene. Pravne osebe (ki jih avtor naslovno imenuje »osebe brez duše« tako kot papež Innocent IV.) je avtor razvrstil po interesni teoriji in preneseni metodi klasifikacije upravnih sistemov, upošteva njihovo pravno subjektiviteto. Originalno je prikazana inovativna klasifikacija, ki je uporabna tako za *ad hoc* pravno-ekonomske analize kot tudi za praktično razvrščanje pravnih oseb pri potrebah za ugotavljanje njihove subjektivitete, pa naj gre za ekonomsko analizo prava, vprašanja zasebnega ali javnega prava ali praktične pravne postopke.

### Metode:

Raziskovalni pristop oziroma metode v članku so kombinacija klasičnih pravnih metod teleološke razlage ureditve v kombinaciji s historično in delno komparativno analizo. Klasifikacija pravnih oseb zgodovinsko izhaja iz antične rimske in nato nemške razvrstitve pravnih oseb na korporacije in ustanove (*universitas personarum, universitas bonorum*) in jih sodobno umešča po merilih oblastnosti, funkcionalnosti in nepridobitnosti (oz. dobrodelnosti).

### Ugotovitve:

*Thema probandi* raziskave, predstavljene v članku, je dokazati, da lahko pravne osebe pravno-pravilno in ekonomsko-uporabno klasificiramo tudi interesno in po klasični teoriji sistemov, ne samo skozi statusno-pravno obliko. Pristopi so med seboj združljivi in se jih da enotno tabelarično prikazati. Takšna klasifikacija je uporabna tako za varnostne študije kot tudi za ekonomske in pravne analize, ko je treba opredeliti subjektiviteto organizacij.

### Izvirnost/pomembnost prispevka:

Izvirnost članka je v oblikovanju nove sodobne klasifikacijske tabele pravnih oseb, ki je uporabna tako za raziskovalne kot za praktične namene. Uporabnost navedene tabele je v njeni hitri uporabi, saj je iz nje *prima vista* razvidno, katere pravne osebe sodijo v javni sektor in katere v zasebnega. Nadalje je iz tabele razviden tudi interes, zaradi katerega so ustanovljene, ki je lahko javni/oblastni ali javni/neoblastni ter zasebni/profitni ali zasebni/neprofitni. Tabela omogoča nazorni pregled nad pravno subjektiviteto organizacij in ločevanje le-teh od organizacij, ki pravne subjektivitete nimajo. To je pomembno tako za delovanje pravnega sistema, pravno-ekonomske raziskave kot tudi za praktične pravne postopke.

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**Ključne besede:** pravna oseba, subjektiviteta pravne osebe, sistemska teorija, interesna teorija, profitnost, neprofitnost

## 1 INTRODUCTION

This article is based on the theoretical assumption that a legal entity is a social organisation, i.e., a special form of a social system. From a systemic-theoretical point of view, we proceed from the assumptions that were formulated and developed by Harvard sociologist *T. Parsons* in the 1950s (Parsons, 1951; Turner, 1991). From a legal point of view, we applied these assumptions using a prism of interest-legal theory (Kelsen, 1992; Pavčnik, 2001) and a contemporary American view of the economic interest of an organisation (Hazlitt, 1962). Furthermore, from a legal point of view, we proceed from an ancient Roman understanding of a legal entity as a corporation or foundation (Bohinc, 2005; Grafenauer & Brezovnik, 2006; Trstenjak, 2003) and from an understanding of the corporate personality, as was developed by *A.W. Machen* in the 1910s (Machen, 1910). By combining these assumptions, we created a new model of a *sectoral and interest-systemic classification of legal entities*.

The *thema probandi* of this article is to prove that legal entities can be classified in a legally-correct and economically-applicable manner according to the interest and classical theories of systems, and not only through the forms of legal entities recognised in law. The approaches are compatible and can easily be arranged in a schematic form. We prove this using an applicative table elaborated in the third section of this article.

In our opinion, such an approach is a theoretical addition to a *Pareto-Parsons* (U. S. Department of Labor, Bureau of Labor Statistics, 2006) conception of social systems, as the classic systemic theory does not take into account that a social system can also have a legal personality. Furthermore, our approach is a new perspective of Machen's model of a corporation as exclusively a public limited company, that in our opinion, corporations can also be authoritative and associative organisations.

The objective of this article is to create a new, relatively simple tool for correctly, quickly, and efficiently classifying legal entities in the public and private sectors, and for distinguishing legal entities regarding their substantive essence (e.g. their profitability, unprofitability, authoritative, and associative natures).

All of the above mentioned is important for a legal-economic analysis of the operation of legal entities, particularly for an economic analysis of law (Zajc, 2009). In the private sector, it is practically applicable for management in business decision-making and management accounting, whereas in the public sector it is applicable in the identification of the functionality of the public interest and the level of authoritativeness of legal entities.

We are aware of the fact that by a sectoral classification of legal entities based on interest and systemic theories, we might be leaving out certain classification elements according to the criteria of other theories. Perhaps we have not included certain *sui generis* forms of legal entities. However, we are of the opinion that the majority of the forms of legal entities are included and that our classification retains essential substantive classification elements and consequently allows for effective *ad hoc* analysis, which is intended for university-level education and quick application in practice.

In the second section of the article, we outline what a legal entity represents from a legal-theoretical point of view and delimited it from other subjects under law, i.e., natural persons. A legal entity is *per definitionem* an artificial legal structure that comprises assets intended for a certain purpose (*universitas bonorum; i.e. foundations*) or a group of individuals (*universitas personarum, i.e. corporations*), whereas a given legal order recognises legal entities the position of subjects under law (Aubelj, 2003; Bohinc & Tičar, 2006; Trstenjak, 2003). The bodies of the legal entity act in its name in legal transactions. Different from natural persons, legal entities, as a general rule, gain legal capacity upon registration in an appropriate register or by means of some other legal act. A legal entity has narrower legal capacity than a natural person, and its contractual capacity is limited by its legal capacity.

In the third section of the article, we classify legal entities by applying an adapted method of system analysis, also taking into account the legal personality of legal entities. In our opinion, such a classification is applicable for study purposes, and is practical, universal, and global. In Slovenia, it is applicable in its entirety, for it is based on the Slovenian legal regulation of the forms of legal entities. The table can be partly applicable, however, in cases in which the legal order of another country determines the personality of legal entities differently than is the case in Slovenia. In such an instance, the table can be easily and quickly adapted, as the criteria for the classification of legal entities are, in our opinion, universal. The classification, as mentioned above, originates in the classification of legal entities into corporations and foundations (Trstenjak, 2003) and classifies them according to the criteria of authoritativeness, functionality, and association.

## 2 DEFINITION OF LEGAL ENTITY

In the legal orders of various countries, two types of subjects are, as a general rule, holders of individual property rights, i.e., natural persons and legal entities.

Natural persons are humans and in law, they are also known as individuals. Legal entities are not humans, but organisations that are artificial legal subjects established by legal acts. Legal entities are artificial social structures that are granted legal personality by law (Tičar, 2012).

A legal entity is an artificial social structure whose legal personality is based on a legal fiction (Aubelj, 2003) and is a special institution under law - *persona ficta* (Dewey, 1926). The legal personality of a legal entity entails that legal entities, in addition to natural persons, are the subjects (Bradač, 1990) that can hold the majority of property rights and obligations or duties that are recognised to them by the legal order (Trstenjak, 2003).

A legal entity is an organisation and a social system that has legal and contractual capacities and acts as an independent subject in legal transactions. A legal entity does not begin naturally by birth, as a natural person, but legally by its articles of association, which are always a legal act.

The legal order recognises a legal entity the status of a subject under law and legal capacity due to its particular characteristics. The legislation prescribes the

conditions for the establishment and existence of legal entities, such as the purpose of the establishment of the legal entity, its bodies, organisation, and assets.

## 2.1 Corporations and Foundations as Legal Entities

As mentioned above, from a legal point of view there are two forms of legal entities:

1. as a result of an association of other persons – *a corporation*, and
2. as assets intended for a special purpose – *a foundation*.

A corporation (*universitas personarum*) is a membership organisation intended for the purposes of its members. The essential elements of a foundation are assets (*universitas rerum, universitas bonorum*) which the founder(s) intend(s) for a special purpose. A foundation does not have members, but only assets intended for a certain purpose.

A corporation is a different type of a legal entity. A defining element of a corporation is that it unites several entities in a manner such that a new entity is established. From a legal point of view, a new entity is different from those united in a corporation. The individuals or entities that establish a corporation are its founding members. They can be legal entities or natural persons (in certain cases, one founder suffices to establish a corporation; e.g. under Slovenian law one founder suffices to establish a limited liability company). However, from a legal point of view, the essence of a corporation is that it remains an entity, regardless of the fact that its members change (Trstenjak, 2003).

The members of a corporation form and express the will of the corporation by appointing its management (e.g., the president of a society, the director of a limited liability company, the management or management board of a public limited company, etc.).

The legal sphere of the property rights of the corporation is separated from the legal sphere of the property rights of its members (i.e. shareholders). If a corporation is a company with shared capital, the legal order prescribes minimal founding capital for the protection of the creditors of the corporation. The members do not have any rights regarding the assets of the legal entity, as it is itself the holder of its rights. Members have membership or corporate rights in relation to the corporation. In cases of companies with share capital, they may appoint management, participate in the annual profit distributions (i.e. dividends) in proportion to their share, and participate in the liquidation of the estate in the case of the termination of the corporation by liquidation.

The bodies of the corporation (i.e. the president, director, management, and management board, depending on the form of the corporation) act in its name in legal transactions. Members of the corporation influence the management and business operations of the corporation by appointing or electing the bodies and by giving them instructions regarding the relevant circumstances.

The two main types of public sector corporations are the state and municipalities. The members of the state are the citizens and legal entities that

have their head office in the territory of the state. Municipalities, and in certain instances localities, if they have their own legal personality in accordance with the municipal charter, are also corporations.

In the private sector, corporations are commercial or associative. Commercial corporations include most of all companies with shared capital. Partnerships are not classified among corporations, as in the legal order they usually do not have legal personality. Associative private corporations include societies with their members, religious communities with their members; believers, political parties with party members, and trade unions with trade union members.

A foundation, on the other hand, is a legal entity whose basis are assets. The foundation's assets are managed by the management for a certain purpose. Foundations do not have members or shareholders, but only management and possibly other bodies as determined by law. A surplus of income over expenditures from business activities and financing is directed towards the purpose for which the foundation was established and may not be distributed as profit to its founders. In the private sector, foundations are private foundations, whereas in the public sector they are public funds.

## 2.2 The Legal Personality of a Legal Entity

Legal personality is a legal characteristic of subjects so that they can be holders of legal rights and obligations (Martin, 2003). For a definition of the legal personality of a legal entity, it is essential that it can be a holder of property rights and obligations in legal transactions. The state, through its legal order, recognises legal personality to a legal entity so that it defines it by law as a special subject under law.

As a general rule, it applies that there is a limited number of legally recognised forms of legal entities. This is the principle of a closed number or the *numerus clausus* principle. This principle fully applies to the private sector, whereas in the public sector it applies only partly, as the legislature can always introduce a new form of legal entity by a new *lex specialis* (Pirnat, 1995).

The state is also a legal entity, whose legal personality is recognised by other states and consequently by the international legal orders (Shaw, 2003).

A legal entity is thus an organisation having legal capacity and an independent subject in legal transactions. In order for a certain organisation in a certain legal order to acquire the status of legal entity (i.e. legal personality), basic conditions must be fulfilled, including:

1. there must be a certain purpose for establishing the legal entity;
2. there must be means to achieve such purpose of the legal entity;
3. there must be management (and other bodies) necessary to achieve the purpose of the legal entity; and
4. it must have a legally admissible organisational form of a legal entity (Trstenjak, 2003).

The legal personality of a legal entity furthermore entails that:

1. it can own movable property and real estate;
2. it can acquire property rights and assume obligations;
3. it can sue and be sued; and
4. it is responsible for its obligations with all its assets (Bohinc & Tičar, 2006).

The legal order recognises a legal entity having the status of a subject under law and legal capacity due to its particular characteristics. In order to define a legal entity from the legal point of view, the basic defining elements of its status as a legal subject must be identified. These are:

1. its form as a legal personality;
2. the designation of its name in legal transactions (i.e. the name of the company);
3. its head office, i.e. the place where the legal entity is based;
4. its activity – production or services; and
5. the means necessary for its operations (e.g. minimal founding capital in the case of companies with share capital).

From the perspective of legal transactions, it is most important that the legal entity has legal capacity and contractual capacity. The legal capacity of a legal entity entails that it is capable of being a holder of rights and obligations. This is passive capacity. Legal capacity is a characteristic of a legal entity, and is not a special right, but the foundation of all rights and obligations. The abstract nature of legal capacity entails that a legal entity is capable of accepting certain rights and obligations in legal relations, if the conditions that are prescribed particularly for such are fulfilled. Furthermore, the general nature of legal capacity entails that it refers to all property rights (except for those property rights granted only to individuals) and legal relations, and that there are no reservations for the acquisition of any of the specific rights and legal positions if the conditions for such are fulfilled.

In addition to legal capacity, legal entities must also have contractual capacity in order to enter into legal transactions. This is active capacity. Contractual capacity is the capacity to perform legally binding actions, which is, as a general rule, expressed by the management of the legal entity in its name. Legal entities gain both capacities simultaneously, i.e. when management is appointed and a decision on their registration in an appropriate register becomes final.

The capacity to act is the capacity to form the legal entity's will regarding its business operations. Management, as the legal representative of a legal entity, has such capacity and it entails the capacity to decide on facts that cause legal consequences. Contractual capacity is also the capacity to form a will regarding business operations and express decisions in a manner such that a legal entity enters into legal relations. It thus concerns the capacity to express the will of the legal entity regarding business operations in a legally effective manner. The contractual capacity of a legal entity is the capacity of its management to form and express the legal entities will regard business operations in its name and on its account.

## 2.3 The Economic Reasons for the Legal Regulation of a Legal Entity as a Special Subject under Law

Why is the regulation of a legal entity as a special subject under law at all necessary?

The answer can be found in substantive logic, which in law is economic in nature, as a general rule.

Historically, the concept of the personality of a legal entity arose in medieval, Catholic ecclesiastical law. According to the American legal historian John Dewey, the author of the idea was Pope Innocent IV (1195–1254), who gave legal personality to monasteries in order to separate their assets from the assets of monks. Such a monastery with legal personality was named a *persona ficta*. The reason for the introduction of the concept of the *persona ficta* was originally economic, as a *persona ficta* did not have a soul and thus could not be guilty of property offences (Dewey, 1926).

Similarly, a legal entity is also today an artificially created entity for economic reasons. From a legal point of view, the reason for such is so that it can be a holder of property rights and obligations equal to a natural person. Property rights are in general economic rights.

A property right in the context of contemporary understanding of the personality of legal entities represents a protected individual and concrete entitlement of subjects under law (Pavčnik, 2001; Perenič, 2005). Legal entities and natural persons are equal holders of property rights, unless the legal order explicitly reserves such only for natural persons (e.g., personal easements).

From a theoretical point of view, a property right entails a legally protected property entitlement (*facultas agendi*), and on the basis of a property right, a subject has a legal entitlement to act in a certain manner. In cases of property-related legal rights, by means of its coercive apparatus, the state protects the private interests of the subject (e.g. property) that are in actual or potential conflict with the interests of other subjects. The interests of a subject may also be in conflict with the interests of the state; however, a state governed by the rule of law must protect the subject's interests to the subject's benefit, not its own. Therefore, only law, as a special and unique normative system, in fact restricts the arbitrary or discretionary use of the monopolistic power of the state (Pavčnik, 2001).

The property right of a subject under law always entails the property obligation of other subjects to act in a certain manner or to refrain from certain conduct to the benefit of the subject who has the property right.

A legal right is a double and ambiguous term. In its substance, every property right is comprised of the legally protected property interest of one legal subject and the legally determined property duty of other legal subjects. On the whole and from the viewpoint of both, a right is in fact a claim right, as upon its legal implementation an exchange of legally protected interests between both subjects occurs.

A property right is comprised of two entitlements: a basic property entitlement and a property claim. A basic entitlement allows subjects to exercise their own interests if they are in accordance with the legal purpose of the entitlement. A legal claim contains the possibility that the state will, in the interest of the subject,



impose a coercive sanction if a subject who has an obligation arising from the right does not act in accordance with their obligation.

A property right, on the one hand, thus contains a property entitlement of one subject, and a duty or obligation of other subjects, on the other. Therefore, broadly speaking (e.g. in accordance with the will theory and the interest theory), a property right is always a claim right of the subject (Aubelj, 2003).

A property right is absolute if it applies to everyone (i.e. with *erga omnes* effect; e.g. an ownership right, an easement, a lien, a land debt). However, a property right is relative if it applies only between given subjects (Pavčnik, 2001).

The essence of the existence of a legal entity is that the legal order recognises it to be a holder of rights and obligations equal to a natural person, unless such rights are reserved exclusively for individuals (e.g. moral copyright is reserved only for a person and not for a legal entity).

### 3 NEW CLASSIFICATION OF LEGAL ENTITIES

As mentioned above, legal entities are social organisations that are holders of property rights and represent a group of membership, or property-oriented entities that mutually cooperate in order to achieve a common, specific, and legally admissible objective. In general, organisations are established, founded, and created to achieve certain objectives.

Subjects establish organisations or are included therein in order to achieve one of the set objectives. Such objectives are thus a primary element of an organisation. Objectives entail what the organisation wants to achieve, and therefore are the basic starting points for the decision-making and operations of the organisation.

The general elements of an organisation are the following: (1) the objectives of the organisation; (2) the personal substrate (the people in the organisation); (3) the material substrate (the means of the organisation); (4) the independence of the organisation; and (5) its internal organisational structure (Grafenauer & Brezovnik, 2006).

The elements of the organisation as a legal entity are the same as in all other organisations. However, the elements of organisations, i.e. legal entities, also have distinctive characteristics. The latter are the only organisations having a legal personality (Pusić, 2002).

As organisations, and with regard to their objectives and manner of operation, legal entities are divided into: (1) territorial legal entities in the public sector; (2) functional legal entities in the public and private sectors; and (3) associative-voluntary legal entities in the private sector which operate in the public or private interests (Grafenauer & Brezovnik, 2006). The structure of legal entities as organisations is shown in the Table 1.

| PUBLIC SECTOR –<br>PUBLIC (INCLUSIVE) INTEREST   |  | PRIVATE SECTOR –<br>PRIVATE (EXCLUSIVE) INTEREST            |  |  |
|--|--|---|--|--|
| <b>1. SYSTEMIC CLASSIFICATION ACCORDING TO THE TYPE OF A LEGAL ENTITY AS A SOCIAL SYSTEM</b>                             |  |   |  |  |
| TERRITORIAL AND<br>AUTHORITATIVE<br>LEGAL ENTITIES<br>(CORPORATIONS)   |  | FUNCTIONAL LEGAL ENTITIES<br>(FOUNDATIONS AND CORPORATIONS) |  | CHARITABLE-<br>VOLUNTARY<br>LEGAL ENTITIES<br>(CORPORATIONS) |
| <b>2. INTEREST CLASSIFICATION ACCORDING TO THE TYPE OF INTERESTS NECESSARY FOR THE ESTABLISHMENT OF THE LEGAL ENTITY</b> |  |   |  |  |
| PUBLIC<br>AUTHORITATIVE<br>INTEREST  | PUBLIC<br>NON-ECONOMIC<br>INTEREST   | PRIVATE<br>NON-ECONOMIC<br>INTEREST                         | PRIVATE<br>ECONOMIC<br>INTEREST  | PRIVATE NOT-FOR-<br>PROFIT INTEREST<br>table                 |
| <b>3. LEGAL CLASSIFICATION ACCORDING TO THE CLASSIC TYPES OF LEGAL FORMS OF LEGAL ENTITIES</b>                           |  |   |  |  |
| PUBLIC NOT-FOR-<br>PROFIT<br>CORPORATIONS  | PUBLIC PARTLY FOR-<br>PROFIT FOUNDATIONS   | PRIVATE PARTLY<br>FOR-PROFIT<br>FOUNDATIONS                 | PRIVATE FOR-PROFIT CORPORATIONS  | PRIVATE NOT-FOR-<br>PROFIT<br>CORPORATIONS                   |
| STATE  | PUBLIC INSTITUTIONS<br>(NOT-FOR-PROFIT)  | PRIVATE<br>INSTITUTIONS<br>(NOT-FOR-PROFIT)                 | COOPERATIVES<br>(BUSINESS COOPERATION BETWEEN MEMBERS,<br>RISTORNO)<br>COMMERCIAL ASSOCIATIONS (BUSINESS<br>COOPERATION BETWEEN MEMBERS) | SOCIETIES  |
|  | PUBLIC AGENCIES  | PRIVATE<br>INSTITUTIONS WITH<br>CONCESSION                  | COMMERCIAL COMPANIES – ABSOLUTELY PROFIT-<br>ORIENTED LEGAL ENTITIES (FOR-PROFIT)  | FEDERATIONS OF<br>SOCIETIES                                  |
| MUNICIPALITIES<br>(LOCALITIES IF<br>THEY ARE LEGAL<br>ENTITIES)  | PUBLIC FUNDS   | FOUNDATIONS   | COMPANIES WITH SHARE<br>CAPITAL  | PARTNERSHIPS   |
|  | PUBLIC COMMERCIAL<br>INSTITUTIONS  |   | PUBLIC LIMITED<br>COMPANIES<br>(LIMITED PARTNERSHIPS<br>WITH SHARE CAPITAL)  | UNLIMITED<br>COMPANIES                                       |
|  | <i>SUI GENERIS</i><br>CORPORATIONS (PUBLIC<br>AND PRIVATE), e.g.<br>SLOVENIAN ACADEMY<br>OF SCIENCES AND ARTS,<br>PUBLIC CHAMBERS,<br>PRIVATE CHAMBERS |   | LIMITED LIABILITY<br>COMPANIES   | LIMITED<br>PARTNERSHIPS                                      |

**Table 1: Sectorial  
(interest-systemic,  
legal) classification  
of legal entities**

In Table 1, legal entities are classified into the public or private sector regarding sectoral, systemic, interest, and legal-organisational criteria. The table is based on the following theoretical assumptions:

1. sectoral division into public and private sectors;
2. the interest theory of the general theory of law (*Kelsen's model*);
3. the systemic theory (*Parsons' model*) of an organisation as a social system; and
4. the general (*ancient Roman model*) theory of legal entities.

The table can be read vertically and/or horizontally. If read vertically, a line between the public and private sectors that divides legal entities into legal entities under public law and legal entities under private law can be seen. Horizontally, interests and the types of legal-organisational forms are shown. The primary characteristic of the public sector is that it serves the public interest, and of the private sector that it serves the private interest. The public interest is authoritative and is served by the state and municipalities, i.e. it is »functional and non-economic«, which is demonstrated mostly through the provision of public

services. The latter is ensured by specialised entities under public law that are not a part of the state or municipal administrations. A private interest is functional and associative-voluntary.

The first is either non-economic and served primarily by private institutions, or economic, which entails an interest in profit. It is served by companies with share capital and partnerships. However, this may also entail an interest in business cooperation between members and not primarily in profit. It is a foundation for the establishment of cooperatives and commercial associations. Special legal entities, such as societies, religious communities, and trade unions carrying out voluntary activities serve private interests.

In Table 1 the public sector comprises, *de lege lata*, in addition to the state and municipalities, non-economic activities of public importance that are, in accordance with the law, organised directly by the state or local administration, with the assistance of entities under public law (e.g. public institutions, public agencies, public funds) and which are not an integral part of the authoritative (territorial) public administration. The mere fact that the state or a local community has a capital investment in a given subject under law does not entail that it is a subject of the public sector. Regardless of the fact that the legal character of such investment is public (i.e. state, local) ownership, the legal regime over its management from the viewpoint of the status of employees and of the market is predominantly that of private law (apart from exceptional cases in the field of public procurement and public-finance reporting, in which also such legal entities are obliged to carry out public procurement procedures and public-finance reporting). If, for example, the case concerns a company owned by the state (e.g. The Postal Service of Slovenia, Slovenian Railways, The Port of Koper), the applicable legal regime is that of private law and the regulatory function of the state may not influence its capital entitlements.

## 4 DISCUSSION

One practical value of this table is its quick application. It is *prima vista* evident from the table which legal entities are a part of the public sector (i.e. the state, municipalities, and functional legal entities under public law) and which fall under the private sector (i.e. commercial companies, cooperatives, commercial association, societies, and other subjects under civil law). Furthermore, the interests due to whom legal entities are established are clearly evident from the table, and such interests can be public/authoritative or public/non-authoritative (Vodovnik, 2013), or private/profit or private/not-for-profit.

Thus, in the Republic of Slovenia, the state and all territorial communities having legal personality (i.e. municipalities and localities if they have legal personality in accordance with the municipal charter) are included within the scope of authoritative legal entities. Territorial legal entities are legal entities whose activities are directed at a certain territory and at dealing with problems concerning the life and public interests of such territory. A key characteristic of territorial legal entities is authority. An authority (sociologically defined as power)

entails that one subject can impose their will on another. Territorial legal entities are the only type of legal entity that can subordinately impose the will of the public interest on other subjects, regardless of the fact whether such other subjects want or accept it. The fundamental functions of territorial legal entities include carrying out so-called regulative functions as well as ensuring and creating general possibilities for the life and work of the people, and the functioning of commercial and other legal entities in the given territory. They provide for carrying out activities in numerous areas; for example, the security of people and property, the functioning of political and economic systems, and the functioning of all necessary economic and other activities. A characteristic of territorial legal entities is that they have political authority that they can use within the framework of constitutional and statutory provisions when performing their tasks. Such authority entails the ability to implement decisions even if »addressees« resist.

Non-authoritative functional organisations include specialised legal entities under public law (e.g. public institutions) and specialised legal entities under private law (e.g. private institutions in the field of social activities and commercial companies). In the case of functional legal entities, neither authority nor territory plays a decisive role. These are primarily organisations that function in accordance with market principles.

Public functional legal entities (e.g. public institutions) carry out service activities (e.g. public services of general interest) in the public interest, and it can be established from the interest part of the table that these legal entities are *not-for-profit* oriented. They are not pure non-profit organisations, as they are allowed by law to make a profit from accessory activities. Most of all, these organisations carry out social activities (e.g. services in the fields of health care, education, culture, sport, child care, care for the elderly). In as much as such services are provided by entities under public law, they are public services of general interest. The *not-for-profit* orientation entails that such legal entities may not primarily make a profit, they may, however, make such by accessory (market) activities. That is to say, making a profit is not prohibited by law; it is, however, of secondary importance. Social activities have priority. Inasmuch as they make a profit, such may not be distributed to the founders, but must be invested back into the activity.

The situation is different in the case of commercial companies, which are functional legal entities whose purpose is to make an economic profit. They are (apart from rare exceptions) exclusively *for-profit* oriented and established so that they provide new value (i.e. capital profit and dividends) to their members or shareholders.

However, in the Slovenian tax system, all functional organisations are taxed in the same manner, as are those that carry out public services who must pay the income tax imposed on legal entities (i.e. the corporate tax) on all income made on the market in a business year outside the scope of the public service.

Associative and voluntary legal entities are legal entities that individuals join voluntarily in order to fulfil their personal and non-profit interests. These are pure *not-for-profit* organisations. Some of them are prohibited by law from making a profit (e.g. political parties, religious communities, trade unions), and

are established within the framework of voluntary activities, e.g. clubs, churches, trade unions, political parties.

Such organisations also include societies that may carry out authoritative tasks in the public interest on the basis of public authority (e.g. vehicle registration, issuing vehicle registration certificates). However, they may also include religious communities and political parties, which are prohibited by law from bearing public authority.

In short, the present *sectoral classification of legal entities* enables readers and users to correctly and quickly classify individual subjects under law in the public or private sectors and simultaneously offers the possibility to separate individual bodies of legal entities (e.g. state authorities, such as courts, the national legislature, the government, or municipal bodies such as municipal administrations, municipal councils) from legal entities as such.

Thus, the table demonstrates that the owner of a police vehicle is not the police, but the Republic of Slovenia as the state. It is also not possible to sue a court, but the Republic of Slovenia as the state.

An entity and not a body of the entity can be a holder of property rights; therefore the legal personality of a legal entity is particularly relevant for a clear understanding of the functioning of the legal system.

## REFERENCES

- Aubelj, B. (Ed.). (2003). *Pravo: leksikon*. Ljubljana: Cankarjeva založba.
- Bohinc, R. (2005). *Pravne osebe javnega prava*. Ljubljana: GV Založba.
- Bohinc, R., & Tičar, B. (2006). *Upravno pravo – splošni del*. Ljubljana: Fakulteta za varnostne vede.
- Bradač, F. (1990). *Latinsko-slovenski slovar*. Ljubljana: Državna založba Slovenije.
- Dewey, J. (1926). The historic background of corporate legal personality. *Yale Law Journal*, 35(6), 655–673.
- Grafenauer, B., & Brezovnik, B. (2006). *Javna uprava*. Maribor: Pravna fakulteta.
- Hazlitt, H. (1962). *Economics in one lesson: The shortest and surest way to understand basic economics*. New York: Three Rivers Press.
- Kelsen, H. (1992). *Reine Rechtslehre von Hans Kelsen*. Wien: Österreichische Staatsdruckerei.
- Machen, A. W. (1910). Corporate personality. *Harvard Law Review*, 24(4), 253–267.
- Martin, E. A. (2003). *Oxford dictionary of law* (7th ed.). Oxford: Oxford University Press.
- Parsons, T. (1951). *The social system*. Glencoe: The Free Press.
- Pavčnik, M. (2001). *Teorija prava: prispevek k razumevanju prava*. Ljubljana: Cankarjeva založba.
- Perenič, A. (2005). *Uvod v razumevanje države in prava*. Ljubljana: Fakulteta za policijsko-varnostne vede.
- Pirnat, R. (1995). Osebe javnega prava: prispevek k reinstituciji pojma v slovenskem pravu. *Javna uprava*, 31(4), 477–492.
- Pusić, E. (2002). *Nauka o upravi*. Zagreb: Školska knjiga.
- Shaw, M. N. (2003). *International law*. Cambridge: Cambridge University Press.
- Tičar, B. (2012). *Understanding state and the law*. Maribor: Inštitut za lokalno samoupravo in javna naročila.

- Trstenjak, V. (2003). *Pravne osebe*. Ljubljana: GV založba.
- Turner, B. S. (1991). *The social system/Talcott Parsons*. London: Routledge.
- U. S. Department of Labor, Bureau of Labor Statistics. (2006). *Occupational outlook handbook* (2006-07 ed.). Washington: U. S. Bureau of Labor Statistics, Office of Occupational Statistics and Employment Projections.
- Vodovnik, Z. (2013). Employment relationships in the public sector: A balance between the state, local and autonomous regulations. *Lex localis*, 11(3), 497–512.
- Zajc, K. (2009). *Ekonomska analiza prava*. Ljubljana: Uradni list Republike Slovenije.

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