

## **Jurisprudence**

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Short notes, detailed study is suggested to the students.

### **“Theories of Legal Personalities”**

#### **INTRODUCTION:**

The decision of House of Lords in Salomon v A Salomon & Co. Ltd had a lasting influence in corporation law. It is often credited with the principle of separate legal entity of the corporation distinct from the members.

Though there is no doubt that the Salomon case had play a significant role in company law, the decision in this case was hardly the origin of the separate legal entity principle. The legal entity of beings other than the human has long been recognized prior to 1897, in which the Salomon case was decided.

The jurisprudence theories on juristic person had been established since the early Roman law to justify the existence of legal person other than the human. The State, religious bodies and education institutions had long been recognized as having legal entity distinct from the members.

The acceptance of the corporate personality of a company basically means that another non-human entity is

recognized to assume a legal entity. This can be seen from the many theories of jurisprudence on corporate personality. Majority of the principal jurisprudence theories on corporate personality contended that the legal entity of the corporation is artificial. The fiction, concession, symbolist and purpose theories supported the contention that existence of corporation as a legal person is not real. It only exists because the law of the state recognized it as legal person and it is recognized either for certain purpose or objectives. The fiction theory, for example, clearly stated that the existence of corporation as a legal person is purely fiction and that the rights attached to it totally depend on how much the law imputes upon it by fiction.

### **THE COMMON-LAW PERSPECTIVES:**

Generally, there are two types of person which the law recognized, namely the natural and artificial person. The former is confined merely for human beings while the latter is generally referred to any being other than human being which the law recognized as having duties and rights . One of the most recognized artificial persons is the corporation.

Legal scholars, particularly the jurists, have always explored the issue on the recognition of corporation as a legal person. In the study of jurisprudence, the separate legal personality of corporation is based upon theories, which are concentrated upon the philosophical explanation of the existence of personality in beings other than human individuals.

W. Friedman stated that: “All law exists for the sake of liberty inherent in each individual; therefore the original concept of personality must coincide with the idea of man.”

Even though there are many theories which attempted to explain the nature of corporate personality, none of them is said to be dominant. It is claimed that while each theory contains elements of truth, none can by itself sufficiently interpret the phenomenon of juristic person.

Nonetheless, there are five principal theories, which are used to explain corporate personality, namely,

- the fiction theory,
- realist theory,
- the purpose theory,
- the bracket theory and
- the concession theory.

## **THE FICTION THEORY:**

The fiction theory of corporation is said to be promulgated by Pope Innocent IV (1243-1254). This theory is supported by many famous jurists, particularly, Savigny and Salmond. **According to this theory, the legal personality of entities other than human beings is the result of a fiction.** Hence, not being a human being, corporation cannot be a real person and cannot have any personality on its own. Originally, the outward form that corporate bodies are fictitious personality was directed at ecclesiastic

bodies. The doctrine was used to explain that the ecclesiastic colleges or universities could not be excommunicated or be guilty of a delict as they have neither a body nor a will. The famous case of *Salomon v A Salomon Co Ltd* is a proof of the English court adoption of the fiction theory. In this case, Lord Halsbury stated that the important question to decide was whether in truth an artificial creation of the legislature had been validly constituted. It was held that as the company had fulfilled requirements of the Companies Act, the company becomes a person at law, independent and distinct from its members.

Salmond, made it clear that a human being is the only natural person while legal persons govern any subject matter other than a human being to which the law attributes personality. States, corporations and institutions cannot have rights of a person but they are treated as if they are persons. Under this theory, rights and duties attached to corporation as artificial person totally depend on how much the law imputes to it by fiction.

The personality the corporation enjoys is not inherent in it but as conceded by the state. Due to the close connection made in this theory as regards to relation of legal personality and the power of the state, fiction theory was claimed to be similar to the theory of sovereignty of state which is also known as the concession theory.

## **THE CONCESSION THEORY:**

The concession theory is basically linked with the philosophy of the sovereign national state. It is said to be essentially a product of the rise of the national state at a

time when there were rivals between religious congregations and organizations of feudal origin for the claim of national state to complete sovereignty. Under the concession theory, the state is considered to be in the same level as the human being and as such, it can confer on or withdraw legal personality from other groups and associations within its jurisdictions as an attribute of its sovereignty. Hence, a juristic person is merely a concession or creation of the state.

Concession theory is often regarded as the offspring of the fiction theory as it has similar claim that the corporations within the state have no legal personality except as it is conceded by the state. Exponents of the fiction theory, for example, Savigny, Dicey and Salmond are found to support this theory. Nonetheless, it is that while the fiction theory is ultimately a philosophical theory that a corporation is merely a name and a thing of the intellect, the concession theory is indifferent as regards to the question of the reality of a corporation in that it focuses on the sources of which the legal power is derived. Dicey took the view that sovereignty is merely a legal conception which indicates the law-making power unrestricted by any legal limits.

### **THE PURPOSE THEORY:**

This theory is also known as the theory of Zweckvermogen. Similar to the fiction and concession theories, it declares that only human beings can be a person and have rights. Entities other human is regarded as an artificial person and merely function as a legal device for protecting or giving effect to some real purpose. As corporations are

not human, they can merely be regarded as juristic or artificial person. Under this theory, juristic person is no person at all but merely as a “subject less” property destined for a particular purpose and that there is ownership but no owner. The juristic person is not constructed round a group of person but based on the object and purpose. The property of the juristic person does not belong to anybody but it may be dedicated and legally bound by certain objects. This theory rationalized the existence of many charitable corporations or organizations, such as trade unions, which have been recognized as legal persons for certain purposes and have continuing fund. It is also closely linked with the legal system which regard the institution of public law (Anstalt) and the endowment of private law (Stiftung) as legal personalities.

### **THE BRACKET or SYMBOLIST THEORY:**

This theory is also known as the “bracket” theory. It was set up by Ihering and later developed particularly by Marquis de Vareilles-Sommières. Basically, this theory is similar to the fiction theory in that it recognizes that only human beings have interests and rights of a legal person. According to Ihering, the conception of corporate personality is essential and merely an economic device by which simplify the task of coordinating legal relations. Hence, when it is necessary, it is emphasized that the law should look behind the entity to discover the real state of affairs. This is clearly in line with the principle of lifting of the corporate veil. Under this theory, rights are not inherent attributes of the human will and that an individual

is not a subject of right by reason that he possesses a will. On the contrary, the will is at the service of law and it is the interest of man which the law protects.

The symbolist theory is often acknowledged for its availability to justify corporate personality from non-legal facts but it has been repeatedly rejected by the courts in common law jurisdictions because it denies the law by deducing that the only legal relation which is fixed and certain can be discovered by removing the 'brackets' of the corporation and analyzing the relations of the human beings involved.

## **THE REALIST THEORY:**

The founder of this theory was a German jurist, Johannes Althusius while its most prominent advocate is Otto von Gierke, who not only responsible for the scholarly wisdom of his writings but also as the challenger to the entire basis of Roman jurisprudence.

According to this theory, a legal person is a real personality in an extra juridical and pre-juridical sense of the word. It also assumes that the subjects of rights need not belong merely to human beings but to every being which possesses a will and life of its own. As such, being a juristic person and as 'alive' as the human being, a corporation is also subjected to rights.

Under the realist theory, a corporation exists as an objectively real entity and the law merely recognizes and gives effect to its existence. The realist jurist also contended

that the law has no power to create an entity but merely having the right to recognize or not to recognize an entity.

A corporation from the realist perspective is a social organism while a human is regarded as a physical organism. The realists contended that action of the corporation is deemed to be carried out on its own, similar to the way of the normal person and not by its agents or representatives like those of the incapable, such as the infant and insane. While human uses his bodily organ to do an act, the corporation uses men for that purpose. Some of the realist theory followers even claimed that similar to the human being, juristic person also has organs.

This theory is found to be favored more by sociologists rather than by lawyers. While discussing the realism of the corporate personality, most of the realist jurist claimed that the fiction theory failed to identify the relation of law with the society in general. The main defect of the fiction theory according to the realist jurist is the ignorance of sociological facts that evolved around law making process. Hence, by ignoring the 'real capacity and functions' of corporation in the real world, the fiction jurists had failed to see the 'live' possessed by a corporation. The realist contended that by rejecting the fiction theory, one would succeed to reject an abstract conception and untrue account of the reality with which the practical lawyer has to deal.

According to the realist jurist, lawyers have to acquire the habit to depart from the plain meaning of law and go behind the scenes of the legal platform for the realization and justice which law is supposed to introduce to life.



## CONCLUSION:

From the discussion on jurisprudence theories of corporate personality, it is observed that main arguments lie between the fiction and realist theories.

The fiction theory claimed that the entity of corporation as a legal person is merely fictitious and only exist with the intendment of the law. On the other hand, from the realist point of view, the entity of the corporation as a legal person is not artificial or fictitious but real and natural. The realist also contended that the law merely has the power to recognize a legal entity or refuse to recognize it but the law has no power to create an entity.

Referring to the English company law case law, it can be seen that in most cases, the court adopted the fiction theory. **Salomon v A Salomon Co Ltd** is the most obvious example. It is also observed that fiction theory provide the most acceptable reasoning in justifying the circumstances whereby court lifted the corporate veil of corporation.

If the entity of the corporation is real, then the court would not have the right to decide the Circumstances where there is separate legal entity of the corporation should be set aside. No human being has the right to decide circumstances whereby the entity of another human being should be set aside. Only law has such privilege.

Nonetheless, the realist contention that the corporation obtain its entity as a legal person not because the law granted it to them but because it is generated through its day to day transaction which are later accepted and recognized by law also seem acceptable.