

## NATURAL PERSONS, JURIDICAL PERSONS AND LEGAL PERSONHOOD

Elvia Arcelia QUINTANA ADRIANO\*

*ABSTRACT. The study of commercial law can be divided into four basic categories: (a) individuals (natural persons); (b) objects of commerce; (c) legal instruments and (d) administrative and legal procedures. Business relations between individuals and business entities requires significant legal documentation, including atypical or nonstandard business contracts. A central feature of all business transactions is the “legal entity”, used by organizations worldwide to conduct business. In order for many businesses to carry out routine activities, they must have many of the same legal rights and responsibilities as natural persons. In a word, these entities require “legal personhood”. Which leads us to the question of Legitimation. The most widely used legal instruments are non-standardized business contracts. In essence, this is the delineation of contracting parties as entities with well-defined rights and obligations. This authority depends, in turn, on the legitimacy of the “personhood” of the contracting parties, which is often a point of dispute in business relations. Regardless of whether one accepts the use of terms “legal entity” and “legal personhood”, they often give rise to immeasurable and diverse conflicts domestically, regional and at global level. This had led to efforts to improve the rules of the International Chamber of Commerce and improve legal models that provide guidance to diverse nations. We have reviewed the works of different authors concluding with the personal insights of Elvia Arcelia Quintana.*

**KEY WORDS:** *Commercial, person, legal entity, personhood, legitimation, business contracts.*

**RESUMEN.** *Para facilitar el estudio de la ciencia del derecho mercantil, se ha delimitado éste en 4 grandes Universos: el de las personas; el de los objetos de comercio; el de los instrumentos jurídicos que derivan de las relaciones comerciales*

---

\* J. D. degree awarded by the National Autonomous University of Mexico and Regular professor in Commercial Law, Economic Law. She is also a Commercial Law Professor in the Postgraduate Studies Division at the Faculty of Law and Financial Law Professor in the Accounting and Administration Faculty at UNAM. UNAM Lecturer. Regular Researcher by competitive examination in Commercial Law at the *Instituto de Investigaciones Jurídicas*, UNAM. Member of the National Research System at the National Council of Science and Technology (CONACYT), Mexico.

*que se desprende de los dos anteriores y por último el de los procedimientos administrativos y jurisdiccionales. Dentro del universo de las relaciones comerciales, en donde se conjugan personas y objetos, se encuentran todos los instrumentos jurídicos de los que se sirven los intercambios comerciales como son, los contratos de carácter mercantil, denominados atípicos. En el gran mundo del intercambio comercial, la figura central es la de las empresas de carácter mercantil, persona jurídica. Las empresas para exteriorizar su actividad requieren de personalidad jurídica, la cual trae aparejada el ejercicio de los derechos y el cumplimiento de las obligaciones, que nos lleva al estudio de la Legitimación. Los instrumentos jurídicos más utilizados son los contratos mercantiles atípicos. Esto nos lleva a analizar a la persona jurídica, de ésta se desprende otro campo de estudio, la delimitación de la competencia de las partes que intervienen en el contrato como entes generadores de derechos y obligaciones, que gira en torno a la legitimación de la personalidad; que a su vez, es centro generador de conflictos en las relaciones comerciales. La problemática anterior, aparentemente acepta los términos persona jurídica y personalidad; los alcances de las consecuencias jurídicas de ambas, provocan incalculables y diversos conflictos domésticos, regionales y mundiales; que ha enriquecido las normas de la Cámara Internacional de Comercio y las leyes modelo de apoyos judiciales trasfronterizos. Para analizar el estudio del tema planteado se han revisado diferentes autores, concluyendo con la aportación personal de Elvia Arcelia Quintana.*

**PALABRAS CLAVE:** *Relaciones comerciales, persona jurídica, juridical person, personalidad, legitimación, contratos de caracter mercantil.*

#### TABLE OF CONTENTS

|  |     |
|--|-----|
| I. INTRODUCTION.....                                   | 103 |
| II. PERSON.....  | 103 |
| III. GENERAL CONCEPT.....                              | 104 |
| 1. Etymology .....                                     | 104 |
| 2. Doctrine.....                                       | 104 |
| IV. CHARACTERISTICS OF THE LEGAL ENTITY .....          | 108 |
| 1. Doctrine .....                                      | 108 |
| 2. Concept.....  | 109 |
| 3. Legal Personhood.....                               | 109 |
| V. PERSONHOOD IN COMMERCIAL STATUTORY LAW.....         | 114 |
| VI. PERSONHOOD IN JURISPRUDENCE .....                  | 115 |
| VII. ELEMENTS OF THE LEGAL ENTITY IN MEXICAN LAW ..... | 115 |
| VIII. ELEMENTS OF JURISPRUDENCE .....                  | 116 |
| IX. CONCLUSIONS.....                                   | 117 |

## I. INTRODUCTION

Legal scholars have divided the study of commercial law into four broad areas: (a) persons (both natural persons and juridical); (b) business entities; (c) legal instruments that facilitate relations between the first two groups; and (d) administrative and legal procedures.

In business, a significant array of legal instruments are used to validate, clarify and enforce transactions. These often include, among others, contracts that are atypical or non-standard.

In fact, nearly every organization conducts business as a “legal entity”, as their activities require legal personhood to exercise certain rights and fulfill certain obligations. This leads us to the next topic, legitimation.

The legal instruments used most often in business are non-standard business contracts, which leads us to the “legal entity”, the basic component of the legal rights and obligations accruing to each contracting party. Whether or not a party qualifies as a “legal entity” depends on the legitimacy of legal personhood, which can often be a point of dispute in business relations.

Regardless of whether one uses the terms “legal entity” or “legal personhood,” their importance has given rise to diverse conflicts, not only domestically but also at regional and global levels. This has led to encouraging efforts to improve the rules of the International Chamber of Commerce and improve model laws to enhance cross-border legal guidance. On the other hand, they have also caused the incurrence of large and substantial costs in administrative and judicial proceedings.

In order to better comprehend this subject, debated since the nineteenth century, we reviewed the works of authors such as Bonnecase, Carnelutti, Savigny, Hans Kelsen, Nicolai Hartman, Ferrara, De Benito, García Máynez, and Rodolfo Von Ihering. We conclude the paper with personal insights of the author, Elvia Arcelia Quintana.

## II. PERSON

Merchants may be legally classified as natural persons or juridical persons.<sup>1</sup> The first group refers to individuals, innately capable of assuming obligations and exercising rights. The second group refers to entities with legal personhood, often referred to as collective entities,<sup>2</sup> juridical persons,<sup>3</sup> or corporations. In this paper, the term “entity” will often be used to refer to this second group.

---

<sup>1</sup> ARCELIA QUINTANA, *COMMERCIAL LAW SCIENCE* 270 (Portúa, 2004).

<sup>2</sup> The term collective legal entity is used by Francisco Carnelutti and has been the subject of studies in various areas of general law. See FRANCISCO CARNELUTTI, *GENERAL THEORY OF LAW*, 153 (Private Law Publisher, 1955).

<sup>3</sup> JOSE L. DE BENITO, *THE LEGAL PERSONHOOD OF COMPANIES AND CORPORATIONS*, 32 (Private Law Publisher).

### III. GENERAL CONCEPT

#### 1. *Etymology*

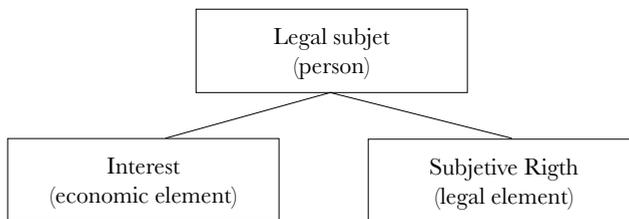
The word “person” has multiple meanings.<sup>4</sup> It is etymologically derived from *personare*,<sup>5</sup> a term related to *histrionalis larva*, which means mask. In this sense, the person is understood as the mask covering the face of an actor who recites verses during a scene in a play; the mask’s purpose was to make the actor’s voice vibrant and loud. Later, people came to use the term “person” to refer to the masked actor himself. In view of the above, it is quite understandable to associate a person as a natural being of the human species.<sup>6</sup>

#### 2. *Doctrine*

Historically, legal scholars have had difficulty precisely defining “person”.

Below are examples of several definitions<sup>7</sup> that have served as benchmarks for this legal entity.

Carnelutti<sup>8</sup> conceives “person” in a triangular sense. He views the subject as the vertex where personal interests (economic element) and substantive law (legal element) meet vis-a-vis a legal relationship.



For Carnelutti, the person is the “meeting point of these two elements; i.e., the crux reached by both”.<sup>9</sup>

<sup>4</sup> EDUARDO GARCÍA, INTRODUCTION TO LAW, 273 (Porrúa, 1980).

<sup>5</sup> García Máynez determined the origin of the word “person” is unclear but perhaps, it derives from the word *personare*.

<sup>6</sup> ROYAL SPANISH ACADEMY, VOICE PERSON, DICTIONARY OF SPANISH LANGUAGE, 1593 (Espasa).

<sup>7</sup> FRANCISCO FERRARA, HANS Kelsen, Carnelutti Francesco, Savigny, José L. de Benito, and Eduardo García Máynez are the reviewed authors in this article.

<sup>8</sup> Carnelutti, *supra* note 2.

<sup>9</sup> *Id.*

Moreover, he says that the legal entity includes more than man in his natural sense, that is, as an individual. It also includes those instances in which there is a collective interest uniting several men to act as in concert as if they were one.

Indeed, the collective legal entity is created when the economic element and the legal element of the legal relationship coincide, thereby creating the foundation of the collective interest.

To Carnelutti,<sup>10</sup> legal entities include both natural persons (individuals) and collective entities. Both types share a point of convergence between economic and legal elements; although the latter is notable for consisting of multiple individuals (not just one) united by a common interest.

Bonnescase<sup>11</sup> has defined the right of legal personhood as a set of rules and institutions that apply to the person, either as individuated (differentiated from others) and in its actions. For Bonnescase, legal personhood can be divided into three parts:

1. The existence and individuation of persons, that is, the elements that distinguish an individual and determine his or her legal status. Differentiating elements include name, physiological features, and place of domicile.
2. The legal capacity of individuals (natural persons) and their differences. On the one hand, this is based on the legal capacity of natural persons defined by the organization's bylaws. On the other hand, it includes the study of entities meant to make up for the shortcomings of natural persons.
3. The existence, individuation, and capacity of legal entities or juridical persons, which is the focus of this paper.

Savigny is the strongest proponent of the traditional theory, better known as the fiction theory.

Savigny<sup>12</sup> sees the legal entity as an artificially-created being that is capable of owning property but that lacks free will. He regarded corporations as exclusive creations of law having no existence apart from their individual members who form the corporate group and whose acts are attributed to the corporate entity.

This led Savigny to the conclusion that a "person" is any entity capable of exercising obligations and rights. Because legal entities are a legal fiction and lack free will, they cannot be a subject of law. According to this line of thought, an ordinary human being is a "person" only when he or she has the free will to acquire rights and obligations, and becomes a subject of law.

---

<sup>10</sup> *Id.*, at 153.

<sup>11</sup> JULIEN, BONNECASE, *ELEMENTS OF CIVIL LAW* 281 (Jose M. Cajica trans., Civil Law, Volume I, Porrúa, 1945).

<sup>12</sup> It was his book, *MODERN ROMAN LAW SYSTEM*, elaborated on the foundations of his theory of fiction, which dominated from the mid-nineteenth and twentieth centuries.

Hans Kelsen,<sup>13</sup> mentions that, based on the fiction theory, a “subject of law is that which is the object of a legal obligation or subjective right” (the latter term is understood as the legal authority to demand the performance of an obligation, though it is not a thing but rather a form of being).

For Kelsen,<sup>14</sup> natural persons and juridical persons are defined by rights and obligations which, when taken together, are metaphorically expressed through the concept of “person.” Kelsen denied any difference between the legal personhood of companies and that of natural persons. Personhood in the legal sense is only a technical personification of a complex of norms, rights and duties.

García Máynez<sup>15</sup> defines a “person” as “any entity capable of having powers and duties.” He mentions that legal entities are divided into natural persons and juridical persons. The first group refers to individuals with rights and obligations; while the second focuses on associations endowed with legal personhood such as unions or corporations. Máynez prefers to differentiate between the two groups by using the terms individual legal entity and collective legal entity.<sup>16</sup>

In a moral or ethical sense, a “person” is endowed with free will and reason that enables it to freely plan goals and find means of bringing them about.

Máynez says that from an ethical perspective —and based on the ideas of German philosopher Nicolai Hartmann—<sup>17</sup> a “person” is capable of making moral judgments, although he makes clear that these judgments do not necessarily determine its conduct. As such, free will is a critical element of legal personhood.

The legal significance of the natural person (or individual) is related to whether legal personhood is a necessary outgrowth of the characteristics of that individual, such that the legal personhood of a physical person is not derived from his human existence.

Regarding the concept of legal entity, Máynez notes that it should be seen through the lens of the “theories of legal personhood of collective entities”.<sup>18</sup>

- a) Fiction Theory (Savigny): Claims that juridical persons, e.g., corporations and other collective entities, are legal fictions, without any effective existence in the real world. As such, a legal person includes any entity capable of exercising obligations and rights.<sup>19</sup>
- b) Purpose Theory (Brinz): Teaches that corporate property is not owned by fictitious entities created by the state but by no person at all. In es-

---

<sup>13</sup> HANS KELSEN, *PURE THEORY OF LAW*, 178 (Porrúa, 2000).

<sup>14</sup> *Id.*, at 183.

<sup>15</sup> Máynez, *supra* note 4, at 21.

<sup>16</sup> *Id.*

<sup>17</sup> Máynez, *supra* note 4, at 274.

<sup>18</sup> *Id.*, at 278.

<sup>19</sup> *Id.*

sence, corporate property belongs not to individuals but to a purpose – “Zweckvermögen”. Although the so-called “purpose theory” has few followers, it contains an important element of truth; that the property of every corporation, not merely charitable foundations but also business companies, is dedicated to a specific purpose.<sup>20</sup>

- c) Realist Theories: Hold that legal entities, both private and public, are real. As such, those with rights include not only humans but every being which possesses a will and life of its own. According to this thinking, a corporation exists as an objectively real entity and the law merely recognizes and gives effect to its existence. Thus, the law cannot create entities but merely recognize them. These theories include “organicism,”<sup>21</sup> the collective soul theory<sup>22</sup>, and social organism theory.<sup>23</sup>
- d) Formalist theory or Theory of Technical Reality (Francisco Ferrara). The word “person” has three meanings for Mr. Ferrara: (a) biological, referring to a rational being; (b) philosophical, referring to a rational being capable of proposing and carrying out objectives; and (c) legal, which treats the person as a subject of law with rights and obligations.<sup>24</sup> Mr. Ferrara regarded the last as merely a status or state of being, which includes only companies and social organizations.<sup>25</sup>

Reviewing Ferrara’s ideas, Eduardo García Máynez<sup>26</sup> believes that the recognition of legal personhood for the right target has constitutive effectiveness. Which is to say that legal persons are not created by legislative act but already exist; the law merely recognizes and gives effect to their existence.

---

<sup>20</sup> García Máynez states, “The rights and obligations of collective persons are not, according to the Brinz thesis, the obligations and rights of a subject, but of its assets. The acts carried out by the former’s agents are not exactly those of the legal person but rather those of the agents that carry out the objectives and reach the goal toward which the assets are dedicated. Despite this, all rights are, a fortiori, the legal power of someone and any obligation necessarily implies the existence of an obligee.” *Id.*, at 282.

Organicism is based on the notion that “collective entities are real entities compared to the human individual.” *Id.* at 287.

<sup>21</sup> *Id.*, at 287. Organicism is based on the notion that “collective entities are real entities compared to the human individual”.

<sup>22</sup> According to this school of thought, in every society there exists a soul or collective spirit that is different than the individual souls of those who make up the group, which is why it is not problematic that collective legal entities coexist alongside physical persons.

<sup>23</sup> *Id.*, at 287. The chief proponent of the theory of social organism is Otto Gierke, who says that “the collective person is not like a third party compared to its members, it is the organic link that binds them together, from which stems the possibility of connecting the rights of the unit and the whole. The corporative person is undoubtedly above, but not separate from, the collective group of persons who make it up;... it is an entity that is both unique and collective.”

<sup>24</sup> *Id.*, at 288

<sup>25</sup> FRANCISCO FERRARA, *THEORY OF LEGAL PERSONS*, 342 (Reus Publisher 1929).

<sup>26</sup> Máynez, *supra* note 4, at 294.

#### IV. CHARACTERISTICS OF THE LEGAL ENTITY

##### 1. *Doctrine*

For Kelsen, both natural persons and juridical persons are subject to rights and obligations. In general, only humans can be considered natural persons, since it is through their conduct that they can obtain rights and fulfill (or violate) obligations. Both natural persons and juridical persons have actions, which are understood as the legal obligations and subjective rights that make up this entity.

Regarding the duties of juridical persons, the articles of incorporation and bylaws of each entity serve as a benchmark to govern the actions of individuals who, as agents of said entity, fulfill (or violate) certain obligations. This situation, called “fictitious attribution”,<sup>27</sup> allows one to consider the legal entity as capable of being bound by obligations.

As to the subjective rights of the legal entity, these are exercised by agents pursuant to that set forth in the articles of incorporation.<sup>28</sup> According to Kelsen, the validity of these articles stems from a legal transaction specified by the applicable laws.

Finally, Kelsen<sup>29</sup> discusses the legal obligations and rights of juridical persons, subject to applicable law and regulations.

Elements of the juridical person under Kelsen’s theory are:

- Artificial entity.
- Conduct.
- Legal capacity.
- Subjective rights.
- Obligations.
- Free will.
- Legal personhood.

De Benito<sup>30</sup> requires the following for the existence of a legal entity:

- Multiple individuals.
- Cooperation.
- Organization.
- Exclusive ownership of property.
- Social purpose.

---

<sup>27</sup> Kelsen, *supra* note 13, at 191.

<sup>28</sup> *Id.*, at 196.

<sup>29</sup> *Id.*, at 199.

<sup>30</sup> De Benito, *supra* note 3, at 42.

Carnelutti claims that legal entities are characterized by:

- Legal capacity.
- Legal personhood.
- Economic element.
- Legal element.

## 2. *Concept*

In the author's opinion, the features that give rise to the formation of a legal entity are:

- a) Existence of an entity or subject: A subject of law is all those beings capable of acting as a holder of the powers or duties for which they are liable in a legal relationship. The term "subject of law" or "legal entity" refers to an unspecified person.
- b) Free will of the entity or subject: Free will is based on the subject's conduct realized with the intent of producing certain legal effects, for which it is important that the law (that will be externalized in some manner) have legal consequences.
- c) Substantive rights: This refers to the effectiveness of the law to protect the legal entity.
- d) Legal personhood: See below.
- e) Obligations, and
- f) Economic interests.

## 3. *Legal Personhood*

In the study of law, the word "personhood" has several meanings. In effect, legal personhood endows the subject with certain legal rights and obligations within a particular legal system, e.g., entering into contracts, owing property, incurring debt, etc. Legal personality is a prerequisite to legal capacity, the ability of any legal person to amend (enter into, transfer, etc.) rights and obligations.

### A. *Theories of Personhood*

In this article, we analyze several theories that attempt to explain "legal personhood" as it applies to business entities. These include the theory of affectation, apparent subject theory, atomistic theory of the state, fiction theory, theory of legal action, and the corporate veil theory.

*a.* Theory of Affectation

This theory takes claims that the protection given to the legal relationship between a material good and a person is the same as the protection given a legal relationship created between an asset and its purpose.

According to this theory, there are no elements to identify what is legal personhood. However, an inert asset is not susceptible to creating a legal relationship. Doing this requires either a natural person or juridical person with free will. In order for a subject of law to have a legal manifestation, it requires free will since this is necessary to have a legal effect and also has the added effect of distinguishing it from the other parties involved in that legal relationship.

*b.* Apparent Subject Theory

This theory was developed by Rudolph Von Ihering,<sup>31</sup> who holds that law consist of two elements. One is substantive, involving a specific purpose and the use or enjoyment of something with economic or moral value. The other is formalistic and refers only to the protection of that right.<sup>32</sup>

A natural person only has legal personhood to the extent that he or she is the sole recipient of these protected interests, which legal entities lack.

Corporate personhood is a concept not exclusive to humans, since personhood cannot stem from the will of natural persons as there are many who lack it. However, they remain individuated as holders of rights and obligations.

Despite the fact that juridical persons have their own interests or rights, personhood is not based solely on laws that grant these interests or rights. Rather, the person is the legal subject or substance of which rights and duties are attributed. An individual having such attributes is called by jurists a “natural person”. Many basic human rights are implicitly granted only to natural persons. For example, a law that prevents discrimination or forbids the government from denying certain rights based on gender, apply solely to natural persons. Another example of the difference between natural and legal persons is that a natural person can hold public office, but a corporation cannot.<sup>33</sup>

---

<sup>31</sup> Rudolf Von Ihering was born in Aurich, Germany in 1818. His legal training took place at the universities of Heidelberg, Munich, Göttingen, and Berlin. He served as a teacher in Basel, Rostok, Kiel, Gissen, Vienna, and Göttingen, where he died in 1892. His methodological points of view had a great impact on the field of historical legal research and the science of law in general.

<sup>32</sup> Rudolf Von Ihering, *The Spirit Of Roman Law*, LAW REVIEW COLLECTION, ART LAW SECTION, 1033 and 1040 (Comares Publisher, 1998).

<sup>33</sup> The law is “a set of substantive and procedural rules issued by the state and that govern, during the time in which they are in effect, members of a society in a given territory.”

*c. Atomic State Theory*

Lingg,<sup>34</sup> who advocated this theory, starts with the idea that only human beings are real and can perform labor; ergo legal personhood can only be ascribed to individuals and not states.

The legal business entity in private law is conceived as a state of being governed by the legal system. This doctrine considers personhood as the existence of a number of individuals exercising their powers in pursuit of a common goal and recognized by applicable law in the same manner as if they were a single person. This situation emerges by linking that statement with a factual situation recognized by the legal regime as a factor of individualization of the entity with free will, without implying that this sole statement can create personhood, given that one requires both recognition by the legal regime and free will of the entity that the regime individualizes.

*d. Fiction Theory*

Friedrich Carl von Savigny<sup>35</sup> theorized that only a natural person is capable of exercising rights and obligations. This is considered to be the oldest and most prevalent theory in Germany (since the mid-nineteenth century) and Italy and France (since the mid-twentieth century).<sup>36</sup>

In fiction theory, the juridical person or corporation is an exception to the rule that only natural persons can exercise rights and obligations. This exception is facilitated by a legal fiction that recognizes the artificial capacity of a fictitious entity to possess or own goods. Savigny defines the legal entity as an artificially created subject of property<sup>37</sup> and that this entity develops its capacity or legal personhood only through property ownership. Property is the means to achieve the objectives for which the legal entity was created.

In sum, the fiction theory equates personhood with the ability to exercise certain rights. It similarly compares legally incapacitated natural persons with juridical persons, given how both fictional subjects of law and natural persons suffering from *capitis deminutio* cannot, by themselves, exert their will within a legal relationship and instead require a representative to exercise their rights granted to them by law.

---

<sup>34</sup> Ferrara, *supra* note 25, at 237.

<sup>35</sup> He was born in Frankfurt, Germany in 1779. He studied in the universities of Göttingen and Merburg, and ultimately served as a professor of law in Merburg, as well as in Landshut and Berlin. A leader in the field of legal history, he died in 1861.

<sup>36</sup> CARLOS FERNÁNDEZ, *THE LEGAL NOTION OF PERSON*, 106 (San Marcos, 1962).

<sup>37</sup> *Id.*, at 59.

*e. Legal Action Theory*

In discussing corporate personhood, Ferrara<sup>38</sup> asserts that juridical persons are not things but rather a state of being. In a sense, legal personhood is like an organic garment with which certain collectives or organizations clothe themselves, a configuration used for the purpose of engaging in commerce. This “label” is imposed on collectives (either business or social organizations) regardless of the subject matter involved.

For this reason, there is no substantial difference between informal associations (those unrecognized by law) and corporations. In both cases, the subject matter is the same and the act of recognizing either’s legal personhood has no value other than to provide the natural persons involved with the most appropriate type of legal status.<sup>39</sup>

As this paper attempts to clarify, juridical persons are not created by law but recognized as legal entities with already existing rights and obligations. This recognition forms the basis for their legal personhood.

*f. Corporate Veil Doctrine*

One could argue that legal personhood is like a “veil” that protects a corporation, subject to removal or “piercing” when used abusively by corporate officers for their own personal gain; to harm third parties; or circumvent laws that they would be unable to avoid except for the legal personhood of the corporation.

The German<sup>40</sup> jurist Serick is credited with pioneering the study of law by systematically analyzing previous court rulings. The doctrine of piercing the corporate veil originated in American law as the disregard theory<sup>41</sup> or the doctrine of corporate disregard.<sup>42</sup> Powell,<sup>43</sup> in turn, defined this theory as “the removal of legal personhood of a corporation in a particular case in order to

---

<sup>38</sup> Ferrara, *supra* note 25, at 342.

<sup>39</sup> *Id.*

<sup>40</sup> With the publication of his book, “*Apariencia y realidad en las sociedades mercantiles. El abuso de derecho por medio de la personalidad jurídica*,” Rolf Serick succeeded in expanding his theory not only to Europe but also to Spanish-speaking countries, thanks to the translation by the Spaniard, Puig Brutau. However, the original idea is recognized as having been a product of American jurisprudence with the development of the disregard theory. CARMEN BOLDO, *LIFTING THE VEIL AND LEGAL PERSON IN SPANISH PRIVATE LAW*, 30-31 (Navarra Publisher, 1997).

<sup>41</sup> Acosta Romero translates this to Spanish as the “teoría del allanamiento de la personalidad,” or the theory of disregard of personhood. M. ACOSTA ROMERO ET AL., *CORPORATIONS TREATY WITH EMPHASIS ON THE CORPORATION*, 693 (Porrúa, 2001).

<sup>42</sup> Boldó, *supra* note 40, at 30.

<sup>43</sup> Ana Brian Nougères, *The legal status of commercial companies. Some modern doctrinal trends*, 10 *Journal of Private Law, Mexico*, UNAM Legal Research Institute, January-April 1993, 19-20.

reach the natural or legal persons behind the same and the underlying economic reality, to apply the substantive law relevant to the specific situation.”<sup>44</sup>

The rationale underlying this theory stems from the corporate officers’ “abuse” of the corporation’s legal personhood by using it a “screen” for their own personal motives, thereby shielding themselves from liabilities arising from their contractual breach. In so doing, they injure the interests of others and flout the law.

In English law, Gower<sup>45</sup> distinguishes cases in which the corporate veil is pierced into four categories: 1) tax-related cases; 2) companies involving a single owner; 3) the use of corporations for fraudulent purposes; and 4) cases involving subsidiaries and holding companies.

In a harsh criticism of corporate personhood, supporters of the contractual theory yexactive scrutiny, especially if the protection provided by its legal personhood is abused.

However, the application of this theory has resorted to the technique of disregard of legal entity to ignore the legal status of the entity, penetrate it so a to reach its shareholders, “lift the veil” of the legal entity.

In Mexican law, the application of the corporate veil theory, abuse of legal personhood, elimination of personhood, and veil lifting (to mention just some of the names that this theory is known by) imply a lack of such personhood, an essential element of the corporation. Accepting the application of the corporate veil theory necessarily involves denying that corporations possess rights other than those held by the partners who established it.

This conflicts with the principle contained in Article 2 of the Law of Mexican Corporations, according to which legal personhood is recognized for both regular and irregular corporations, with the caveat that this second type is required to hold itself out as a corporation to third parties.

In conclusion, we can say that a “veil” which protects the legal entity can be lifted or “pierced” when it is abused by corporate officers, either for their own personal benefit in detriment of third parties; or to circumvent certain laws to which they would be bound as natural persons.

### *B. Requirements for Legal Personhood*

The requirements that help create or establish legal personhood are:

First, the involvement heritage theory, the apparent subject theory, the atomic state theory, and the fiction theory regard legal personhood as something natural to man, which is why these theories generally use the terms person and personhood synonymously, even when they are different. They similarly amalgamate personhood with free will or capacity. That is why these theories

---

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

claim that only natural persons have true personhood, since only individuals have free will. In this way, collective entities are a legal fiction.

Unlike these theories, the legal action theory recognizes the legal entity, distinguishing between the person and personhood.

In order to identify the subject of law, three requirements must be met:

- a) The existence of a subject of law,
- b) A factual situation that individualizes it in terms of the ownership of rights and fulfillment of obligations, and
- c) The recognition of that individualization by existing law.

In sum, legal personhood arises when a legal construct becomes a reality. That legal construct pertains to a particular factual situation in which the subject of law or an undetermined person finds itself individualized as the holder of certain rights and certain obligations in a legal relationship.

## V. PERSONHOOD IN COMMERCIAL STATUTORY LAW

In Mexican commercial statutory law, there is no provision defining legal personhood even though this term is employed, especially in adjectival or procedural aspects. In this way, legal rulings about legal personhood usually do so in terms of the requirements that must be met for a person to intervene in a particular act or business transaction.<sup>46</sup>

In other business laws,<sup>47</sup> the term legal personhood is used to refer to the fact that certain state-owned entities that regulate the operations of business have legal personhood, though these laws do not specify what this means.

When legal personhood is mentioned in legislation, it is generally done so in a negative way; i.e., in regard to the lack or loss of personhood. This suggests that people should demonstrate the existence of that element in order to perform certain legal actions.

The Commercial Code<sup>48</sup> does not include any definition of personhood, but nonetheless explains its meaning by requiring judges to examine each respective party's personhood. They even provide litigants that a litigant can challenge the opposing party's personhood when it appears that the plaintiff or defendant lacks a legal prerequisite.

Based on an analysis of diverse business laws, we can conclude that the concept of legal personhood suffices for the practical applications for which it is used.

---

<sup>46</sup> The article 391 of the Code of Commerce refers to the assignment of letters of credit that are not endorsable.

<sup>47</sup> Among these bodies of regulatory law are the Law of Chambers of Commerce and their Confederations (Art. 4); Law of the Mint of Mexico (Art. 2), Law of Protection and Defense of Financial Services Users (Art. 4) and the General Law of Corporations (Art. 2).

<sup>48</sup> Articles 1056 to 1062 regulate personhood and the legal capacity of the parties.

## VI. PERSONHOOD IN JURISPRUDENCE

Based on criteria set forth by the Mexican federal courts, there is no clear concept of what constitutes legal personhood. This is because Mexican courts have limited themselves to simply duplicating (with some variations) the text of the law, stating that “personhood is an issue that must be considered at any stage of trial and even informally due to the being the foundation of the proceeding.”

For a business association involved in a legal proceeding, it is necessary to demonstrate two personhoods: that of the association itself as a legal entity and that of its representative who must demonstrate that he or she has sufficient authority to act on behalf of the entity. This has been considered in the jurisprudence of the Second Chamber of the Supreme Court of Justice.<sup>49</sup>

However, there are other criteria<sup>50</sup> in which the personhood of the representative of a legal person continue being seen as an outgrowth of its principle. Given the absence of uniform criteria in Mexican law, the personhood of business entities (or corporate personhood) remains a matter of dispute.

## VII. ELEMENTS OF THE LEGAL ENTITY IN MEXICAN LAW

The Federal Constitution in Articles 5, 13, 14, 16, 20 sections V and IX, among others, uses the term “person” to refer to both natural persons as well as corporations, considering them as subjects of law governing generic hypotheses of these precepts. Based on these provisions, it is clear that the constitutional text refers to those who possess individual rights, including both juridical persons and natural persons. Then, it follows the main element recognizes the legal person is related to the subjective rights and guarantees enshrined.

For its part, the Federal Civil Code’s first chapter, called “on natural persons”, is devoted to discussing the natural person; while the second chapter focuses on corporations. This law considers the following as juridical persons: the nation, states, municipalities, public organizations recognized by the Code, professional associations, and others entities referred to in Section XVI of Article 123 of the Federal Constitution; mutual cooperative associations; other associations with diverse political purposes; organizations devoted to scientific, artistic, recreation or any other lawful purpose not unknown to law; and private foreign legal entities.

---

<sup>49</sup> See JURISPRUDENTIAL THESIS, PERSONHOOD IN THE LABOR PROCESS. REQUIREMENTS THAT NOTARIAL TESTIMONY MUST SATISFY REGARDING CORPORATIONS, Judicial Weekly of the Federation and its Gazette, Ninth Period, Volume XII, September 2000, p. 112.

<sup>50</sup> See thesis 892, under voice: PERSONHOOD DERIVED REPRESENTATION OR SUPPORT in the Appendix of the Judicial Weekly of the Federation from 1917 to 1995, Volume VI, Common Law, Part Two, p. 613.

Under the provisions of the Federal Civil Code that governs the person being studied in this paper, the following elements are apparent: substantive rights, obligations and free will.<sup>51</sup>

Corporate statutes<sup>52</sup> that refer to natural persons or juridical persons classify both under the rubric of merchants, which consist of objective and subjective criteria for the former, and formalistic criteria for the latter.<sup>53</sup>

The Commerce Code's merchant classification of the legal entity and corporation is a result of its legal status, as with the Federal Labor Act, which classifies workers as natural persons who provide personal services and are subordinate to another (natural or juridical) person that pays them a salary.

Therefore, the characteristic that follows from the Commerce Code is the legal personhood of the corporation, which is a characteristic that allows the corporation to identify itself as a merchant.

Under the General Law of Business Corporations, another feature pertains to the free will of the business entity. This free will, however, refers to activities of the legal person itself and is reflected in the legal relationships established or created as a result of those volitional acts from which there necessarily stem subjective rights and obligations that emerge.

Elements of the legal entity arising from these statutes are: legal personhood, free will, subjective rights, and obligations of an entity or subject, which coincide with the same element as those specified in the section discussing this author's personal insights.

### VIII. ELEMENTS OF JURISPRUDENCE

The corporation as a subject of law has also been a focus of attention within the criterion that federal courts have issued. In one such criterion, the federal Circuit Courts discuss the nature and legal personhood of the juridical person, stating that "a corporation is a fictional entity whose legal personhood is expressed and exercised through its representatives; which is understandable given that its very nature requires the involvement of natural persons, managers or administrators to represent it and work on its behalf, given that fictional entities cannot labor on their own behalf.

In analyzing these criteria, other elements of legal entities include:

---

<sup>51</sup> The doctrinal elements define the legal entity.

<sup>52</sup> Reviewing the Article 3rd Code of Commerce.

<sup>53</sup> According to the subjective criterion, those who conduct themselves according to law are merchants, regardless of whether or not they have a fixed place of business. According to the objective criterion, merchants are persons with legal capacity to enter into contracts and bind a business, engage in commercial transactions, and make this their ordinary job. According to the formal criterion, merchants are the *personas morales* formed upon satisfaction of the requirements of commercial statutes or and other applicable laws.

- The powers and subjective rights of the legal entity.<sup>54</sup>
- The free will of the entity or social will.<sup>55</sup>
- Obligations of the entity.<sup>56</sup>

Based on Mexican jurisprudence, the concept of juridical person includes the following elements:

- I. Existence of a legally-recognized entity;
- II. Free will of that entity, set forth in its articles of incorporation and manifest through its agents;
- III. RIghts and obligations accruing to the business entity; and
- IV. Legal identity independent from that of its shareholders and subject to law in its own right.

## IX. CONCLUSIONS

A legal entity is a legal construct, created by the combination of five elements: an entity or subject of law, free will, subjective rights, obligations, and legal personhood.

As a practical matter, the juridical person distinguishes itself through the recognition of its legal personhood, which allows it to acquire certain rights and be subject to certain obligations. As such, the actions of a legal entity demonstrate its will.

In addition to identifying the holder of rights and obligations, legal personhood helps ensure that actions realized by the business entity have legal effect.

The factual situation that gives an identity to the juridical person and the relevant legal regime's recognition of it are what gives the juridical person its legal personhood, which is a factor that distinguishes it from other subjects that also possess free will and are capable of exercising rights and fulfilling obligations.

Having set forth arguments in support of this thesis, we can state that the focus of this study does not form part of the physical person. Therefore, it can be applied to juridical persons, which are fictional entities in the real world but very real ones in the world of law.

---

<sup>54</sup> See THESIS, DIRECTORS. THE INHERENT POWERS OF A TRUSTEE ARE GOVERNED BY THE GENERAL LAW OF BUSINESS CORPORATIONS, in the Judicial Weekly of the Federation and its Gazette, Volume XVI, July 2002, p. 1237

<sup>55</sup> See also THESIS, LEGAL REPRESENTATION AND CORPORATE MANAGER. DIFFERENCES BETWEEN FUNCTIONAL OR ORGANIC REPRESENTATION AND MANDATES, in the Judicial Weekly of the Federation and its Gazette, Volume XIII, June 2001, p. 759.

<sup>56</sup> See also THESIS, GENERAL MANAGERS. CASES IN WHICH THEY LACK STANDING TO OBTAIN AN AMPARO REMEDY, in the Judicial Weekly of the Federation and its Gazette, Volume III, June 1996, p. 846.

Indeed, legal entities have five elements:

First, they must have the ability to possess rights.

Second, they must have free will pursuant to that set forth in its articles of incorporation.

The third and fourth elements, which are related to its subjective rights and obligations, exist within a corporation because it has will. However, there are cases in which express authority is necessary to create rights and obligations, due to conduct and circumstances that establish authority without the volitional aspect.

Based on the ideas above, we can confirm that legal personhood is a creation of law, whose role is to identify the subjects of certain rights and obligations, and grant legitimacy to actions realized pursuant to those rights and obligations.

The fifth element of legal personhood, on the other hand, encompasses several elements. One of these is a factual situation identifying it and that occurs when it adopts one of the types of business associations provided for in the General Law of Business Corporations. In addition, upon recognizing these types of business associations we find another aspect of legal personhood; namely the law's recognition of the legal entity's separate identity.

In sum, we can conclude that the legal entity can be defined as follows: A juridical person is an abstract subject created under law and having free will, rights, obligations, and legal personhood, which give it a separate identity within legal relationships and make it a generator of economic, financial, and commercial obligations.

Personhood is the individualization of the legal entity through a factual situation in which it finds itself overseen by a legal rule that allows one to distinguish it from other entities in the business law relationships within the area of law in which the matter unfolds.