

CORPORATE PERSONALITY IN COMPANY JURISPRUDENCE: DIVERGENCES IN THEORETICAL PERSPECTIVES*

Abstract

Theories in company law are in no small measure great each trying to explain the corporate personality. These involve the fiction, concession, real entity, nexus-of-contract, aggregate and corporate social responsibility theories, inter alia. In this essay, these theories are viewed through the prism of critical analysis. Following the contradicting views arising from the theories, this essay concludes that corporate law theories cannot be determinate, but nevertheless, significant in terms of context and convention.

Keywords: Corporate law, Law theories, Corporate Personality, Divergences

1. Introduction

The topic relating to the origin and nature of the company has posed a jigsaw puzzle for legal thinkers and philosophers. The issue has not been an open and shut case and has effectuated several schools of thought. The theories engendered in this regard include the legal fiction, concession, real entity, nexus of contract, aggregate and corporate social responsibility theories, among others. This essay seeks to critically inquire into the core of the various theories of corporate personality examining their strengths and weaknesses. The fundamental questions are what constitute corporate personality? Is there any corporate law theory so certain that it cannot be flawed? To what extent has a particular corporate law theory aptly explained the origin and nature of the company? The final curtain is drawn with the writer's standpoint in the whole corporate tale: the postulation of a particular corporate law theory depends on how its proponents view and understand the company. Hence, no theoretical explanation is so certain and immune from doubts; and corporate law theories although relevant in relation to context and convention, remain indeterminate.

2. The Legal Fiction/Concession Theory

The concept of *persona ficta* (artificial person) is traceable to the Middle Ages,¹ particularly, in the writings of an Italian jurist, Sinbalduus Fliscus who was also known as Pope Innocent IV (1243-1254).² In his treatise, a commentary on the five books of decretals of Pope Gregory IX, he opined that when the college, is to deliver an oath, it can be sworn by a single person who stands in representation of the college. He wrote: *collegium in causa universitas fingatur una persona*, which translates as 'since the college is in corporate matters figured as a person.'³ The early understanding of the company as a fictional person can also be associated with the work of Lord Coke, in particular, his essay on the *case of Sutton's Hospital*.⁴ In that essay, Coke remarked that 'the corporation itself is only in *abstracto* and rests only in intendment and consideration of the law.'⁵ Although in his wordings Coke did not explicitly make reference to terms like 'fiction' or 'fictitious', his phrase has been widely regarded as an implicit promulgation and a classic illustration of the fiction theory in common law.⁶ Generally, the *point de departe* of the legal fiction theorists is that 'person' as a concept can exist in two different ways viz the natural and the artificial.⁷ The former is

*Amadike NKEM, LLM (Kingston University, London).

¹ Maximillian Koessler, 'The Person in Imagination or Persona Ficta of the Corporation' (1949) 9(4) *Louisiana Law Review* 435

² Horace Kinder Mann, *The Lives of the Popes in the Middle Ages* (K Paul, Trench, Trubner 1902) 17; Johann Friedrich Schulte, *Die Geschichte der Quellen und Literatur des Kanonischen Rechts* (Stuttgart 1887) 91

³ Pierre Gillet, *La Personalite Juridique en Droit Ecclesiastique* (Malines, Belgium, 1927) 165; Sir Frederick Pollock, *A First Book of Jurisprudence* (4th ed., Macmillan 1918) 117

⁴ *The Case of Sutton's Hospital* 10 Jac 1612

⁵ Sir Edward Coke, *The Report of Sir Edward Coke* (Butterworth 1896) 303

⁶ Budington Du Bois, *The English Business Company After the Bubble Act 1720-1800* (The Commonwealth Fund 1988) 86

⁷ William S Laufer, *Corporate Bodies and Guilty Minds: The Failure of Corporate Criminal Liability* (University of Chicago Press 2006) 50

category of persons existing in the forms given to them by God of nature, possessing rights and duties and their words and actions regarded as their own. The latter group of persons exists in form created and designed by human laws and they represent the words and actions of another.⁸ With the distinction of person as natural and artificial, the legal fiction theorists further opined that company falls within the scope of the artificial person assigned to it by the law. In *Trustees of Dartmouth College v Woodward*, Chief Justice Marshall described the personality of the company as an artificial being, invisible, intangible, and existing only in contemplation of law.⁹

A corollary to the artificial personhood of the company is the separate personality of the company from its members. The *locus classicus* of this principle is located in the case of *Salomon v Salomon*¹⁰. In that case, Lord MacNaghten maintained that in law, the company is viewed as a separate person from its individual members. Following incorporation, the business might be the same, having the same people as manager and the same people receiving profits. This notwithstanding, the company is neither the agent of the shareholders nor the trustee. The member of the company will not be liable except as provided in the Act.¹¹ What follows from incorporation is that the company is in law, a person with separate or distinct personality from its individual members, including the owners, shareholders directors, managers and other individual members.¹² Separate personality also implies that the company can own property,¹³ sue and be sued,¹⁴ have human rights,¹⁵ engage in a contract,¹⁶ commit crime¹⁷ and be a victim of tort.¹⁸

Despite the acceptance of the separate personality of the company, it has also been acknowledged that the corporate veil can be pierced in some circumstances. These include where the statute had expressly provided for it;¹⁹ where national interest needs to be protected in times of war or socio-economic conflict;²⁰ where there has been a fraudulent abuse;²¹ where a controlling interest has been shown or where the company is the owner and controller of general policy structure of another company;²² and when a person deliberately evades existing legal obligation, liability or legal restriction to which he is subjected to or deliberately jeopardizes the enforcement by interposing a company under his control;²³ among others. Concession theory whereby the being of the company is derived through the concession from the State,²⁴ and the artificial personality theory are offshoots of legal fiction theory.

Nonetheless, the walls of the *Salomon*²⁵ principle contained in them the seeds of their own cracking and destruction. The principle in *Salomon*²⁶ requires that an entrepreneur like Aaron Salomon is likely not to

⁸ Leon Mihoud, 'La notion de personnalite morale' (1899) 11 *Revue Du Droit Public*, 1, 8

⁹ *Trustees of Dartmouth College v Woodward* (1819) 17 US (4 Wheat) 518, 636 (Chief Justice Marshall)

¹⁰ *Salomon v Salomon & Co Ltd* [1897] AC 22

¹¹ *Ibid* 51 (Lord MacNaghten)

¹² The Companies Act 2006 s 15 (1), 16 (2); The Companies and Allied Matters Act 2004 s 37

¹³ *Macaura v Northern Assurance Co Ltd* [1925] AC 619

¹⁴ *Foss v Hartbottle* (1843) 67 ER 189

¹⁵ The European Convention on Human Rights 1950, Articles 6, 10, 14; The African Charter on Human Rights and Peoples' Right 1981, Article 7, 14, 25

¹⁶ *Re Noel Tedman Holding Pty Ltd* [1967] QdR 561

¹⁷ *R v P & O European Ferries (Dover) Ltd* (1990) 93 CR App R 72

¹⁸ *Campbell v Paddington Corporation* [1911] 1 KB 869

¹⁹ *Dimbley & Sons Ltd v NUJ* [1984] 1 All ER 751, 758 (Lord Diplock)

²⁰ *Polzeath* [1916] 32 TLR 674

²¹ *Jones v Lipman* [1962] 1 WLR 852

²² *Holdsworth & Co v Caddies* [1995] 1 WLR 352

²³ *Prest v Petrodel Resources Ltd* [2013] UKSC 34, 35

²⁴ Harry G Henn and John R Alexander, *Laws of the Corporation and other Business Enterprises* (3rd ed., West Academic 1985) 15

²⁵ *Ibid*

²⁶ *Ibid*

devote much care and attention in being honest and fair whilst dealing with third parties, in as much as great personal risk of loss would not be incurred but wounded pride and the aspirations of a yielding business. In a similar vein, personal risk of loss will not be suffered by other shareholders of the company when the company fails in so far as the limited liability provision which limits their personal liabilities applies. Looking at the whole scenario, it depicts a situation in which the economy is occupied by companies whose shareholders and management do not attach much concern on direct personal responsibility or loss in the event of corporate failure. This riddles the economic status quo as immensely unethical.²⁷ Surprisingly, the much-lauded separate personality would be set aside and the corporate veil dislodged in some circumstances. The qualification riddles the ‘wisdom’ in *Salomon*²⁸ and demonstrates the acceptance of the legal fiction theorists that the company is after all not an artificial person. What this school of thought did was to throw away through the front door the reality of facing directly the natural persons of the company whilst bringing in same through the back door.²⁹ The legal fiction theory has also been attacked by the ardent proponents of real entity theory. This group of legal thinkers is of the view that the company is in fact a real entity contrary to the belief of the legal fiction theorists that the company is a mere legal fiction.³⁰ Thus what the legal fiction theorist considered a simile: the company is *like* a company, the real entity theorist understood to be a metaphor: the company *is* a person.³¹ To what extent are the submissions of the real entity theorists justifiable? Is their belief tenable? It is indeed to the tenets of the real entity theory, its vices and virtues we would now turn to.

3. The Real Entity Theory

At the twilight of the nineteenth century, a corporate law theory known as the real entity theory or organic theory began to emerge and was championed by the German scholar, Otto Von Gierke.³² His fundamental claim is that the legal personality of the company is superimposed upon an organic unit which exists in human society.³³ According to him, the state and other associations are considered as social organisms and the collective organisms exist beyond and above individual organisms.³⁴ Aside the individual will, there also exists, he opined, a collective will which is incorporated in several social units and considered juristic persons once recognized as separate legal entities.³⁵ Gierke explains the collective personality as the capacity of an association to possess rights and responsibilities and thus differing from a mere aggregate of several individuals. In his organic theory, he made it explicit that the collective person is a real person rather than an imaginary one and its legal status like that of an individual is assigned by law.³⁶

The development of the real entity theory towards the end of the nineteenth century was also aided by the British legal historian, Fredrich William Maitland who holds that a collective person can will and act by itself and by the men who are its organs in a similar way a man wills and acts by brain, mouth and hand. He considered it not a fictitious person but a group-person and its will, a group-will.³⁷ In all, the premise of the real entity theorists is that legal entities are not fictitious but real with the capacity of having their own mind as well as possessing rights and duties they could exercise. Although the real entity theorist accept that legal entities are persons by virtue of the law and act of the State, they nevertheless still maintain that the legal

²⁷ Alastair Hudson, *Understanding Company Law* (Routledge 2011) 3

²⁸ *Ibid*

²⁹ Amadike Nkem and Ikenga K E Oraegbunam, ‘Jurisprudence of Corporate Personality: Rethinking the Paradox of Separate Personhood in Fiction Theory’ (2018) 2 *AJLHR* 41`

³⁰ William M Geldart, ‘Legal Personality’ (1911) 27 *L. Q. REV* 90

³¹ Ernst Freund, *The Legal Nature of Corporations* (University of Chicago Press 1897)13

³² David Millon, ‘Theories of the Corporation’ (1990) 39 (2) *Duke Law Journal* 201, 211

³³ Von Otto Gierke, *Deutsches Privatrecht* (Leipzig 1895) 471

³⁴ Martin Wolff, ‘On the Nature of the Legal Persons’ (1938) 54 *L Q Rev.* 494, 500

³⁵ Von Otto Gierke, *Juristische Person* (2nd ed., Leipzig 1875)

³⁶ Von Otto Gierke, *Die Genossenschaftstheorie und die deutsche Rechtsprechung* (Weidmann , 1887) 5

³⁷ Von Otto Gierke, *Political Theories of the Middle Age* (Fredrich William Maitland tr., Cambridge University Press 1988) XXVI

person was in fact not created by the law, but instead a pre-existing reality only 'founded' and acknowledged by the law.³⁸

The real entity theorists had to grapple with a fundamental problem which concerns whether a legal entity considered real can act by itself. In response to this philosophical puzzle, the supporters of real entity theory provide the entity with organs, having metaphorical 'hands and mouth'.³⁹ The acts by these organs: the higher ranking officials in the company are considered the acts of the company as they bind upon the company. It should be noted that these organs are not the agents of its company, but are part of and reflect the legal entity itself.⁴⁰ It also provided under the real entity that legal entities being 'living creatures' can be found liable both in criminal and tort law.⁴¹ This notwithstanding, as legal entities could only act through their organs, their liability under tort or criminal law would be incurred if an offence is committed by one or more organs who acts or act in their official capacities.⁴² More still, these individual are personally liable to third parties. Impliedly, offence by employees of lower level not regarded as organs was insufficient to make the legal entity liable. Thus, the liability of the company depends on the status of the employee who engages in misconduct.⁴³ John Thomas Gray, skeptical of the real entity theory stated: 'it should be observed that even if a corporation be a real thing, it is yet a fictitious person for it has no real will, but it would be a fictitious person only as an idiot or a ship is a fictitious person.'⁴⁴ He further asked: 'is the corporation to which these will of individual men are attributed a real thing or only a thing of fiction, a fictitious entity?'⁴⁵ To this he promptly responded that 'if it is a fictitious entity we have a double fiction; first a fiction on the creation of an entity, and by then by a second fiction we attribute to it the wills of individual men. If the corporation is a real entity then we have only of this second fiction.'⁴⁶ The real entity theorists, try as they may, cannot justifiably posit that the company is a real entity. The questions, the supporters of the real entity theory should answer with all intellectual honesty are can the company as a real entity be a citizen? Can it vote in an election and be voted for? The alleged separate and distinct 'person' although meaningful in some sense, should not be applied to something which nevertheless do have its legal aspect, but extends beyond this to include the political, economic and financial perspectives, among others.⁴⁷ The real entity theory has also been criticized by the aggregate theorists who hold, contrary to the real entity theory, that the company does not have a distinct and separate personality. The aggregate theory maintains that the company consists of aggregations of natural persons whose relationships are built through mutual agreements.⁴⁸ Below concerns a critical and in-depth analysis on the core principles of aggregate theory.

4. The Aggregate Theory

In the nineteenth century, the aggregate theory was popular, particularly in England and vividly became known in the United States during the latter half of the nineteenth century.⁴⁹ This school of thought regards

³⁸ Ron Harris, 'The Transplantation of the Legal Discourse on Corporate Personality Theories: From German Codification to British Pluralism and American Big Business' (2006) 53 *WASH & LEE L. REV.* 1421, 1424

³⁹ *Ibid* (55) 603-610

⁴⁰ *Ibid*

⁴¹ Mark M Hager, 'Bodies Politic: The Progressive History of Organisational 'Real Entity' Theory' (1988-1989) 50 *U. PITT. L. REV.* 575, 588

⁴² *Ibid* (n37) 145

⁴³ Martin Petrin, 'Reconceptualizing the Theory of the Firm – From Nature to Function' (2013) 118 (1) *PEN. ST. L. REV.* 1, 8

⁴⁴ John Thomas Gray, *The Nature and Sources of the Law* (2nd ed., The Macmillian co., 1927) 53

⁴⁵ *Ibid* 52

⁴⁶ *Ibid*

⁴⁷ Nicholas James, 'Separate Legal Personality: Legal Reality and Metaphor' (1993) 5 (2) *Bond Law Review* 215, 227

⁴⁸ William W Bratton Jr., 'The New Economic Theory of the Firm: Critical Perspectives From History' (1989) 41 *STAN. L. REV.* 1471, 1489

⁴⁹ Jess M Krannich, 'The Corporate 'Person': A New Analytical Approach to a Flawed Method of Constitutional Interpretation' (2005) 37 *LOY. U. CHI. L.J* 61, 68

the company and other legal entities as constituting aggregations of natural persons whose relationships are structured by mutual agreements.⁵⁰ The aggregate theory does not recognize the existence of a distinct corporate entity. Robert Hessen, for instance stated: ‘a group or association is only a concept, a mental construct, used to classify different types of relationship between individuals.’⁵¹ For the aggregate theorists the corporate whole is simply the sum of its parts; the companies are formed when groups having a common interest come together for common objective and these private individuals are the basis for all the acts of the companies; it has no separate existence from its owners.⁵² The theory justifies the assumption that the interests of the shareholders are the most indispensable task of the company and is regarded as the shareholder primacy or profit maximization.⁵³ The principal proponents of the aggregate theory are Adolf Berle and Gadinier Means for whom the corporate management should focus only on maximizing the interest of the shareholders. The trust of his article is that the financial interest of the shareholders ought to be protected and maximized by the corporate management.⁵⁴ They rejected the views of the corporate entity and theory and stirred attention directly on the corporate enterprise and those they feel are the important actors which include the shareholders and the managers, the latter being entrusted with the property of the former.⁵⁵ The corporate theory deducible in the work of Berle and Means involves an aggregation composed of shareholders and management which by virtue of the standard principles of property and trust law, the management is subjected to protect the interests of the shareholders.⁵⁶ The substance of aggregate theory has also been reflected in several other judicial authorities.⁵⁷

The rise of aggregate theory notwithstanding, it was still criticized and rejected by the entity theorists. The disregard of the aggregate theory however was not as a result of the rejection of its private property basis. Rather developments arising from the internal relationship that exists between management and shareholders weaken the partnership analogy. One of the most important characteristics of this development is that the shareholders were prevented from participating actively in the business management.⁵⁸ Following dispersed share ownership, small individual holdings and the increase of complex transaction, shareholders were practically transformed from entrepreneurs to inactive investors, whose economic interests were left in the custody of professional managers.⁵⁹ The re-conceptualization of the source of managerial power also faulted the aggregate theory. The enormous power of management had traditionally, been vested on the shareholder, leaving the directors as mere delegates.⁶⁰ The table was turned as it were, during the 20th century in which the directors came to be vested with powers of management. The power of the board of directors was described by the court as ‘original and undelegated’ and thus not dependent on the prohibition of the common law against the power of an agent in appointing a subagent.⁶¹ A particular commentator during this period argued that ‘where the whole sum of corporate powers is vested by law in a board of directors...such an organizations...allows us to see in a large railroad, banking or insurance corporation rather an aggregation of capital than an association of person.’⁶² Merrick Dodd was also critical of Berle and Means. Contrary to the views of Berle and Means, Dodd alleged that the company is a real person and not an aggregate of private

⁵⁰ John C Coates, ‘State Takeover Statutes and Corporate Theory: The Revival of an Old Debate’ (1989) 64 *NY U L. REV.* 806, 815-818

⁵¹ Robert Hessen, *In Defense of the Corporation* (Hoover Institution Press 1978) 41

⁵² Alan Dignam and John Lowry, *Company Law* (8th edn., OUP 2014) 405

⁵³ Karel William, ‘From Shareholder Value to Present-Day Capitalism’ (2000) 29 *Economy and Society* 1

⁵⁴ *Ibid*

⁵⁵ *Ibid*

⁵⁶ *Ibid* 222-223

⁵⁷ *Automatic Self-Cleansing Filter Syndicate Co. v Cunningham* [1906] 2 Ch 34; *Ashbury Railway Carriage & Iron Co. Riche* [1874-1880] All ER Rep Ext 2219; *Hutton v West Cork Railway Company* (1883) 23 Ch D 654; *San Mateo v Southern Pacific Railroad* (1882) 13 F 722; *Dodge v Ford Motor Co* (1919) 170 N.W 668

⁵⁸ *Ibid* (n33) 214

⁵⁹ *Ibid* 214-215

⁶⁰ *Union Pac. Ry. Co. v Chicago Ry. Co.* (1986) 163 US 564, 596

⁶¹ *Manson v Curtis* (1918) 223 NY 313, 322

⁶² *Ibid* (n32) 58

individuals behind it and like a normal person, the company has responsibilities that restrict its freewill.⁶³ He theorized concerning a ‘Socially Responsible Corporation’ in which managers carry out their duties in such a way that upholds their social responsibilities to stakeholders including employees and customers, which may sometimes contradicts its economic goals.⁶⁴ In this way, Dodd rejected the concept of shareholder primacy and embraced the separation of ownership from control. Whether Dodd in his stakeholder’s interest or corporate social responsibility theory had laid down a fitting corporate law theory occupies us next.

5. The Corporate Social Responsibility Theory

A group of corporate thinkers who believe that public welfare should occupy a pride of place argued for the corporate view known as the corporate social responsibility. In a popular law review article, *For Whom Are Corporate Managers Trustees?*⁶⁵ Dodd, Jr. used the natural entity theory as a premise in theorizing concerning corporate social responsibility. Dodd had to grapple with the problem of justifying corporate policies that provide for the benefit of the constituencies at large rather than the shareholders. Constituencies in this context include the employees and creditors of the company, its consumers as well as the communities where the plants of the company are situated. Dodd referred to the views of Young who had opined that the company should recognize its public obligations, perform its public duties and be a ‘good citizen.’⁶⁶ In the famous article, Dodd argued for a view founded on an entity theory of the company. If the obligation of the management is to only act as agent of the shareholders, where the interests of the shareholder is relegated and other competing interests pursued, the fiduciary role of the management is considered violated in this regard.⁶⁷ However, were the management considered the agent of a corporate entity distinct from the shareholder aggregation and that entity under the responsibility to be a ‘good citizen’, the management, thus acting for the company would have the power to fulfill the citizenship responsibility of the company, even when the shareholders disapprove. In this respect, Dodd concluded that the management was not trustee for the shareholders, but for the company.⁶⁸

Dodd deserves a pat at the back for using the real entity theory in sketching an argument that companies have responsibilities towards some non shareholder constituents. Nevertheless, his attempt to argue in favour of the companies as real entities making it the basis for recognizing corporate social responsibility failed in many respects. The theory and analysis of Dodd did not particularly bear resemblance with the views validating the real entity theory. In his entire submissions, Dodd did not consider whether companies are the types of real entities which possess moral obligations. It is clear that Dodd believed that companies are more or less natural persons to have such responsibilities; however, he failed to make his argument in this regard detailed. Although Dodd is of the view that companies have ethical duties, he made little attempt in justifying the very obligations he said they should seek to carry out. His only argument against shareholder’s profit maximization concept and for his stakeholder-based view of socially responsible corporate behavior was the allegation that public opinion moved towards his direction.⁶⁹ The notion of corporate social responsibility upheld by Dodd has been doubted by the nexus-of-contract theorist. This skepticism is informed by their understanding that self-interested profit-seeking, often benefits the stakeholders and is advantageous to them and the society than is generally understood.⁷⁰

⁶³ Merrick Dodd Jr., ‘For Whom Are Corporate Managers Trustees?’ (1932) 45 *HARV. L. REV.* 1145

⁶⁴ *Ibid*

⁶⁵ *Ibid*

⁶⁶ *Ibid* 1154

⁶⁷ James Boyd White, How Should ‘We Talk About Corporations? The Languages of Economics and of Citizenship’ (1985) 94 *YALE L.J.* 1416

⁶⁸ *Ibid* 69

⁶⁹ *Ibid* 1160-1161

⁷⁰ Daniel R Fischel, ‘The Corporate Governance Movement’ (1982) 35 *VAND. L. REV.* 1259, 1269-1270

6. The Nexus-of-Contract Theory

The origin of the nexus-of-contract theory is traceable to the 1937 article written by Ronald Coase.⁷¹ In that article, Coase sought to understand how existence of the company could be reconciled with what he described as the ‘main achievement of science’.⁷² He asked a question to which he proffered an immediate answer. He asked why do we ‘find islands of conscious power in the ocean of unconscious co-operation like lumps of butter coagulating in a pail of buttermilk...’⁷³ even though resources could be effectively organized by decentralized market? The answer of Coase to this was transaction Cost. He explained that it is expensive to find goods and services, negotiate terms for contracts on every particular business transaction. Through having a single contract that gives the right of direction to a central authority, these costs can be prevented, Coase opined.⁷⁴ The term ‘contract’ for Coase ‘is one whereby the factor for a certain remuneration (which may be fixed or fluctuating), agrees to obey the directions of an entrepreneur *within certain limits*.’⁷⁵ Neoclassical economists modified the version of theory in Ronald Coase and argued for a more individualistic and more contractual model. Alchian and Demsetz in 1972 wrote that Coase made a mistake in explaining that managers exercise even more circumscribed control in that the willingness of employees to follow direction was invariably an issue of contractual choice.⁷⁶ They maintained that companies have ‘no power of fiat, no authority, no disciplinary action. [They do not differ] in the slightest degree, from ordinary market contracting between any two people.’⁷⁷ They concluded that management usually understood as a hierarchical, is actually a continuous process of negotiation of successive contracts.⁷⁸ Four years later, in 1976, Jensen and Meckling made a classical and conventional explanation of the nexus-of – contract theory. In that watershed period, they wrote that ‘[t]he private corporation or firm is simply one form of legal fiction which serves as a nexus of contracting relationships.’⁷⁹ In essence, the nexus-of-contract theory provides that the company consists of connected group or series of contracts between the participants.⁸⁰ In line with this understanding, the company is primarily, a collection of smaller units, the nexus and this bears sync with the aggregate theory of the company. Like the aggregate theory, the nexus-of-contract theory does not support the theoretical view that the company is an entity distinct from the components. It also did not recognize the organicism concept in the real entity theory. The nexus-of-contract theory is rather a purely individualistic view. The nexus-of-contract theory places the company on a footing of contractual consent. The delegation of power in management and the consent to contract show various aspects and various consequences of the same act of participating in the new economic firm. In the absence of consent, power cannot be possibly delegated by the actor to other corporate participant; if the authority exercised by those empowered in the company is delegated, then the consent of the subordinates is implied.⁸¹

The presence of consent makes the nexus-of-contract theory impressive. Nevertheless this has also forms the basis of its criticisms. The nexus-of-contract theory has been criticized on the ground that the use of ‘contractual’ in the theory falls out of place with the meaning of ‘contract’ in contract law, making the argument fallacious.⁸² This criticism arises due to the fact that Economists and law do not apply the term

⁷¹ Ronald Coase, ‘The Nature of the Firm’ (1937) 4 *ECONOMICA* 386

⁷² *Ibid* 394

⁷³ *Ibid* 387

⁷⁴ *Ibid* 390

⁷⁵ *Ibid*

⁷⁶ Armen A Alchian and Harold Demsetz, ‘Production, Information Costs and Economic Organisation’ (1972) 62 *AM, ECON. REV.* 777

⁷⁷ *Ibid*

⁷⁸ *Ibid* 794

⁷⁹ Michael C Jensen and William H Meckling, ‘Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structures’ (1976) 3 *J. FIN. ECON.* 305, 311

⁸⁰ Henry N Butter and Larry E Ribstein, ‘Opting Out of Fiduciary Duties: A Response to the Anti- Contrarians’ (1990) 65 *WASH. L. REV.* 1, 3

⁸¹ William W Bratton Jr. ‘Nexus of Contracts Corporation: A Critical Appraisal’ (1989) 74 (3) *CORN. L. REV.* 407, 457

⁸² Oliver Hart, ‘An Economist’s Perspective on the Theory of the Firm’ (1980) 89 *COLUM. L. REV.* 1757, 1764

'contract' precisely in the same manner. The economists use the term 'contract' to refer generally to all voluntary transaction.⁸³ It could possibly include everything ranging from simultaneous exchanges and informal deals to highly formalized written agreements. The fundamental characteristic is that the transactions are consensual rather subjected to any requirement by government regulations or some other form of external coercion.⁸⁴ Lawyers, on the other hand, apply the concept of contract in a much limited way in line with the basic requirements of offer, acceptance and consideration. Contract is defined as 'a promise or set of promises for the breach of which the law gives a remedy or the performance of which the law in some way recognizes as a duty.'⁸⁵ Brudney and Clark are principal critics of the ingredients of consent in the nexus-of-contract theory. They specifically pointed out that the nexus-of-contract theory is without an empirical grounding and corporate law significantly lacks contractual aspects; operating in an area beyond the conscious agreements that form the crux of legal contract.⁸⁶ Apart from considering themselves as parties to discrete contracts, shareholders expect managers to work hard for them and do not give consent to management self-dealing. The relationship existing among the shareholders and management involves trust and rests in part on fiduciary underpinnings.⁸⁷ These go to show the shortcomings of the agency concept and the delegation of power presupposed by the nexus-of-contract theory. Brudney and Clark concluded that corporate law is contractual only to a metaphorical extent akin to the philosophical social contract.⁸⁸

7. Who, What and Whence is the Company?

Ever since the middle ages, through the nineteenth century and down to the contemporary time, corporate philosophers and legal thinkers had been theorizing on the origin, nature and role of the company. The legal fiction theorists understood the company as an artificial person by virtue of the law with separate personality from its members.⁸⁹ The concession theorists viewed the company in the same plane as the fiction theorists defining the company as an artificial and separate entity; a concession or a privilege granted by the state law.⁹⁰ The real entity theorists viewed the company differently and maintained that it is a real person and a living organism. The supporters of aggregate theory considered the company as nothing more than an aggregate of natural persons whose relationship are built and structured on mutual agreements.⁹¹ Inherent in this theory is the stakeholder's value which requires the corporate managers to act particularly towards maximizing the wealth of the shareholders.⁹² In contrast to this belief, the corporate social responsibility theorists argued that the company is a real entity, distinct and separate from its constituent elements. Thus the management is required in essence to work towards ensuring the benefits of the entire corporate constituents rather the shareholders alone.⁹³ Another school of thought, the nexus-of-contract theorists had submitted that the company constituted a series of contracts between the individual; is not a person and has no legal personality or interests.⁹⁴ In the wake of these theoretical inconsistencies, what is readily inferable is that no theoretical understanding about a company is so certain that it cannot be doubted and thus corporate law theories are indeterminate. Dewey had argued that corporate law theories should not be allowed to

⁸³ Ibid

⁸⁴ Melvin A Eisenberg, 'The Conception that the Corporation is a Nexus of Contracts and the Dual Nature of the Firm' (1999) 24 *J Corp. L.* 819, 822

⁸⁵ Allan Farnsworth, *Contracts* (3rd edn., Aspen Publishers 2003) 1

⁸⁶ Victor Brudney, 'Corporate Governance, Agency Costs and the Rhetoric of Contract' (1985) 85 *COLUM. L. REV.* 1403, 1406; Robert C. Clark, *Agency Costs versus Fiduciary Duties in Principal and Agents: The Structure of Business* (J. Pratt and R. Zeckhauser eds. Harvard Business School 1985) 55- 57

⁸⁷ Ibid Victor Brudney 1403 1421; Ibid Robert C Clark 61-62

⁸⁸ Ibid Victor Brudney 1405-1406; ibid Robert C Clark 67

⁸⁹ Ibid (n10)

⁹⁰ Stephen Bottomley, *The Constitutional Corporation: Rethinking Corporate Governance* (Ashgate Publishing Company 2007) 40

⁹¹ Ibid (n55)

⁹² Ibid (n54)

⁹³ Leo V Ryan, 'The Evolution of Stakeholder Management: Challenges and Potential Conflicts' (1990) 3 *Intl J Value Based Management* 105, 108

⁹⁴ Ibid (n87)

influence legal decisions. This he premised on the fact that any corporate theory has too many contradicting implications to be relevant.⁹⁵ He maintained that theoretical views on the company have indeterminate implications in that historically ‘each theory has been used to serve the same ends and have been used to serve opposing ends.’⁹⁶ It suffices to say that the general view of Dewey apparently did gain widespread acceptance after it was theorized. As a matter of fact, the concept of indeterminacy in Dewey became conventional wisdom since the late 1920s.⁹⁷ Whilst this essay lends credence to the view of Dewey that corporate law theories are indeterminate, it also registers its reservation in that the fact that corporate law theories are indeterminate does not make them irrelevant and restricted from influencing legal decisions. The truth is that corporate law theories despite their indeterminacy remains relevant within the conventional periods they prevailed and to restrict them from influencing legal decisions does violence to the nature of legal decisions itself. Legal decisions must necessarily be built on a particular legal theory and this normally depends on the contextual and conventional theory in prevalence.

The indeterminate argument of Dewey has been criticized by the contemporary scholar, Morton Horwitz. In *Santa Clara Revisited: The Development of Corporate Theory*⁹⁸, Horwitz argued that ‘most important controversial legal abstractions do have determinate or political significance.’ The crux of his argument is that legal theories and by extension corporate theories exist in concrete social and historical contexts. Particular legal theories, Horwitz asserted, are at any particular time do have a generally acceptable or conventional understanding. In other words ‘[w]hen abstract conceptions are used in specific historical contexts they have more limited meanings and more specific argumentative functions.’⁹⁹ That is not to say that ‘in particular contexts the choice of one theory over another is not random or accidental because history and usage have limited their deepest meanings and applications.’¹⁰⁰ The indeterminacy argument by Horwitz seems analogous with recent attempts to ground the objectivity of law in societal and professional convention. Intellectuals like Stanley Fish and Owen Fiss, building on the Wittgenstein concept of ‘interpretive communities’ had alleged that shared understandings by community members limit interpretive activity.¹⁰¹ Although this essay corroborates and associates with the argument of Horwitz that a particular legal theory has a conventional understanding and is relevant at a particular time, nonetheless, it is submitted that corporate law theories do not *ipso facto* become determinate. The point to be made is that a particular legal concept at any particular time is subjected to many interpretative meaning which can sustain strong subversive normative argument as can be seen in the history of corporate law theories shown above. Although a view or understanding can be contextual, nevertheless, this does not prevent the emergence of a contrary argument to it, as sharp conflicting possibilities can arise with respect to a particular contextual meaning. The acceptance of a particular theory is in itself refutable; a given theory can be explained in sharply differing ways and is invariably subjected to contradictory interpretations. Corporate legal theories remain indeterminate since there cannot be only a single normative view about a particular theory.

8. Conclusion

Great are the theories on company law ranging from the legal fiction, concession, real entity, aggregate, corporate social responsibility, and nexus-of-contract, among others. The thrust of the legal fiction theory is that the company is an artificial person created by the law with a separate personality from its members. As an offshoot of the fiction theory, the concession theory considered the company to be an artificial entity

⁹⁵ John Dewey, ‘The Historic Background of Corporate Legal Personality’ (1926) 35 *YALE L J* 655, 669

⁹⁶ *Ibid*

⁹⁷ *Ibid* (n49)1508

⁹⁸ Morton J Horwitz, ‘Santa Clara Revisited: The Development of Corporate Theory’ (1985) 88 *W. VA. L. REV.* 173, 175-176

⁹⁹ *Ibid* 176

¹⁰⁰ *Ibid*

¹⁰¹ Stanley Fish, *Doing What Comes Naturally* (Clarendon Press 1989); Owen Fiss, ‘Conventionalism’ (1985) 58 *S. CAL. L. REV.* 177

which is a concession or a privilege granted by the state law. The core of the real entity theory is that the company as an entity cannot be a fiction, a symbol or a piece of state's machinery, but a real entity and a living organism. In the opinion of the aggregate theorists, the company is an aggregate of the individual who formed the company by a contract. Thus the managers should seek the maximization of the wealth of the shareholders. The corporate social responsibility theorists understood the company as a real entity, distinct and separate from its composite element. Therefore, the interest of the company is clearly distinct from the interest of the shareholder and the management should seek the benefit of the entire stakeholders. The nexus-of-contract theory provides that the company is but a nexus or series of contractual relations between the participants, including the shareholders and the managers. By and large, the above theoretical differences demonstrate that no theoretical perspective on the company is certain and cannot be subjected to a contradicting view. Theories in company law are indeterminate and efforts to have a definite view would be an exercise in futility. More still corporate law theories at least have contextual and conventional relevance.