

An Analysis of the Concepts and Theories of Legal Personality under Common Law

By

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Abstract

The paper analysed the concepts and theories of legal personality. The study was motivated by the fact that the concept of legal personality is mixed up with complexities as a result of different competing theories each trying to explain the concept in line with its perspective. It is against this, that the paper appraised the issues of legal personality. In achieving this a doctrinal method was adopted. Having analysed the theories it was found that no theory takes into account all of the personality problems and finally concluded by recommending that in dealing with issues of personality all the theories should be taken into consideration as there is theoretical sense in each theory and it is not easy to say how much of its affects a particular decision.

Keywords: *concepts, Theory, Legal Personality, Natural Person, Juristic Person.*

1.1 Introduction

The main object of law is to regulate the relationship between individuals in the society. The validity of the acts and omissions of persons is determined on the basis of their reasonableness. All those acts which do not adversely affect the interest of others are held to be lawful whereas the acts which interfere with others right are invalidated by law for the protection of interests of mankind. Therefore rights and duties form the basis for judging legality of mans acts. The law imposes liability for unreasonable and unlawful acts, the enforcement of which is ensured through legal sanctions. The law being concerned with regulating the human conducts, the concept of legal/juristic personality constitutes an important subject matter of jurisprudence for there cannot be rights and duties without a person in law.

This paper is therefore aimed at determining who are legal/juristic persons that can be subject to rights and duties in law? As good understanding of the concept of legal personality will enhance justice delivery in the administration of justice.

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1.2 Origin of the Concept of Legal Personality

The word person is derived from the Latin word "persona" which meant a mask worn by actors playing different roles in a drama. Until sixteen century the word was used to denote the part played by a man in life. Thereafter, it began to use in the sense of a living being capable of having rights and duties¹.

Many writers have restricted the use of the term personality to human beings alone because it is only them who can be subject-matter of rights and duties, and therefore of juristic personality. But it must be stated that the term has a far wider connotation in law and includes gods, angles, idols², corporation³, etc. though they are not human beings. Conversely, there may be living persons such as slaves, who are not treated as person in law because they are not capable of having rights and duties. Likewise, in Hindu law an ascetic "sanyasi" who has renounced the world ceases to have any proprietary rights and his entire estate is passed on his heirs and successors and his legal personality is completely lost.

The theologians, use the term personality to designate the members of the trinity and later on the trinity were designate as personae. The philosophers made in equal to true essence of life laying more emphasis upon nationality. Some of the philosophers twisted it to the side of ethics and maintained that personality may be regarded as an ethical rather than a metaphysical conception. There are still thinkers who-consider personality as "the ideal and perfect attribute of 'being' never fully attained by human kind"⁴

1.3 Definition of Terms

1.3.1 Person

Many definitions of persons have been given by various jurists, they have defined persons in different ways. The German jurist Litelmana considers it as the essence of legal personality. To quote him "personality is the legal capacity of will, the bodiliness of men for their personality a wholly irrelevant attribute. Salmond defines a person as, any being to whom the law regards as capable of rights or duties Any being that is so capable, is a person whether human being or not and nothing that is no so capable is a person even though he be a man" . According to Paton, a legal personality is a particular device by which law creates units to which it ascribes certain powers. It is merely a convenient juristic device by which the problem of organizing rights and duties is arise out. He also defines legal personality as a medium through which some such units are created in whom

¹ Legally speaking "acts" also includes opinion

² In India idols are legal persons as decided by the Privy Council in *Pramatha Nath Mulick V. Pradyuma Kumar Mulick*, (1925), LR 52, Ind. App. 252

³ *Solomon V Solomon & Co* (1887) Act, 22

⁴ Allport G.W. (1972), *Jurisprudence*, Loxterb, London, Pp. 114

rights can be vested. According to Gray, a person is “an entity to which rights and duties may be attributed.”⁵

According to the German writers: “will is the essence of a personality. A legal person is one who is capable of will. According to Meurer, The jurists conception of the juristic person exhausts itself in the will and the so called physical persons are for the law only juristic persons with a physical super fluim . According to Karlowa, the body is not merely the house in which the human personality dwells; it is together with the soul which now for his life is inseparably bound with it, the personality. So, not only as a being which has the possibility of willing but as a being which can have manifold bodily and spiritual needs and interests as a human center of interests, is a man, a person according to the English and American jurists, a person must have not only a “corpus” but also “an animus” . Mere “animus ” or will is not enough. A person is one who has rights and duties. It is something which can own rights and is capable of doing acts which affect the rights of others⁶.

Savigny⁷ has defined the term person as the “subject or bearer of a right" but, as pointed out by Holland, this definition is not exhaustive. Rights avail against persons as much as they are reposed in them. A person is not necessarily a human being. There may be human beings who are not persons. Slaves are not person in the legal sense as they cannot have rights. In the same way, there may be persons who are not human beings. This is particularly so in the case of corporations.

Thus person in juristic term are of two kinds namely natural and legal. The former are human beings capable of rights and duties. Legal persons are beings who may be real natural or imaginary artificial in whom law vests rights and duties and thus attributes personality by way of fiction.

1.3.2 Status

Personality should be distinguished from status and capacity. “Status” is a word which is given various meanings. *Salmond* says that generally there are four meanings of the word⁸:

- 1) Legal condition of any kind, whether personal or proprietary.
- 2) Personal legal conditions, excluding proprietary relations.
- 3) Personal capacities and incapacities as opposed to other elements of personal status.
- 4) Compulsory as opposed to conventional legal position.

⁵ Gray, T. (1971), *Nature and Source of Law*, Oxford Press, London, p.55

⁶ Hegel G.W. F. (1941), *The Philosophy of Rights*, Oxford University Press, London, p.312

⁷ Savigny, V. (1832), *Outline of Science of Jurisprudence*, Hayward Putcha, Berut Unserver Zeit Zur, p.315.

⁸ Salmond, J.W. *Jurisprudence*. (12 Eds) Steve and Hynes, London, p.310

According to *Austin*, the complex of rights and duties, or capacities and incapacities which especially affect a narrow class are term as status⁹. Allen, says that “status may be described as the fact or condition of membership of a group of which the powers are determined extrinsically by law status affecting not merely one particular relationship, but merely one particular relationship, but being condition affecting generally through in a varying degree a members claim.

In short, status is condition which arises due to the membership of a class or group and affects the rights and duties of the members of that class. In other words status indicates the rights and liabilities which a person has by virtue of his being a member of a particular class or group. There are number of grounds which lead to the creation of a status such as minority, marriage, office and profession, etc. a person can have a number of statuses at the same time. He might be a husband, a father, and an officer at the same time.¹⁰

1.3.3 Capacity

Capacity means the rights and powers of a person by virtue of his being at a particular position. A person can have many capacities. If a person is a judge he has the capacity of a judge as well as the capacity of a citizen at the same time. But the double capacity does not mean personality. His legal personality is only one. Therefore, a person in one capacity cannot enter into a contract or another alike legal transaction with himself in his other capacity. On the same principle where a creditor becomes his debtors executor, he could not sue himself. But, later on this hardship was mitigated by giving the creditor a right of retainer. Similarly in many other cases this rule has been relaxed¹¹.

1.4 Kind of Persons

From the foregoing it can be seen that for the purpose of juristic personality law recognizes only two kinds of persons, namely.

- i) Natural persons.
- ii) Legal persons who are artificial creations of law.

(I) Natural Person

A natural person is a living human being. But all living human beings are not necessarily be recognized as persons in law. According to *Holland*, a natural person is “such a human being as is regarded by the law as capable of rights and duties in the language of Roman law, as having a status¹²”.

⁹ Austin J. Austin Jurisprudence, 1,p.371

¹⁰ Ibid

¹¹ Ibid

¹² Ibid

According to another writer, natural persons are living human beings recognized as persons by the state. The first requisite of a moral human being is that he must be recognized as possessing a sufficient status to enable him to possess rights and duties. A slave in Roman law did not possess a personality sufficient to sustain legal rights and duties. In spite of that, he existed in law because he could make contracts which under certain circumstances were binding on his master. Certain natural rights possessed by him could have legal consequences if he was manumitted¹³.

Likewise, in Roman¹⁴ law, an exile or a captive imprisoned by the enemy forfeited his rights. However, if he was pardoned or freed his personality returned to him. In the case of English law, if a person became an outlaw he lost his personality and thereby became incapable of having rights and duties. The second requisite over, he must possess essentially human characteristics. For example, before the abolition of slavery, the slaves were considered as “res and were devoid of any legal personality for they could have no rights and duties. Again lunatics and infants have timely a restricted legal personality. They do not have civil rights such as right to vote, etc. In Hindu society¹⁵, too, when a person becomes a “sanyasi” his proprietary rights extinguish and his property goes to his heirs as if he were dead.

(a) Legal Personality of Unborn Child

A child in the mother's womb has for many purposes been regarded by a legal fiction as already born, in accordance with the maxim. “*Nasciturus Pro Jam nato baelor*”. The fiction was intended that in all matters affecting its interests, the unborn child in uterus should be treated as already born, but in English law, this fiction has been applied only for the purposes of enabling the child if it is born to take a benefit. It has been thought reasonable that a posthumous child who has lost his father should not be deprived of his benefits under Lord Campbell's act for the death of his father and this is the same position under Islamic law¹⁶.

In criminal law¹⁷, too, an unborn child has been recognized in a number of offences. By the time of Coke, it was well settled law that killing a child in mother's womb was a crime¹⁸ but not a felony and if the child was born alive and thereafter died of the pre-natal injuries, it was murder. Thus, where the head of the child was extruded from its mother's womb and the surgeon in charge of the delivery was so grossly incompetent that he crushed the skull of the child resulting him to death, the surgeon was held guilty of manslaughter.

¹³ Ibid

¹⁴ www.philosright/23jeg.juirsp, Accessed on 11th December, 2019

¹⁵ ibid

¹⁶ Ibid

¹⁷ Chukkol K.S(1988), *The law of Crimes in Nigeria*, A.B.U. Press, Zaria, p.13

¹⁸ S 232-6 Panel Code Act, Cap. 53 LFN Abuja

In Nigeria, wills made in favour of unborn children are valid under certain limitations and provisions both under wills Act and Islamic Law. From this what can be inferred is that the interests and benefits of an unborn are well protected under Nigerian law.¹⁹ In this connection it may be noted that a child in its mothers womb is, for certain purposes, regarded, by a legal fiction, as already born. These purposes are:

- 1) The acquisition of property by the child itself, or
- 2) Being a life chosen to form part of the period in the rule against perpetuities.

The recognition of the legal personality of a child in the wombs illustrated in the case of procedure that a pregnant woman condemned to death is not execute unless she has been delivered of her body. Similarly it has been hold that a posthumous child is entitled to compensation for the death of his father. But the personality of an unborn person is contingent on his being born as living being²⁰.

(b) Legal Status of Dead Person

The question whether the deceased continues to have legal personality requires careful consideration. Let us see whether the dead have any legal rights. The testaments of the dead are respected and enforced by the law. This does not mean that the dead have a right to have their wills enforced. The will is enforced in the interest of the living legates to whom property is bequeathed. If the will does not contain any disposition of property in favour of any human legatee, it will not be enforceable. This shows that right to have a will enforced is not that of the testator but only that of the living legates. The reputation of the dead is also protected by the law. A libel on dead persons may be actionable in a court of law. This is, however, not recognition of any right in favour of tire dead. The living relations of the deceased would be harmed by defamatory statements against him. That is why such defamation is made actionable. It is obvious that the dead have no rights. That they have no duties clear enough, for they are beyond the reach of the sanctions of law .So deceased persons lose their personality with their lives.

In law, the dead are things, not persons. Being not punished after their death, they are not entitled to any rights in Nigerian though in following cases they have been given some rights.

- 1) Right of reputation.
- 2) Right of will
- 3) Right of decent burial.

*Salmond*²¹ observes that generally speaking, the personality of a human being may be said to commence with his birth and cease with his death. Therefore dead men are no longer

¹⁹ Ibid

²⁰ Ibid

²¹ *Salmond*, J. W. Op. Cit., p.311

persons in the eyes of the law. He²² further points out three things in respect of which anxieties of living men extend beyond the period of their deaths, of which law will take notice. They are mens body; her reputation and his estate. Though the dead mans corpse is the property of no one the law, however, seeks to ensure its decent burial or cremation. The criminal law provides that any imputation against a deceased person, if it harms the reputation of that person of living, and is intended to hurt the feelings of his family or other near relatives, shall be an offence of defamation under many penal law. The reputation of dead man is to some extent protected by the law. The defamation against a dead person is no doubt punishable under the criminal law but only when it affects the interests of his relatives and near-ones who are living. The right so protected is in reality not that of the dead man but that of his living descendants.

(c) Legal Personality of Animals

Law does not recognize beasts or lower animals as persons because they are merely things and have no natural or legal rights. Salmond regards them as merely objects of legal rights and duties, but never the subjects of them. Beasts being incapable of legal rights and duties, their interests are not recognized by law. Though, legal history reveals that archaic codes contained provisions regarding punishment to animals if they were found guilty to homicide. Even under the modern law the trespassing beast may be detained "damage feasant", and detained until its owner or someone else interested in the beast pays compensation to the person wronged.

Sutherland²³, in his principles of criminology, has referred to an interesting trial of some rats in 1519. They were charged and tried for ravaging the fields of a farmer. The counsel for the defendant rats pleaded that no doubt their clients had caused severe damage to the plaintiff but at the same time the numerous holes made by their clients made the soil of the plaintiff more fertile. The court rejected the defence and awarded the sentence of punishment. The court, however, ordered that while executing the sentence, care should be taken that the rats are duly protected from dogs, cats, howls, etc. so much so that taking a lenient view towards pregnant female -rats, the court ordered to stay the execution of their sentence until they delivered the offspring.

The modern law, however, holds the master liable for the wrong caused by their pets, beasts and animals. The liability so imposed on the master does not arise out of the principle of vicarious liability but because of his negligence in keeping the animal well

²² *ibid*

²³ SUTHERLAND refers to certain instances when beasts were punished. If an ox gores a man or a woman to death, then he was stoned and his flesh was not eaten. In Germany, a cock was charged and accused of contumacious crowing. It was brought in the witness box and tried. But the counsel failed to prove the innocence of his feathered client hence it was killed. In ancient Greek law also there are evidences of animals and trees being punished like human beings - SUTHERLAND Principles of Criminology, P.44

within control. Likewise, a wrong done to a beast may be a wrong to its owner or to the society of mankind, but not to the beasts. The law, however seeks to extend protection to animals in two ways, namely cruelty against animal and bestiality see ,

Salmond rightly suggest, the duties towards animals are in fact duties towards the society itself. The society does have an interest in the protection and well-being of the animals. A reference may be made about the police-dog used for detection of crime and criminals. Despite the fact that they play a crucial role in apprehending offenders, it must be stated that a conviction cannot be based solely on the evidence of a police-dog unless it is corroborated by other supporting evidence. The reason being that the police-dogs cannot be subjected to cross examination like human beings. This again supports the contention that animals do not have legal personality²⁴.

Briefly, the legal status of lower animals beasts are not persons either natural or legal. They are merely things. They are often the objects of legal rights and duties, but never the subject of them. In ancient codes, animals were however punished for their wrongs.

(d) Legal Personality of Idols and Mosques

It has been judicially held that under some legal system idol is a juristic person and as such it can hold property. Its position is, however, like that of a minor and the priest, i.e. pujari acts as a guardian to look after its interests. The privy council in historic case of *Pramatha Nath Mullick V. Pradymumna Kumar Mullic*²⁵, held that an idol is juristic person and its will as to its location must be duly respected. The court directed that idol be represented by "a disinterested next friend to be appointed by the court to put up its point of view. Similar view was reiterated by the supreme court of India in. *Yogendra Nath Naaskar V. Commissioner of Income Tax*²⁶ where in it was held that an idol is a juristic person capable of holding property and of being taxed through its "shebait" who are entrusted with the possession and management of its property. An idol can be treated as a unit of assessment for assessing its liability under the income tax act. The court further observed that if the idol "deity" is allowed in law to own property, there is no reason why it should not be liable to be taxed under the law of-taxation. It is because of the legal personality of idols that the rule against perpetuity does not apply in case of religious endowments. Idols and funds was considered to be a juristic person. It owned property. It could sue and could be sued.

A fund dedicated for a religious purpose was also of the nature of legal person. It has certain rights and received certain protection from law, such as the property dedicated to a

²⁴ Salmond, J. W. Op. Cit., p.311

²⁵ (1872) Beng L.R. 377

²⁶ (1943) 4 DLR 337, See also *Pinchin N.O. V Santam Ins Co. Ltd.* (1963) 2, SA 254, (WLD),

“math”. Now a brief account of the position of legal personality in modern times shall be given. As regards the legal personality of a Mosque, the courts have expressed conflicting views. In *Maula Bux V. Hafizuddin*²⁷ the high court of Lahore held that a Mosque was a juristic person capable of being sued. But the Privy Council held a contrary view in *Masjid Shahid Ganj* case and observed that mosques are not artificial persons in the eyes of law and, therefore, no suit can be brought by or against them. However the Privy Council left the question open whether for any purpose a mosque can be regarded as juristic person.

(ii) Legal Persons

Legal persons are real or imaginary beings to whom personality is attributed by law by way of fiction whereas it does not exist in fact. Juristic persons are also defined as these things, mass or property, group of human beings or an institution upon whom the law has conferred a legal status and who are in the eye of law capable of having rights and duties as natural persons²⁸. Law attributes by legal fiction a personality²⁹ of some real thing. A fictitious thing is that which does not exist in fact but which is deemed to exist in the eye of law.

There are two essentials of a legal person and these are :

- i) The corpus.
- ii) The animus.

The corpus is the body into which the law infuses the animus, will or intention of a fictitious personality. The animus is the personality or the will of the person³⁰. There is a double fiction in a juristic person as created or made an entity. By the second fiction, it is claimed with the will of a living being. Juristic persons come into existence when there is in existence a thing a mass of property an institution or a group of persons and the law attributes to them the character of person. A firm a jury, bench of judges or a public meeting is not recognized as having a legal personality. The animus is lacking in their case. According to *Salmond*, a legal person is any subject matter other than a human being to which the law attributes personality.

Fitzgerald, the learned editor of *Salmond's on jurisprudence*³¹ writes that legal persons, being the arbitrary creations of the law may be of several kinds. The English law, however, recognizes only a few kinds of legal persons which includes
a) Corporations³²,

²⁷ (1969) A. 12 Sc (1) 928

²⁸ Salmond J.W. Op. Cit., p. 315

²⁹ Ibid

³⁰ Ibid

³¹ Fitzgerald, P. J. (1996), *Salmond on Jurisprudence*. (12ed.) Sweet and Maxwell, London, p.301

³² *Saloman V. Saloman & Co.* (1887) Act 22; See also the American case of *Peoples Pleasure Park Co. v. Roheledar*, (1908) 61 SER 794

- b) Institutions such as trade unions and societies and associations, and
- c) The estate of funds.

1.5 Theories of Corporate Personality

There are various theories of corporate personality which have attempted to theorize the nature and authority of it. This might make one to gather that theoretically all the legal problems regarding juristic persons have been fully explored but this is not true. There is a great divergence between theory and practice. Anyone theory alone is not capable of solving the problems fully. Therefore, the courts have not followed anyone theory consistently. The reason of the gap between theory and practice is that the theorists have kept themselves more occupied with either a philosophical explanation of legal personality, or in making it to fit in some political ideology than with the practical problems. Writers have expressed conflicting views regarding the exact nature of corporate personality³³. These views find expression through different theories of corporate personality which are as follows:

- 1) Fiction theory
- 2) Realistic theory;
- 3) Bracket theory;
- 4) Concession theory
- 5) Purpose theory

1.5.1. Fiction Theory

This theory is expounded mainly by *Savigny, Salmond, Kelson and Holland*. According to this theory, a corporation is clothed with a legal personality. The personality of a corporations is different from its members. The theory says that only human beings can properly be called "persons" . Some kinds of groups, etc. are regarded as persons for certain purposes only by a fiction of law and they have no real personality.

*Savigny*³⁴ regarded corporation as an exclusive creation of law having no existence apart from its individual members who form the corporate group and whose acts by fiction, are attributed to the corporate entity. As a result of this, change in the membership does not affect the existence of corporation or its unity. Savigny further pointed out that there is double fiction n case of a corporation. By one fiction, the corporation is given a legal entity, by another it is clothed with the will of an individual. Thus fictitious personality of a corporation has also a wil of its own which is different from that of its members.

³³ Fitsgerld, P. J. (1996), *Salmond on Jurisprudence*. Op. Cit., p.13

³⁴ Saving, V. *Outline of Science of Jurisprudence*, Op. Cit. p.3

John Salmond also supports the view that a corporation has a fictitious existence. It is distinct from its members and capable of surviving even after all the members have ceased to exist. A company incorporated by an Act of parliament can only be dissolved by another such Act.³⁵ Kelson³⁶ also regards legal personality as a fiction. To quote his words, "it is the convenient peg upon which to hang legal rights and duties. Thus, a group of persons or a successive series of persons is a legal person because it has an imaginary personality by the fiction of law" .

Fredrick Pollock³⁷ in a long essay on the fiction theory of corporation " has shown that the English common law has given no countenance to the fiction theory of corporate personality. The fact however, remains that in English law neither collective liabilities nor collective powers can be incurred or claimed by a body of individuals. Unless it can satisfy the requirements of incorporations. Unincorporated bodies are not treated as legal persons in English law. Before a body of persons can have rights and duties in their corporate character they have to produce an authoritative document having the approval of the state which defines the purpose for which it exists, the means by which will is manifested, the extent of the liability undertaken by each of its members and so forth.

The fiction theory has been criticized by *Sir Fredrick Pollock*³⁸ who refutes the acceptance of the theory in the common law of England. He maintains that under the English law neither collective liabilities nor collective power can be claimed by a body of individuals unless they are duly incorporated under the existing law. In other words unincorporated bodies are not treated as legal persons in English law. So also is the position in Indian law. *An ordinary law cannot* be treated as legal person in its collective capacity. It can neither sue nor be sued unless it is duly restricted under the relevant law. Thus, corporate personality is a mere creation of law.

1.5.2.Realist Theory

This theory has another name also i.e. "organic theory" . The main exponent of this theory is Gierke, the great German jurist. He has been followed by *Maitland, Beseller, Lasson, Bluntschuli, Zitelmann, Miraglia, Sir Fredrick Pollock, etc*³⁹.

³⁵ Salmond J.W. Op. Cit., p.310

³⁶ Kelsen H. *General Theory of Law and State*, Translated (1945), Cambridge Mass , London, p.415

³⁷ Pollock F. (1972), *Essays in the Law*, Vixta House, London, p.204

³⁸ *ibid*

³⁹ Gierke, V. O., (1889), *German Law and Associations*. p.215

Realist theory says that a group has a real will, real mind, and a real power of action. A corporation has all the characteristics which a natural person has. Therefore, juristic persons are real in the same sense in which human beings are. Legal personality is not fictitious, nor it depends upon states recognition. The emphasis, in this theory on corporate life contains elements of reality “at least in the modern age ” but to attribute real will to the corporation and to compare it will biological organism leads with the theory to absurdity⁴⁰.

1.5.3 Institutional Theory

Closely linked with realist theory is institutional theory It has been propounded by a French jurist *Hauriou*. This theory is based on collectivist outlook. It says that the individual is integrated into the institution and becomes a part of it⁴¹. Different interpretations have been given to the theory and have been used to serve divergent purposes. Pluralists interpretation is that there can be independent institutions within the institution of state they consider state only as a supreme institutions. Fascist interpretation is that the state is the only institutions and other institutions within it are parts of it, and, therefore, they must function according to the direction of the state⁴². By putting this interpretation they used the theory to suppress other individuals. It is a real person possessed of a real will of its won and capable of actions and responsibilities. It is a personality that is recognized and not created by law. *Gierke*, the great German jurist, he believed that every collective group has a real mind, a real will and a real power of action. A corporation, therefore, has a real existence irrespective of the fact whether it is recognized by the state or not. The corporate will of the corporation finds expression through the acts of its directors, employees or agents. The existence of a corporation is real and not based on any fiction. It is a psychological reality and not a physical reality⁴³.

Gray⁴⁴, however, denies the existence of collective will. He calls it a figment to quote his own words, “to get rid of the fiction of an attributed will by saying that corporation has a real general will is to drive out one fiction by another” . Psychological research has shown that the association of many persons produces a" will” distinguishable from that of the separate members of the group. From the interpretation of many wills there arise a single group or corporate will which is distinct from the totality of the wills of its members and which inspires the action taken by the group just as an individual will of a man inspires the mans own action.

⁴⁰ Ibid

⁴¹ Hauriou, M., (1925) *La Theorie De l Institution Et de la Foundation*, p.10

⁴² Ibid

⁴³ Gierke, O.V (1889) *German Law and Association*. p.15

⁴⁴ Gray, T. (1971), *Nature and Source of Law*, Oxford Press, London, p.55

Dicey, observed "when a body of twenty, or two thousand, or two hundred thousand men bind themselves together to act in a particular way for some common purpose, they create a bond which by no fiction of law, but by the very nature of things differs from the individuals of whom it is constituted" . If individual consciousness and individual will invests an individual with personality, group consciousness and group will invest the group with a personality of the individual⁴⁵

John Salmond is of the view that even if the group will is a reality, it is not possible to concede the reality of the unitary national entity which may in law survive the last of its members. He further points out that the realist theory is inapplicable to a corporation sole. The attribution of personality to the succession of the holders of certain offices where there can be no pretence to psychological unity, is regarded by him as destructive of the realist theory of corporate personality. It may, however, be observed that as pointed out by Gray, a corporation sole is not a fiction or juristic person, it is simply a series of natural persons some of whose rights are different and devolve in a different way from those of natural persons in general⁴⁶ .

Even English law is now tending in according to recognition to collective persons as real persons. In *Willmott V. London Road Car Company*⁴⁷ a lessee covenanted not to assign or underlet without the consent of the lessor, which was not to be withheld in respect of "a respectable and responsible person . It was held that the word "person in the covenant included a corporation. That group of collective personality is a reality cannot now be seriously disputed in the light of the present day knowledge of mass psychology. Once it is realized that for the real existence of incorporeal persons physical perception to the senses is unnecessary, it would be easy to see that moral entities are real organisms, endowed with a real will can sustain legal personality since they are efficient subjects of rights.

Fascists have made use of the *realistic theory* of corporate personality to support the omnipotence of the state. The realistic theory opposes the contention of the concession theory that personality is attributed by the state. Some other continental jurists such as *Bluntschili*, *Beseller*, and *Miraglia* have also supported the realistic theory⁴⁸. In England it was supported by *Pollock*, *Mailand* and *Dr. Jethrow Brown*. *Dicey* also contends that the personality of a group is a reflection of its consciousness and will. Thus, group personality is as real as the personality of an individual.

⁴⁵ Ibid

⁴⁶ Salmond J.W. Op. Cit., p.311

⁴⁷ (1956) AC 104

⁴⁸ Pollock F, (1972) *Essay in the Law*. Op. Cit., p.10

*Gray*⁴⁹, has criticized the realistic theory pointed out that collective will can have no reality, it is nothing but a mere fiction. *Salmond* also holds that even if it is assumed that the group will is a reality, the reality of the unitary national entity which may in law survive the last of its members cannot be conceded to. He further argues that the realistic theory cannot be applied in case of corporation sole because it is simply a series of natural persons whose rights are different from those of natural persons in general⁵⁰. The main difference between fiction theory and realistic theory lies in the fact that the former denies that corporate personality has any existence beyond what the state chose to give it, the latter holds that a corporation is a representation of physical realities which the law recognizes.

1.5.4. Bracket Theory-Or Symbolist Theory

This theory says that the members of the corporation are the only persons who have rights and duties. Granting of juristic personality means putting a bracket round the members in order to treat them as one unit. This is done for the purposes of convenience. In other words juristic personality is only a symbol which helps in effectuating the interest or the purpose of the group⁵¹. The theory speaks great truth when it says that the groups are only to effectuate the interest of its members, but it has certain weakness also the contention of the theory that only human beings have personality and the group is so far from the truth. In modern time, it is agreed on all heads and is fully established that corporation has a legal personality which is separate and distinct from its members and it has entirely different rights and duties. It is the separate personality that enters into the contract and other legal transaction with others⁵². How a person can enter into contract with a bracket? This question hits at the very not of the theory. An important implication of theory is that law can remove the bracket at anytime and can look behind the entity to discover the real state of affairs. Simply says that, bracket theory means the members of a corporation are the bearers of the rights and duties which are given to corporation for the sake of convenience.⁵³

The bracket theory is associated with the well-known German jurist *Ihring*. According to this theory juristic personality is only a symbol to facilitate the working of the corporation bodies. Only the members of the corporation are "persons" in real sense and a bracket is put around them to indicate that they are to be treated as one single unit when they form themselves into a corporation⁵⁴. The supporters of Bracket theory argue that just as a synonymous word is put within brackets to give an equivalent meaning, so also collective

⁴⁹ Gray T. (1971) *Nature and Source of Law*, Op. Cit., p.102

⁵⁰ Ademola F. (2008) *Jurisprudence*, (14ed) Lexi Nexis Butter Work, Durban, p.195

⁵¹ Ibid

⁵² Ibid

⁵³ Ibid

⁵⁴ Ibid

form of a group of different individuals is expressed through a corporation and their separate identities are given a unified form. Thus incorporation is done merely for the sake of convenience. The American juristic Hohfeld, has advocated this theory in a different form. In his view corporate personality is the creation of arbitrary legal rules designed to facilitate proceedings by and against an incorporated body in law-court.

*Salmond*⁵⁵, criticizes the theory of group person on two grounds. It is not applicable to a corporation sole as we cannot have any group-mind or group personality. Moreover, a corporation aggregate can exist even there is only one surviving member or there is no member at all. Collective will is considered to be a fiction and it is pointed out that to replace the fiction theory, by realist theory, is to drive out, one fiction by another fiction.

According to *Keeton*, if corporations exist independently of state recognition there must be a number of corporate personalities which have not yet received legal recognition. The state may concede legal existence but which are united simply, to achieve together limited ends. He argue that, legal personality is itself nothing but a fiction. Legal order can attribute legal personality at will. If it wishes to do so, it can personify things, institutions or groups; "juristic and physical persons are essentially on the same plane. The physical person is the personification of the sum total of legal rules applicable to one person. The juristic persons is the personification of the sum total of legal rules applicable to a plurality of persons"⁵⁶. In the modern time realist theory is suitable regarding corporate personality.

1.5.5. Concession Theory

This theory is quite close to the Fiction Theory. The supporters of one are the supporters of the others-. The main characteristic of this theory is that it treats the dignity of being a "juristic person as having to be conceded by the state that is the concession theory is based up with and some times confused with fiction theory"⁵⁷. The identification of law with state is a "sine qua non" for this theory, where as no such condition is necessary in the case of fiction theory. It is, thus, by grace or concession alone that legal personality is granted, created or recognized. So far as this theory maintains that grace of law or of the state is the only source from which legal personality may flow, the theory states a truism. It states truism is the sense only that all rights whether human or corporate, emanate from what the law gives, and where the law does not provide anything, *at least*, its recognition is essential to validate, maintain or perpetuate what already exists or is conferred by nature or what man has taken or created for himself.

⁵⁵ Salmond J.W. Op. Cit.,p.10

⁵⁶ Ibid

⁵⁷ Adaramola F. (2008), Op. Cit., p.193

The concession theory is thus, the necessary concomitant of any theory of unfettered state sovereignty. One value of the theory is that it has been used for political purposes to strengthen the state and to suppress the autonomous bodies within the state. No such body has any claim to be recognized as a person. Since this theory is regarded as laying down the sociological truth that all group life, "as apart from the mere grant of legal personality" is created by the state, it is then both mischievous and erroneous. In other words, this theory says that corporate bodies have legal personality only to the extent granted by law. Here law means the state. In other words, the law is the exclusive source or authority which can confer juristic personality. Though this theory states a truism, by leaving the creation of juristic personality absolutely at the discretion of state, it leaves room for mischief. This theory has been used in many cases to suppress autonomous institutions. It differs from the fiction theory in one important respect. It is that the former identifies law with the state which the latter does not.

1.5.6. Purpose Theory

The main exponent of this theory was *Brinz*, the German jurist. The theory is founded on the view that corporations are treated as persons for certain specific purposes. The assumption that only living persons can be the subject matter of rights and duties; would have deprived imposition of rights and duties on corporations which are non-living entities. It therefore became necessary to attribute personality to corporation for the purpose of being capable of having rights and duties⁵⁸. The origin of purpose theory is to be traced back to "*stiftung*", i.e. foundations which were treated as juristic persons. A foundation is analogous to a trust for specific charitable purpose such as propagation of education, grant of scholarships, etc. Those foundations were attributed juristic personality in Germany in order to facilitate legal transactions. The "*stiftung*" being a kind of charitable fund, was not a real person, therefore, it was personified for the specific purpose for which it was created.

1.5.7. Hohfelds Theory

Hohfeld has also given a theory about corporate personality. His theory is closely related to the Bracket theory. He says that only human beings have rights and duties and corporate personality is a merely a procedural form which is used to work out in a convenient way for immediate purpose a complex class of jural relation⁵⁹.

Hohfeld draws a distinction between human beings and juristic persons. The juristic persons, according to him, are the creation of arbitrary rules of procedure. It is only the human beings who have rights, duties, powers and liabilities. Transactions are also conducted by them, and it is they, who finally become entitled and responsible. There are,

⁵⁸ Ibid

⁵⁹ Ibid

however, arbitrary rules which restrict the extent of their responsibility in a number of ways, that is, to the amount of the shares. The “corporate person” is only a procedural form, which is used to work out in a convenient way for immediate objects a mass of jural relations of a large number of individuals, and to put off a detailed functioning out of these relations among the individuals “*inter se*” for a later and more appropriate occasion⁶⁰. The theory so propounded by *Hohfeld* is clearly analytical in its nature. His view that corporate personality is a procedural form may appear to be a misleading use to the word procedural.

1.5.8. Kelsons Theory

*Kelson*⁶¹ makes an analytical and formal approach to the concept of personality. He says that for legal purposes there is no contrast between natural and juristic persons. Personality is always a matter of law. In law personality means the totality of rights and duties. Any entity which bears the totality is a person in the eye of law. To make a distinction between natural and legal persons is meaningless. Law individualizes certain parts of the legal order and establishes a unity in the rights and duties pertaining to it. The device is for procedural facility and it is the rights of “human” individuals that are real. *Kelsons* theory does not throw any light on the nature of the group personality nor it helps in solving practical problems. It is submitted that to do this is not in the province of the “pure thing of law” therefore, *Kelson* did not bother himself with actual working or practical problems. In other words, the most important theory worth noting is *Kelsons* theory of corporate personality. *Kelson* who adopts a purely formal approach recognizes no distinction between human beings as “natural persons” and “juristic persons”. Any such distinction, for him is irrelevant, since all legal personality is artificial and derives its validity from superior norm. “Personality” according to him, “is only a technical personification of a complex norms a focal point of imputation which gives a unity to certain complexes of rights and duties”. The totality of rights and duties is person in law there is no entity distinct from them. The concept of person, therefore, for him, is always a matter of law. The biological character of human beings falls out of its domain⁶².

1.5.9 .Organism Theory

This theory stated that social and public utility organizations have limbs in them and will of their own. A corporation, thus, according to this theory, is capable of rights and liable to duties. This does not postulate that human beings alone are the subject of legal rights. Any being or body with a will and life of its own is capable of having legal right and bound by

⁶⁰ Ibid

⁶¹ Kelsons (1999), *Theory of Corporate Personality General Theory of Law and State*. Oxford Press, London, p.93-109

⁶² Ibid

legal duties and liabilities⁶³. What thus, in essence, this theory emphasizes is that any being or body should have a will of its own. According to the organism theory of personality, corporations are social organisms, whereas human beings are physical organisms. Corporations are distinct from those who are their members. Their wills are also different from the wills of their members. For it is not what the individual members decide at corporation meeting while passing resolutions, it is rather what the corporation as a body decides. The will of each individual member of the corporation gets submerged into the will of the corporation. The organism theory has however, been subjected to a seven criticism from the view point of a corporate sole. Because in a corporate sole, there is single individual as a trustee, fiduciary or office-holder. How could organism theory then apply to it? A reply advanced to this objection by the supporters of the organism theory is that in case of a corporate sole, the single individual holding the office does not function individually with his or her own will; it is rather the will of that individual modified or determined by the will also of the advisers of that individual representing the corporate sole⁶⁴.

1.6 Unincorporated Association

Before concluding the discussion on incorporation, it would be desirable to contrast it with unincorporated associations which, according to *Salmond*, are nothing but the sum total of their members. These unincorporated bodies may vary in size and importance from small social clubs to all powerful professional bodies holding considerable power in industrial activities. The rights and duties of a club are nothing more than the rights and duties of its members who are contractually related "inter se" and its property is joint property of the members, though in fact it is often held by trustees on behalf of the members to simplify transactions⁶⁵.

Unincorporated bodies have no legal personality whatsoever. Therefore, it can neither sue nor be sued in its own name. The liability of its members is unlimited. For instance, a partnership firm is not a legal person therefore; none of its partners can contract with the partnership firm because a man cannot make a contract with himself. The decision of the House of Lords in *Taffvale Railway Company V. Amalgamated Society of Railway Servants*⁶⁶, however seems to have blurred the distinction between incorporated associations which can sue and be sued in their own name and not the unincorporated ones. In the instant case, the House of Lords ruled that a trade union, though not incorporated and registered under the Trade Union Act could be sued in torts for the wrongful acts of its officials. The union concerned had to pay \$ 2300 by way of damages in addition to the legal expenses incurred by the plaintiff in litigation. The decision created a great furor among the labouring classes

⁶³ Aderamola F. Op. Cit., p.198

⁶⁴ Ibid

⁶⁵ Salmond, J.W. Op. Cit., p.10 (1901) UKHL1, AC 426

⁶⁶ (1901) UKHL1, AC 426 Ibid

and they protested against it. Consequently, The Trades Dispute act, 1906 was passed which restored immunity of trade unions from liability for the torts of their servants. The Act was, however, amended in 1927 to curtail this immunity in the event of strikes and lock-outs in industries.

Now, it is a well settled law that the trade unions by virtue of the Trades Dispute Act, 1906, cannot be sued in torts. They can however, be sued in contract. The question of trade unions personality once again came up for decision in the case of *Bonsor V. Musicians Union*⁶⁷. In this case, a member sued his union for breach of contract on account of wrongful expulsion. The personality of the union had to be considered by the court for the reason that if a union is not a separate legal entity from its members, an action for breach of contract would fail as a member cannot bring an action against himself.

1.7. Conclusion

From the foregoing analysis it is found that, the theories had a political significance in their role in addition to attending legal problems. It is also found that no single theory takes into account all the aspects of the problems of legal or juristic personality. Nevertheless, the theories has great importance and its understanding will assist administration of justice from many perspectives; It will assist court in determining the complex issue of who is entitle to what legal right and whether or not certain duties imposed by law can be abdicated to a particular person due to his status. It will equally assist the court in apportioning justice to deserving individuals by ensuring that only person with legal personality enjoyed the right conferred by law. Finally, it is hereby recommended that all the theories should be taken into consideration as each of them has a theoretical sense and not easy to say with certainty how much of each affect a particular decision.

⁶⁷ (1956) A. C. 104