

# Penn State Journal of Law & International Affairs

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Volume 4  
Issue 1 *Seventeenth Biennial Meeting of the  
International Academy of Commercial and  
Consumer Law*

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December 2015

## The Natural Person, Legal Entity or Juridical Person and Juridical Personality

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ISSN: 2168-7951

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### Recommended Citation

Elvia Arcelia Quintana Adriano, *The Natural Person, Legal Entity or Juridical Person and Juridical Personality*, 4 PENN. ST. J.L. & INT'L AFF. 363 (2015).  
Available at: <https://elibrary.law.psu.edu/jlia/vol4/iss1/17>

*The Penn State Journal of Law & International Affairs* is a joint publication of Penn State's School of Law and School of International Affairs.

**Penn State**  
**Journal of Law & International Affairs**

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2015

VOLUME 4 No. 1

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**THE NATURAL PERSON, LEGAL ENTITY  
OR JURIDICAL PERSON AND JURIDICAL  
PERSONALITY**

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## INTRODUCTION

In order to ease the study of the science of commercial law, the subject has been classified in four large universes: (1) persons, (2) objects of commerce, (3) legal instruments derived from business relations, and (4) administrative and jurisdictional procedures. The administrative procedures are held in front of administrative courts and the jurisdictional procedures in front of judicial courts.

Within the universe of commercial relations, where persons and objects converge, all legal instruments are, and operate as, a support for commercial exchanges. An example of this is commercial contracts, which due to their nature are known in this universe as atypical contracts<sup>1</sup>.

In the large world of business transactions, the central aspect that stands out is the commercial enterprise, that is, the “juridical person.” To ensure that enterprises may conduct their activity they require a “juridical personality,” which allows for the exercise of rights and fulfillment of obligations that lead us to the study of legitimation.

The legal instruments most widely used by corporations are the atypical contracts. These legal instruments lead us to analyze the juridical person, taking into consideration that it implies another extensive field of study known as the “delimitation of competence of the parties” who participate in the contract, as generating entities of rights and duties, that revolves around legitimation of personality, which, at the same time, could be a point of dispute in business transactions.

The problem about the legitimation of personality, notwithstanding that apparently accepted the terms juridical person and juridical personality, the scope of legal consequences for both, provoke incalculable and diverse conflicts (the lack of legitimation for act in name of a company, when the legal representative acts without authorization of the part involved) not only at domestic level, but also

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<sup>1</sup> Atypical contracts are those whose content has no control or the discipline does not exist in the legislation regarding to the relationship in private law between individuals who contract

at regional and global levels. This can be positive, in that it can enrich the rules of the International Chamber of Commerce and improve model laws that provide cross-border judicial support. However, this can also have a negative impact, giving rise to large and spiraling expenses, when one of the parties must ask for consultant support because they do not know the language (procedural rules and regulations of the proceedings), in the administrative or judicial proceedings.

To analyze the subject matter of this study, the “juridical person,” which has been a topic for discussion since the 19th century up to the 21st century, a consultation among authors including Bonnacase, Carnelutti, Savigny, Hans Kelsen, Nicolai Hartman, Ferrara, De Benito, Garcia Maynez, Rudolph Von Ihering, has been a strict scientific commitment, concluding with the personal contribution provided by Arcelia Quintana, has been updated.

## I. PERSON

A person is juridically classified in two groups: natural persons and juridical persons.<sup>2</sup> The first group refers to a human being, who is an individual being capable of assuming obligations and capable of holding rights. The second group refers to those entities endowed with juridical personality who are usually known as a collective person,<sup>3</sup> social person,<sup>4</sup> or legal entity. In this paper, the term “entity” will be often used when referring to this second group.

## II. GENERAL CONCEPT

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<sup>2</sup> ARCELIA QUINTANA, *COMMERCIAL LAW SCIENCE* 270 (2d ed. 2004).

<sup>3</sup> The term collective legal entity is used by Francisco Carnelutti and it has been the subject of studies in various areas of general law. *See* FRANCISCO CARNELUTTI, *GENERAL THEORY OF LAW* 153 (1955).

<sup>4</sup> *See* JOSE L. DE BENITO, *THE LEGAL PERSONHOOD OF COMPANIES AND* 32 (1955).

A. Etymology.

Beginning with an etymological understanding of “person,” we must reconcile the juridical fiction with what the law defines as a juridical person.

The word “person” has multiple meanings.<sup>5</sup> From an etymological sense this word is derived from *personare*,<sup>6</sup> a term that denotes *larva histrionalis*, meaning “mask.” In this manner, the person acted as the mask covering the face of an actor who recited verses during a scene in a play because the purpose of the mask was to make the actor’s voice resonant and loud. Later, people used the term “person” in reference to the masked actor himself. In view of the above, it is quite understandable to associate the person as a natural being of the human species.<sup>7</sup>

B. Doctrine.

The term “person” has been an important concept in the general scope of law, in civil matters.

In order to determine what should be understood by “person,” diverse legal scholars have created varied studies attempting to clarify its origin.

These studies described below express and analyze diverse positions developed by different legal scholars<sup>8</sup> whose ideas have served as a model to identify the different trends of thought explaining the juridical person. In the intelligence that we exclusively expect to establish for science of commercial law effect, the relevant items that

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<sup>5</sup> See EDUARDO G. MAYNEZ, INTRODUCTION TO LAW 273 (Porrúa 31st ed. 1980).

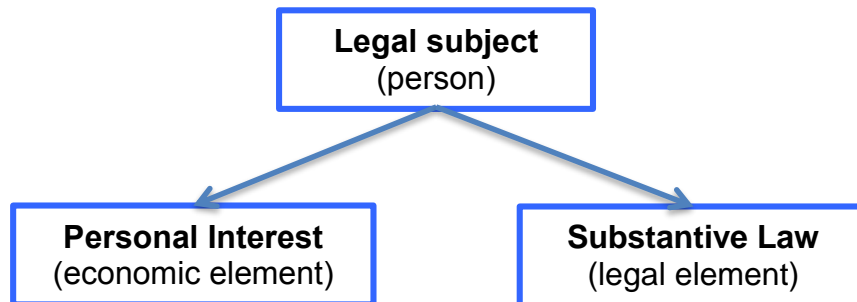
<sup>6</sup> See *id.* (Aulo Gelio quoted by Garcia Maynez, determined through their glossological research that the origins of the word “person” are unclear but most likely derives from the word “pesonare”).

<sup>7</sup> ROYAL SPANISH ACADEMY, DICTIONARY OF SPANISH LANGUAGE, voice, person (Espasa, 1593).

<sup>8</sup> Among the authors who have devoted themselves to the study of the “person” are Francisco Ferrara, Hans Kelsen, Francisco Carnelutti, M.F.C. de Savigny, Joseph L. Benito, and Eduardo Garcia Maynez, whose works are reviewed in this paper.

allow us to specify on the commercial matter what we should understand by “legal entity” or “juridical person” as an entity capable of having obligations and rights.

Francisco Carnelutti<sup>9</sup> understands “person” in a triangular sense. He views the subject as the vertex in which the personal interest (economic element) and the subjective right (legal element) coincide in a legal relationship.



For Carnelutti, the person is the “meeting point of these two elements, that is, the crux of the matter where both converge.”<sup>10</sup> Carnelutti clarifies that the juridical person is not only the man considered in his individuality. Instead, Carnelutti affirms that where collective interest exists, i.e. leading several men as one, unity is allowed to emerge, and personality as a unit will be acquired.

The collective juridical person, as Carnelutti expresses, is created when the economic element and the juridical element of the relationship is the meeting point of more than one man, which is the fundamental principle of this unification of the collective interest.

For Carnelutti, a juridical person is a natural or individual person as well as a collective or compound person,<sup>11</sup> and both hold a common characteristic: they are the meeting point of the economic and juridical element. The latter differs from the fact that it is not a single individual in that position, instead it is two or more individuals who are united by a collective interest.

<sup>9</sup> See FRANCISCO CARNELUTTI, GENERAL THEORY OF LAW 149 (1955).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 143.

Julien Bonnecase<sup>12</sup> on the other hand, defines the juridical personality law as a set of rules and institutions that apply to the person itself, in its individuation and its power of action. For him, the personality law is classified in three parts:

1. The existence and individuation of persons, which means the set of elements that allow on one hand social distinction of the person, and on the other hand, a determination of juridical effect. The elements that allow for further distinction are its name, its legal status, and its address.
2. The legal capacity of natural persons and their variations: on one hand the guidelines of the organization in regard to capacity of natural persons and their variations (capacity to enjoy and exercise capacity with their limits), and on the other hand the study of the legal bodies which substitute for the incapacity of natural persons.
3. The existence, individuation, and capacity of legal entities or juridical persons, which is the subject matter of this paper.

M.F.C. de Savigny<sup>13</sup> is the strongest proponent of the traditional theory, better known as the theory of fiction.

From the analysis of Savigny's proposed theories, it is understood that the legal entity is an artificially-created being, capable of having a patrimony, but distinguished by its lack of will. Savigny concludes that a "person" is any entity capable of having obligations and rights because the juridical persons are legal fictions, therefore they do not have free will and are not subjects of law. According to this trend of thought, the term "person" applies only to the human being

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<sup>12</sup> See 1 JULIEN BONNECASE, *ELEMENTS OF CIVIL LAW* 281 (Jose M. Cajica trans., 1945).

<sup>13</sup> His book, *Modern Roman Law System*, elaborated on the foundations of his theory of fiction, which dominated from the mid-nineteenth and twentieth centuries. See M.F.C. SAVIGNY, *MODERN ROMAN LAW SYSTEM* 304 (Jacinto Mesía & Manuel Poley trans., 2009).



because it holds the will to acquire rights and duties, and for the same reason, becomes a subject of law.

Hans Kelsen<sup>14</sup> argues that according to the traditional theory, a “subject of law” refers to the object of a legal obligation or subjective right. This is known as the juridical power to claim an action for the enforcement of an obligation. In view of this juridical power, the subject participates in the production of the court judgement considered as an individual norm that will rule on the enforcement of the penalty derived from that default.

In sum, for Kelsen<sup>15</sup> the natural person and the juridical person are merely a set of rights and obligations which, when taken together, are metaphorically expressed as the concept of “person.” In this way, the natural or juridical person as a holder has legal obligations and subjective rights which are metaphorically expressed in the concept of person, which is nothing more than the personification of that unity.

Garcia Maynez<sup>16</sup> defines a “person” as “any being capable of having powers and duties.” He maintains that juridical persons are classified as either natural persons or legal entities. While the first group refers to human beings as a subject of rights and obligations, the second group focuses on those associations endowed with personality such as unions or commercial corporations. Maynez prefers to distinguish between the two groups by using the terms “individual juridical person” and “collective juridical person”<sup>17</sup> with the purpose of distinguish them.” In a moral or ethical sense, a “person” is a subject endowed with free will and reason, capable of establishing its own purposes freely as well as finding means to complete them.

Maynez affirms from an ethical point of view, and in accordance with the thesis of the German philosopher Nicolai Hartmann,<sup>18</sup> that a “person” is the subject whose conduct is able to

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<sup>14</sup> See HANS KELSEN, *PURE THEORY OF LAW* 178 (Robert J. Vernengo trans., 2000).

<sup>15</sup> *Id.* at 183.

<sup>16</sup> See EDUARDO G. MAYNEZ, *INTRODUCTION TO LAW* 21 (31st ed., 1980).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 274-275.

express moral values. He clarifies that those values do not necessarily determine its conduct, in such a manner that ethically speaking, free will is one of the essential attributions of personality.

The juridical meaning of a natural person is related with determination if the juridical personality is the necessary consequence of its quality as a human being; in a sense that the juridical personality of the individual does not derive from his human existence.

In respect to the concept of legal entity, Maynez states that it should be viewed through the “theories of juridical personality of collective beings.”<sup>19</sup>

- Theory of Fiction (Savigny). Savigny sustains that a person is any being capable of obligations and rights, and rights are only for beings who are endowed with will, therefore, the juridical subjectivity of collective persons is a result of this fiction, since such beings do not have a free will.<sup>20</sup>
- Theory of Rights without Subject (Brinz). Brinz classifies the patrimony in two categories: personal and non-personal, also known as patrimonies attached to a destination or purpose. In the first category they belong to a subject, while in the second category they do not have an owner, but their destination is addressed by a particular purpose and enjoys special legal guarantees. Here, although the rights exist, they do not belong to anyone but to something.<sup>21</sup>
- Realist Theories. The realist theories affirm that private and public juridical persons are realities, therefore, the concept of subject of law is not limited to man, and does

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<sup>19</sup> *Id.* at 278-94.

<sup>20</sup> *Id.* at 278.

<sup>21</sup> *Id.* at 282–83 (stating that, “[t]he 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.”).

not exclusively refer to beings endowed with will. These theories also include the “organicism,”<sup>22</sup> the collective soul theory,<sup>23</sup> and the thesis of the social organism.<sup>24</sup>

- Theory of Francisco Ferrara. For this author, the word “person” has three meanings: a biological sense, which is equal to a man; a philosophical sense, which is identified with a rational being capable of proposing and carrying out purposes; and the juridical sense which understands the person as a subject with rights and obligations.<sup>25</sup> Specifically for this juridical sense Ferrara states that it is a way things are, because behind the person there is not any other thing but associations and corporate organizations.<sup>26</sup>

Maynez<sup>27</sup> expressed a critique to Ferrara’s ideas, stating that the recognition of juridical personality by the substantive law does not have constitutive effectiveness. That is to say, the juridical person is not born at the discretion of the legislator, the only thing the legislator does is to recognize its existence.

The diversity of the approaches around the concept of person make it necessary to contemplate the following comparative table to clearly understand the concept:

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<sup>22</sup> *Id.* at 287 (organicism is based on the notion that “collective entities are real entities compared to the human individual.”).

<sup>23</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>24</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>25</sup> *Id.* at 288.

<sup>26</sup> See FRANCISCO FERRARA, *THEORY OF LEGAL PERSONS* 342 (Eduardo Shepherd & Maury trans., 1929).

<sup>27</sup> See EDUARDO G. MAYNEZ, *INTRODUCTION TO LAW* 294 (31st ed. 1980).

Person	Doctrinal Concept
FRANCISCO CARNELUTTI	Is the meeting point between the economic element and the juridical element.
M.F.C. DE SAVIGNY	Person is any being capable of obligations and rights, who is endowed with will.
HANS KELSEN	The object of a legal obligation or subjective right.
EDUARDO GARCÍA MÁYNEZ	Any being capable of having powers and duties.
EDUARDO GARCÍA MÁYNEZ	As a subject with rights and obligations.

In this study, the first authors are from the classical theory and the last authors are from modern theory, demonstrating that the theory itself has not changed. Thus, the comparative analysis of classical theory and modern theory becomes more explicit.

### III. ELEMENTS THAT SHAPE THE LEGAL ENTITY

As the concept of “person” has been analyzed in its etymological sense and by the main exponents of the doctrine, it is now necessary to study the elements that contribute to the juridical person.

#### A. Doctrine

As mentioned, for Kelsen both natural persons and legal entities hold physical rights and obligations. In principle, only the human being is considered a person, because it is exactly its conduct that may infer a right, comply with or fail an obligation. Both natural and juridical persons express conduct which is understood as the

content of juridical obligations and subjective rights that conform to this unity.

In reference to the duties of the juridical person, its bylaws, as internal regulations, determine or constrain the conduct of the individual who-as a body of the same-fulfills or violates the obligation. This circumstance of non-fulfilment in the juridical person is known as the “fictitious attribution”<sup>28</sup> which allows for the consideration of the legal entity as capable of being bound by obligations.

As to the subjective rights of the juridical person, Kelsen believes that they are exercised by a body of administration contained in the bylaws, and shall be conferred to the legal entity according to the bylaws.<sup>29</sup> According to this author, the bylaws acquire validity by means of a juridical transaction determined by state order.

Finally, Kelsen<sup>30</sup> defines the juridical personality of the legal entity, which means that the legal order provides obligations and rights and their content is the conduct of human beings who are the bodies or members of the corporation organized by its bylaws and may be described with advantages by means of a personification of the corporation’s charter.

The elements of the legal entity deduced from the theory of Kelsen are the following:

- The being or artificial person;
- Conduct;
- Legal capacity;
- Subjective rights;
- Obligations;

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<sup>28</sup> See HANS KELSEN, *PURE THEORY OF LAW* 196 (Robert J. Vernengo trans., 2000).

<sup>29</sup> *Id.* at 191.

<sup>30</sup> *Id.* at 199.

- The will; and
- Juridical personality.

José L. De Benito,<sup>31</sup> from his point of view, sets forth the following as “conditions” for the existence of a juridical or corporate person:

- Plurality of individuals;
- Cooperation;
- Organization;
- Exclusive patrimonial capacity; and
- Corporate purpose.

The elements of a juridical person defined by Carnelutti are as follows:

- Legal capacity;
- Juridical personality;
- Economic element; and
- Juridical element.

B. Personal opinion of the author

- The elements that contribute to the formation of a legal person are the following:
- Existence of a being or subject: A subject of law is any being capable to act as holder of powers, or liable with

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<sup>31</sup> Professor of the National Academy of Legislation and Jurisprudence of the National Association of Historians of the Spanish Science. De Benito refers to the personality not as an element of the legal person, but as the result of a combination of the five elements. For him, that personality is the recognition the person expresses in front of the public.

obligations in a juridical relationship. The term subject of law or juridical being alludes to an unspecified person in terms of strict law.

- Will of the subject or being. The action of a subject with the intention of producing certain legal effects, and should be highlighted its importance for the law, since this will should be also expressed in an appropriate manner to produce legal consequences.
- Subjective rights. This refers to the power of the juridical norms which is granted to express or omit certain conduct that ensures the judicial protection.
- Juridical personality. This section requires a study to be discussed separately.
- Obligations. The obligation is understood as the existing juridical bond between the demand of a subjective right by its holder and the duty to fulfill the conduct based on the norm that is imposed on the other subject who belongs to the relationship.
- Economic interests.

### C. Juridical personality.

In the juridical field, the word personality has several meanings. It is often used to indicate the quality of a person to be considered as a center of juridical norms or as a subject of rights and obligations.

For the purpose of taking part of juridical relationships, the legal entity needs the so-called personality as an element that individualizes the entity. It is helpful to distinguish the legal entity from a different subject of law with a will that may be found in a similar factual circumstance.

*1. Theories of personality* - This study analyzes the most emblematic theories of personality that intended to explain personality in relation to business corporations, such as the patrimony appropriation theory, the theory of the apparent subject, the atomistic

theory of the state, the theory of fiction, the theory of the legal act, and the controversial theory of veil.

We have mentioned that, except for the theory of the legal act which establishes the difference between “person” and “personality,” none of these theories explains what personality is, but analyze the juridical person in general. Even so, these theories have been described by authors such as Garcia Maynez<sup>32</sup> and Cervantes Ahumad, among others, as “theories of personality” even when considering the juridical person itself rather than its personality.

Finally, we should emphasize the exposure of the reference theories can be viewed through Franciscos Ferrara<sup>33</sup> in his work “Theory of Legal Persons.” This author developed, in an objective and systematic way, the study of the doctrinal ideas now discussed, which in turn have been studied by several authors such as Garcia Maynez<sup>34</sup>, Mantilla Molina<sup>35</sup> and Antonio Brunetti.<sup>36</sup>

(1) *The patrimony appropriation theory.* - This theory considers that there exists the same legal protection to one good and one person in a legal relationship than such created between patrimony and purpose. In this manner, the purpose receives rights and obligations, that is to say, a patrimony appropriated or earmarked for certain purpose.

In this theory there are no elements to identify what personality is, even when intending to put on the same level one subject of law with a “purpose” with rights, understood as patrimony that is able to generate rights and obligations; however, an inert patrimony is not susceptible of creating de jure relationships. For such effects, a volitive being or person is required, whether it is natural or juridical, because juridical relationships presuppose the expression of a conduct that produces consequences of law. At the time one subject expresses or

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<sup>32</sup> EDUARDO G. MAYNEZ, INTRODUCTION TO LAW 278 (31st ed. 1980).

<sup>33</sup> It is worth mentioning that Ferrara is located, by temporality, very close to the time that such doctrinal positions were exposed. *See* FRANCISCO FERRARA, THEORY OF LEGAL PERSONS 122 (Eduardo Shepherd & Maury trans., 1929).

<sup>34</sup> MAYNEZ, *supra* note 32, at 274, 280, 293.

<sup>35</sup> ROBERTO L. MANTILLA MOLINA, COMMERCIAL LAW 207 (29th ed. 2002)

<sup>36</sup> ANTONIO BRUNETTI, JOINT STOCK COMPANY 45 (1960).



personifies himself juridically, it is required that this subject has will because only in that way is it possible to produce consequences of law, which also allows individualization of the volitive subject in respect to other persons who intervene in those relationships.

(2) *Theory of the apparent subject.* - The theory of the apparent subject was developed by Rudolph Von Ihering,<sup>37</sup> who argues that the law consists of two elements. One element is substantial, which resides in the practical end that produces utility or enjoyment of the things that have economic or moral value, and, the other element, formal, is only related to this aim as a means of enjoyment protection; so this author asserts: “the rights are interests juridically protected; the law is the legal certainty of enjoyment.”<sup>38</sup>

For Ihering, only the natural person has personality because it is the sole recipient of the protected interests (the above mentioned), contrary to juridical persons who do not enjoy said prerogative. The juridical personality of legal entities is something that is not inherent to the quality of man because personality does not derive from the will of natural persons.

Although the legal entity has its own legal interests, this does not mean that personality resides essentially in norms. This is because even when law is effectively “a set of substantive and adjective norms”<sup>39</sup> used to regulate the life of man; these norms by themselves do not create personality, in contrast, they only recognize a situation can be useful as a factor of individualization for the volitive subject, even when this subject suffers a reduction in its capacity.

(3) *Atomistic theory of the state.* - This theory stems from the idea that the creation of the State is grounded in the conception of

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<sup>37</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>38</sup> RUDOLF VON IHERING, *THE SPIRIT OF ROMAN LAW* 1033, 1040 (1998).

<sup>39</sup> ARCELIA QUINTANA, *COMMERCIAL LAW SCIENCE* 6 (2d ed. 2004) (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.”).

Ihering. This means that only men are a reality and are able to act, therefore, personality is an attribution for individuals only, not for the State.

The juridical person in private law is conceived as a fact ruled by the legal order. A personality, then, is when the law recognizes the pursuit of a common purpose by a collection of individuals, as if the pursuit was done by a single person. This emerges when personality is linked with a situation of fact<sup>40</sup> recognized by the juridical norm, as a factor of individualization of the volitive being, and it does not imply that a sole statement defines the personality, because the recognition of the norm is a requirement as well as the will of the being whose norm should be individualized.

(4) *Theory of fiction.* - Friedrich Karl Savigny<sup>41</sup> supported the theory of fiction, which is considered the most disseminated and the oldest since it prevailed until the first half of the 19th century in Germany, and the middle of the 20th century in Italy and France<sup>42</sup>. In conformity with this stance, only man has capacity to be a holder of rights and obligations.

The theory of fiction sets forth the idea that the juridical person or legal entity represents an exception to the principle that only the natural person has capacity to act as holder of rights and obligations. This is a result of a legal fiction that recognizes the artificial capacity for possession or ownership of property<sup>43</sup> by a fictitious being.

Savigny defines the juridical person as a subject of goods who was created artificially, by virtue of the fact that said being only develops his capacity or juridical personality within the limit of the domain of goods, which are the only means to reach the purposes it was created for.

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<sup>40</sup> The expression “situation of fact” is used in strict law way, understood as factual circumstance which necessarily produce legal consequences.

<sup>41</sup> Karl Friedrich Savigny (1779-1861) was born in Frankfurt, Germany. He studied at the University of Göttingen and University of Marburg, and was a professor of law in University of Marburg, University of Landshut and at University of Berlin. He was a leader in the field of legal history.

The theory of fiction confuses personality with the capacity to act; likewise, this theory puts in the same level the natural persons, who are incapable juridically, with collective juridical persons. When considering that fictitious subjects of law and those affected by a *capitis deminutio*, are not able to personify themselves or express their will in juridical relationships by themselves, in consequence, they require a representative to exercise the personality – capacity to act – that law provides them in a fictitious manner.

(5) *Theory of the legal act.* - Ferrara,<sup>44</sup> when referring to the juridical personality of the legal entity, argues that juridical personality is not a thing, but instead a way things are. The juridical personality is the organic vestment used by certain groups of men or establishments to introduce themselves in the life of law, it is the legal configuration certain groups of men assume in order to participate in commerce. The personality is a juridical seal that comes from the outside to superimpose on these phenomena of association and social order, which may facilitate, vary, or change the substratum of the substance subject to this juridical seal which is always a collectivity or a social organization. For this reason, there is not a substantial difference between corporations and non-recognized associations. Both have an identical substratum, and the recognition of personality does not have value other than granting to these pluralities of individuals' variables, which are the most appropriate form of a juridical unit.<sup>45</sup>

As derived from the theory subject matter of this section, the legal order does not create juridical person; it only recognizes them as individualized subjects with pre-existing rights and duties in the social reality. This legal recognition is the element that comes to construct its personality.

Juridical personality is a juridical fiction due to juridical person exists by rule of law and it is necessary emphasizes it. It is necessary to understand the rights and duties applicable to the juridical person; as they are still the origin of legal disputes.

(6) *Theory of veil.* - This stance arises from the argument that it is possible to “penetrate” the legal entity raising its “formal veil”

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<sup>44</sup> See FRANCISCO FERRARA, THEORY OF LEGAL PERSONS 342 (Eduardo Shepherd & Maury trans., 1929).

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

up. The theory covers the same in situations where a determined corporate form confers directly to partners the legal consequences from acts this entity executed to disregard it or set said legal entity aside, with the purpose that partners respond to corporate transactions they made with personal purposes under the protection of the corporate structure in question, causing a patrimonial detriment to third parties or evading legal prohibitions, that as a natural person, they could have not overcome.

The legal scholar Rolf Serick is recognized as the pioneer in the systematization of the study based on the analysis of diverse court decisions. The theory of veil has its origin in United States law, having as a frame of reference the precedent of diverse judicial resolutions issued by United States courts, as well as opinions from different legal scholars. This trend of thought is known as the “theory of disregard” or doctrine of the “disregard of legal entity”.

The argument supporting this theory begins from the “abuse” by partners of the juridical personality by commercial corporations when they use it as “screen” for a personal benefit. These partners hide behind “the veil” that covers them with a corporate structure, failing contractual obligations that infringe third parties interests and evading the law.

Frederick James Powell is considered one of the most representative proponents of the theory of disregard in the United States. He has defined this theory as “the non-recognition of the juridical personality of a commercial corporation in a concrete case, which allows said legal entity to reach natural or juridical persons behind the same, including the underlying economic reality, in order to apply them the corresponding positive law for the concrete situation.”<sup>46</sup>

In English law, Laurence Cecil Bartlett Gower<sup>47</sup> classifies the cases in which partners are permitted to “prescind” from the legal personality of a commercial corporation into four categories: 1) cases related to tax matters; 2) cases of sole partner corporations; 3) cases in

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<sup>46</sup> *Id.* at 30 (citing Nicolas H. Oreggia).

<sup>47</sup> *Id.* at 21.

which corporations develop their activity with fraudulent purposes; 4) holdings and subsidiaries.

On the other hand, when making a severe critique to the concept of juridical person, the supporters of the contractual theory assure there are not absolute and invariable concepts, and the juridical person should be subject to an examination; especially, if under its scope there is an abuse of the legal personality.

Now then, the applicability of this theory has used the technique of disregard of a legal entity, which consists of setting aside the juridical personality of the being, penetrating in the personal substratum of the partners (shareholders), “raising the veil up” of the legal entity.

In Mexican Positive law<sup>48</sup>, which also involves in an implied manner, the non-recognition of said personality, as an essential element of the legal entity which will cause to deny that commercial corporations are subjects or rights different to those granted to partners who gave rise to its foundation.

The above would contradict the principle contained in Article 2 of the Law of Commercial Corporations, which recognizes a personality in legal and illegal corporations, with the requirement for the latter to reveal themselves as such before third parties.

As a conclusion, we may affirm that juridical personality is conceived as a “veil” that covers the legal entity, which may be raised up or uncovered in case of its abuse and use by the partners for their personal benefit in prejudice of third parties or to evade the applicability of legal provisions, which, as individual persons would fail to observe, provided, however, that making use of said person and its personality they do overcome such obstacles for their personal benefit.

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<sup>48</sup> The theory of the abuse of the juridical personality, the theory of the underestimation of the personality, the raising up of the veil (to mention only some of the names given to this theory).

2. *Requirements for the legal personality.* - The requirements that help to construct or concrete the legal personality, and, at the same time, establish its juridical concept are the following:

First of all, the patrimony appropriation theory, the theory of the apparent subject, the atomist theory of the State and the theory of fiction identify personality as something innate to man, therefore they use as synonyms the terms person and personality, even when there are different juridical figures. Likewise, they associate personality with will or capacity. For that reason, these theories affirm that only the natural person holds a real personality, since a human being exclusively has a will, the collective beings are only a fiction or an appearance.

Different from the theories cited above, the theory of legal act recognizes the own will to the legal entity, and it also distinguishes person and personality.

In order to produce the individualization of the subject of law, three requirements must be fulfilled. These refer in a certain manner to the real factor and the formal factor:

1. The existence of a being or a subject of law. To specify the personality we require the existence of a being or a subject of law, a volitional entity considered *legally real*, that could be expressed in juridical relations.
2. A situation of fact that individualizes it in the holdership of rights and the fulfillment of obligations. Juridical relations, who can be established as a result of a natural phenomenon, achieve this or the will externalized by that subject. In such a way that this one is situated or has a *status* which allows to differentiate it from the other volitive subjects; that is, it is legally individualized.
3. The recognition of individualization by the normative legal order. This third requirement refers to legitimation<sup>49</sup> of the

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<sup>49</sup> Legitimacy comes from –legitimo- that, in turn derives from the Latin *legitimus* (-a, um). In common language it means “under the rules”. In the legal literature, *legitimus* means, “according to law”, “fair”. For the Romans, “designate

volitive subject as a holder of determined rights or certain obligations in a juridical relationship. It is necessary that the being or volitive subject and the situation of fact are under a legal rule in order to individualize that person, that is, acquire a certain legal status.

In conclusion, personality is established when a legal assumption is updated in reality as long as it is foreseen in a general norm of law that describes a determined situation of fact where the subject or undetermined person is, with the purpose to individualize it as a holder of determined rights or certain obligations in a specific juridical relationship.

#### IV. PERSONALITY IN THE COMMERCIAL LEGISLATION.

In Mexican commercial legislation there is no precept that defines juridical personality, even when the term is also used by said legislation; especially in adjective or procedural aspects. Thus, the legal provisions that refer to the juridical person generally do it in function of the necessary quality that one person shall have to intervene in certain legal act or legal transaction of a commercial nature.<sup>50</sup>

In other commercial laws,<sup>51</sup> the term is used in reference to the fact that certain beings who belong to the State, in charge of regulating

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something practiced or maintained as correct; produces a favorable reaction, approval.”

<sup>50</sup> Código de Comercio [CCo.], *as amended*, art. 391, Diario Oficial de la Federación [DO], 17 de abril de 2012 (Mex.) (unless the otherwise agree, the assignor of goodwill will answer only for the legitimacy of the credit and for the personality from who made the assignment).

<sup>51</sup> Among these bodies of regulatory law are the Ley de Cámaras Empresariales y sus Confederaciones y del Código de Comercio [Law of Chambers of Commerce and their Confederations], *as amended* art. 4, Diario Oficial de la Federación [DO], 30 de abril de 2009 (Mex.); Ley de la Casa de Moneda de México [Law of the Mint of Mexico], art. 2, Diario Oficial de la Federación [DO], 20 de enero de 1986 (Mex.); Ley Federal de Protección al Consumidor [LPC] [Federal Consumer Protection Law], Diario Oficial de la Federación [DO] 24 de diciembre de 1992 (Mex.); Ley General de Sociedades Mercantiles [LGSM] [General Law for Commercial Corporations], Diario Oficial de la Federación [DO], 4 de agosto de 1934 (Mex.).

several aspects of the commercial activity, have juridical personality of their own, without expressing what it means.

The reference to personality cited in said legal systems is generally in a negative way, that is, it refers to the inexistence or loss of the same; it is a *contrario sensu* circumstance that allows to affirm that persons shall demonstrate the existence of that element to execute certain juridical acts.

The adjective precepts of the Commercial Code<sup>52</sup> that rule this juridical figure, do not provide a definition thereof; however, its meaning is understood when determining that judges shall examine *ex officio* the personality of the parties. They even foresee that litigants may challenge such of their counterpart, when it is considered that the plaintiff or defendant does not have the juridical quality he holds and appears in court.

It is possible to conclude derived from the analysis above, related to several commercial provisions in which it is proven the concept of legal personality that we expressed as a personal opinion, it is the appropriate because such element holds a practical applicability.

#### V. THE PERSONALITY IN JURISPRUDENCE.

The criteria that has been established in federal courts does not provide a clear concept of what personality is, because the courts are limited to produce the text of the law with some variations, when establishing that “personality is a matter that shall be examined in any status of a trial and even *ex officio* since it is the fundamental basis of the procedure.”<sup>53</sup>

In reference to a commercial corporation that appears at a trial, it is necessary to show two personalities. First, from the juridical as a legal entity who is legitimated in the legal cause. Second, as the one from its representative, being understood that the latter shall prove it

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<sup>52</sup> Código de Comercio [CCo.], art. 1056–62 (regulating personhood and the legal capacity of the parties).

<sup>53</sup> See Jurisprudential Thesis II, *Personhood: Its Study can be made in any Stage of Trial, Even Officiously*, Semanario Judicial de la Federación 1917-1995 41.



has sufficient powers to act on behalf of the other, which should have been granted by the corporate body authorized for said purposes. The above has been considered by the jurisprudential criteria by the Second Courtroom of the Supreme Court of Justice of the Nation.<sup>54</sup>

However, there are other criteria<sup>55</sup> in which the personality of a representative of a legal entity is still being considered as a derivation of its principal.

Thus, the topic related to the personality of juridical persons is controversial in the field of jurisprudence, because there is not uniformity of criteria in the final judgements pronounced in that sense.

## VI. ELEMENTS OF THE LEGAL ENTITY IN MEXICAN LEGISLATION

The Political Constitution of the United Mexican States in its federal nature, in Articles 5, 13, 14, 16, 20 of sections V and IX, among others, use the term person to refer to natural persons and legal entities, and the Magna Carta considers them as subjects of law in generic hypothesis that rule said precepts. From such normative assumptions, it may be confirmed that the constitutional text alludes to those who are holders of constitutional individual guarantees that include the legal entity and the natural person as well. Afterwards, it is deduced that the principal element that recognizes to the juridical person is such of the subjective rights expressed as guarantees.

On its part, the Federal Civil Code in the First Book known as “Book for Persons” includes natural persons in its First Title, in the Second Book includes the legal entities. This Law details that legal entities are the following: the Nation, the States and the Municipalities, the other corporations of public nature recognized by this Law, professional associations and others cited by Section XVI of Article 123 of the Federal Constitution, the mutual cooperative companies,

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<sup>54</sup> See Jurisprudential Thesis, *Personhood in the Labor Process, Requirements that Notarial Testimony must Satisfy Regarding Corporations*, XII Federation Judicial Weekly and its Gazette 112 (2000).

<sup>55</sup> See Thesis 892, *Personhood Derived Representation or Support*, VI Semanario Judicial de la Federación 1917-1995 613.

those associations who are different to the above mentioned (natural person and legal entity or juridical person) that propose political, scientific, artistic, recreational purposes or any other legal purpose, as long as they are recognized by law, as well as foreign legal entities of a private nature.

From the above we conclude in conformity to the provisions of the Federal Civil Code that rule the person subject matter of this study, the following elements are deducted: subjective rights, obligations and will.<sup>56</sup>

The commercial legislation<sup>57</sup> also refers to the natural person and the legal entity or juridical person, to qualify them as merchants, applying for such affects an objective and subjective criteria as to the first of them, and one formal for the second.<sup>58</sup>

Now then, the qualification as merchant that is provided by the Commercial Code in respect to the juridical person, commercial corporation, is an effect related to its juridical personality as it happens in the Federal Labor Law that qualifies the worker to the individual that provides a personal service who is subordinated to another, whether it is a natural person or legal entity by means of the payment of a salary. Accordingly, the element that is deducted from the Commercial Code is the juridical personality of the legal entity that allows it to individualize itself as merchant.

From the General Law of Commercial Corporations, the other element that is deducted is concerned with the will of the juridical person. However, this will is referred to the activities of the juridical

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<sup>56</sup> See section V.1 *supra*, the legal entity defined by doctrinal elements.

<sup>57</sup> Código de Comercio [CCo.], *as amended*, art. 391, Diario Oficial de la Federación [DO], 17 de abril de 2012 (Mex.).

<sup>58</sup> ARCELIA QUINTANA, COMMERCIAL LAW SCIENCE 258 (2d ed. 2004) (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).

person itself which are reflected in the juridical relationships that are established or created as a consequence of that conduct, from which necessarily gathers subject rights and obligations for the juridical person, as the case may be.

The elements of the legal entity which come from the legislation are the juridical personality, the will, subjective rights and obligations referred to a being or subject, which are coincident with those detailed in the personal opinion.

## VII. ELEMENTS OF JURISPRUDENCE.

The legal entity as a subject of law has also been a topic for its reference in the different criteria issued by the tribunals of the federation.

In this way, as provided in an isolated jurisprudential criteria, the Full Circuit Tribunals refer to the nature and to the juridical personality of the legal entity, considering that “a legal entity is a fictitious entity, whose juridical personality is expressed and exercised by means of its representatives; since due to its nature, the juridical persons need individuals, managers or administrators to represent them, to act in their behalf because fictions do not operate by themselves.” At the time of analyzing these criteria, we may deduct other elements of juridical persons:

- One of them identifies the faculties or subjective rights of the juridical person;<sup>59</sup>
- The other is considered as the will of the being of social will; and another are<sup>60</sup>

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<sup>59</sup> See Thesis, *Directors, The Inherent Powers of a Trustee are Governed by the General Law of Business Corporations*, XVI Judicial Weekly of the Federation and its Gazette 1237 (2002).

<sup>60</sup> See Thesis, *Legal Representation and Corporate Manager, Differences Between Functional or Organic Representation and Mandates*, XII Judicial Weekly of the Federation and its Gazette 759 (2001).

- Obligations of the legal entity.<sup>61</sup>

From the above, we may also conclude that jurisprudence establishes the following elements of the legal entities:

1. The existence of a juridical being.
2. A will from said being which shall be foreseen in its bylaws contained in the incorporation deed and expressed in its representation bodies.
3. The legal entity is holder of rights and susceptible of acquiring obligations, which the legal entity exercises and fulfills.
4. It has a juridical personality of its own that distinguish the same from the partners who incorporate and convert it in a subject of law.

#### VIII. DEFINITION OF THE JURIDICAL PERSON OR LEGAL ENTITY FROM THE PERSONAL POINT OF VIEW

A legal entity is a juridical construction that is given with the following five elements: the being or subject, its will, the subjective rights, the obligations and the juridical personality.

In the specific case, the legal entity is individualized through the recognition of the juridical personality that allows the same to acquire the holdership of rights and being susceptible of obligations.

In consequence, the conduct of a juridical person implies its will. The importance of the personality, in addition to individualizing the subject as holder of rights and obligations, is also that it is the suitable means to allow the legal entity to exteriorize itself juridically.

The factual circumstance that individualizes the legal entity and the recognition made by the legal order is the essence that provides the legal entity with a juridical personality, since it is a factor of legal

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<sup>61</sup> See Thesis, *General Managers, cases in Which They Lack Standing to Obtain an Amparo Remedy*, III Judicial Weekly of the Federation and its Gazette 846 (1996).

exteriorization that distinguishes it from other subjects who also have a will and are capable of exercising rights and fulfilling obligations.

From the ideas above expressed it is asserted that juridical personality is a creation of law, which function is to individualize the subjects with rights and obligations, granting them legitimacy in the ownership of said rights to exercise them, and fulfill its corresponding obligations.

After we have established the arguments that support the present research, it is possible to assert that the juridical figure subject matter of the present study is not innate to the natural person, therefore, may be applied to legal entities, ideal beings for the real world, but real for the world of Law.

In effect, in juridical persons concur the five elements:

The first is related to the being or subject of law, that contrary to what we may think, it does not need a physical body to legally exist, and it is enough to have existence for the purpose of law.

The second element is the will of the subject, which is detailed in its bylaws.

The third and fourth elements, related to the subjective rights and obligations, are updated in the legal entity because the juridical person holds a will. However, there are cases in which it is not necessary the will in order to produce rights and obligations, since there are facts that determine it even if the volitive aspect concurs.

As to the juridical personality, as the fifth element, we may establish that the juridical personality also requires the conjunction of diverse requirements for its conformation. One of the other requirements that help to concretize the juridical personality is the factual situation that individualizes that subject. This occurs when the legal entity adopts one of the corporate structures foreseen in the General Law of Commercial Corporations, which individualizes it as a determined commercial corporation.

Besides, due to the recognition of those types of corporations in the legal order above cited, we obtain other of the elements

applicable to personality, which is the juridical recognition of such individualization, at the same time, as a result of the concurrence of said elements, the legal entity acquires a legitimate legal personality to consider it as holder of rights and obligations.

In summary, we may conclude that, joining the five elements that shall be met to conform said person, this is defined in the following terms:

The legal entity is a subject of an abstract existence, legally constructed with a will of its own, including rights, obligations and a juridical personality that individualizes it in the relationships of law and make it a center that generates rights and obligations of an economic, financial and commercial nature.

Following the order of ideas set out above, the legal personality is also susceptible to having a concept which will allow it to distinguish this from the legal entity.

Personality is the individualization of the juridical person by means of a factual situation in which it is placed, foreseen by a legal norm that allows personality to distinguish it from other volitive beings in the commercial-legal relationships in an environment of law where the concrete case develops.