

ภาคผนวก

CHAPTER 34

CORPORATE PERSONALITY IN THEORY AND PRACTICE

THE principal theories of corporate personality have not been primarily concerned with the solution of legal problems. They have been concerned either with the philosophical explanation of the existence of personality in beings other than human individuals, or with the political interpretation of group personalities of different kinds. The latter type of theories, in particular, has exercised great influence on political theory and practice; but it has been of very limited use in the solution of problems of modern taxation, property transactions or company law.

THE PRINCIPAL THEORIES OF CORPORATE PERSONALITY

It will suffice briefly to restate the principal theories on corporate personality:

(1) The fiction theory, whose most famous exponent is Savigny,¹ and whose principal British advocate is Salmond,² regards the legal personality of entities other than human beings as the result of a fiction. "Real" personality can only attach to individuals. States, corporations, institutions, cannot be subjects of rights and persons, but they are treated as if they were persons.

(2) The concession theory though more closely linked with the philosophy of the sovereign national state than the fiction theory is, in some respects, a variant of it, for it asserts that corporate bodies within the state have no legal personality except in so far as it is conceded to them by the "Law," which means the state. This theory is also supported by most of the exponents of the fiction theory, such as Savigny, Salmond and Dicey.³

(3) The theory of the *Zweckvermögen*⁴ declares that the property

¹ *System des heutigen römischen Rechts*, Vol. 2, p. 236 et seq.

² *Jurisprudence*, para. 113.

³ *Law of the Constitution* (8th ed.), pp. 87-88.

⁴ Associated with the names of Bekker, and, in particular, Brinz (*Pandekten*, Vol. 1, p. 196 et seq.).

of juristic persons may be dedicated to, and legally bound by, certain objects, but that they are subjectless property, without an owner. This theory also assumes that only human beings can have rights.

(4) Ihering's theory⁵—philosophically akin to the fiction theory—finds the subjects of the rights of the juristic person in those human beings who are really behind it—the members of a corporation, and the beneficiaries of a foundation (*Stiftung*) which is endowed with legal personality in nearly all Continental laws, although in Anglo-American law they receive different treatment through the concept of trust.

(5) The realist or organic theory, associated, above all, with the name of Gierke⁶ and to some extent supported by Maitland,⁷ is opposed to all the foregoing theories; for it asserts the real existence of legal persons as the source of their juristic personality. The corporate body is a *reale Verbandsperson*; it does not owe its personality to state recognition; it is not a fictitious legal creation, nor does personality reside in its component members or beneficiaries. ✓

A brief analysis will reveal that all these theories have primarily political significance and that their usefulness for the solution of practical legal problems takes second place. The fiction theory proper is essentially the product of a philosophical conception: of the innate quality of the human person, which gives him *a priori* personality. In Savigny's words:

All law exists for the sake of the liberty inherent in each individual; therefore the original concept of personality must coincide with the idea of man.⁸

It is therefore hardly correct to assert that "the fiction theory is not a theory at all" but "merely a formula."⁹ In its pure form the fiction theory is politically neutral. Its offspring, the concession theory, is, however, an eminently political theory; its principal purpose has been to strengthen the power of the state to deal as it pleases with group associations inside the state. The state alone, though itself a juristic personality, is placed on the same level as the individual. Its personality is really beyond question, and it

⁵ *Geist des römischen Rechts* (5th ed.), Vols. 2 and 3.

⁶ *Das deutsche Genossenschaftsrecht*, 4 vols.; *Das Wesen der menschlichen Verbände* (1902).

⁷ Introduction to Gierke's *Political Theories of the Middle Ages* (1900).

⁸ *System des heutigen römischen Rechts*, Book 2, para. 60.

⁹ Wolff, "On the Nature of Legal Persons," 54 L.Q.Rev. 494, 505 (1938).