A duty is an act which a person is obliged to do. When law recognises an act as a duty, its performance is enforced.

According to **Salmond** – "a duty is an obligatory act. It is an act, the opposite of which would be 'wrong'. Duties and wrongs are correlative. The commission of a wrong is the breach of a duty and the performance of a duty is the avoidance of a wrong".

The general conditions for regulating behaviour were stated by **Professor Fuller**.
A duty has to be:

1. General
2. Promulgated
3. Prospective
4. Intelligible
5. Consistent in itself
6. Capable of fulfillment
7. Constant through time
8. Congruent with official Act

These eight points are called **inner morality of law.**

Structure of Duty: Courts use different concepts of duty, so as to do justice in different situations. Behaviour is regulated chiefly through duties. To conceive of them expect in relation to conduct is impossible.

Austin, recognised a category of Duties, which he called self-regarding duties and which are imposed according to him, in the interest of the person obliged by them.

Allen: Showed that all the concern of criminal law and behaviour involved has a bearing on the community or on some section of it.

Thus there may be
a) Duties which contemplate behaviour alone.
b) Duties which contemplate behaviour in relation to specified circumstances.

Allen: "Duty cannot be enforced by anything but individual conscience".
Right and duties are correlative in nature.

Austin: While every right is relative and has a correlative duty, every duty need not necessarily have a correlative right.

Austin mentions **four classes of duties**, which are absolute i.e. which do not correlate with any right.

1. Self regarding duties (*e.g.* duty not to commit suicide or become intoxicated)
2. Duties to public or person (not to commit nuisance)
3. Duties not regarding person (God)
4. Duties owed to the Sovereign or State

Austin's view may be summed up. "A sovereign Government of one or a sovereign government of a number in its collegiate or sovereign capacity has no legal rights against its own subject."

The above view is supported by **Allen** – "The state no doubt may have definite rights and interest in the strict sense, similar to those of the individual citizens – rights of a very different kind from the right to punish or right to command or right of sovereignty. It may enter into contracts and other relationships which give birth to rights and duties in the ordinary legal sense."

Allen – A state for example compels children to go to school, or to be vaccinated, prohibits the sale of certain drugs or forbids importation of animal which have not first been quarantined".

Salmond and Pollock however, disagree with the above theory and are of the view that all duties are relative and there can be no absolute duties, for there must be a right in another when one is under a duty.

Austin argued that the duties of the subject towards the state are absolute, by asserting that, no man can confer a right upon himself. Therefore, every legal right requires three parties *viz.* - The person of **inherence**. The person of **incidence** and a **sovereign government** setting the law through which the right and duty are conferred and imposed. Thus for the sovereign to have a legal right; the existence of another sovereign to confer it would become necessary. That is not possible.

Gray: The state has an indefinite power to create legal rights for itself but the only legal rights which state has at anytime are those interests which are then protected by the law *i.e.* by rules in accordance with judicial organ of state.

Hibbert – the distinction between absolute and relative duties is logical and convenient, since it harmonises with the distinction between might and right, for the state can redress infringement of absolute duties by its own might, where as person invested with legal rights do not redress infringement by their own might by appealing to sovereign for protection of their rights, which is quite a different from of redressal.

Thus Hibbert says that to concede rights to the state is really to confuse might with right.

Pollock – "There seems to be no valid reason against ascribing rights to the state in all cases where its officers are authorized to take steps for causing the law to be observed and breakers of the law to be punished."

In ***Minerva Mills vs. UOI (1980) Supreme Court***, it was held:

"There may be a rule which imposes an obligation on an individual authority, and yet it may not be enforceable in a court of law and therefore not give rise to a corresponding enforceable right in another person.

Positive and Negative Duties

A positive duty is an act which the law obliges a person to do, while a negative duty is a forbearance on the part of the person on whom the duty lies.

Sanction: A number of authorities contend that a duty can be distinguished as legal, whenever a sanction attaches to its breach. The corollary of this view is that the presence of sanction is the test of legal duty. The word sanction has different meanings:

(1) According to **Pollock** – "the appointed consequence of disobedience".

(2) **Kelly** emphasised that sanction applies only in the event of a certain pattern of conduct not being observed. The sanction is therefore, what the law prescribes. He treated the prescription of sanction as primary norms and patterns of conduct that have to be observed to avoid sanction as secondary".

Theories of Rights:

(1) **Will Theory**

- The purpose of law is to grant the individual the means of self expression or self-assertion. Therefore, right emerges from Human will.
- **Austin and Holland** belong to this school.
- **Pollock and Vinogradoff** also belong to this school.
- Naturalists and metaphysicists gave support.

- **Locke** – "inalienable rights" – States could not interfere in certain spheres of individual life.
- **Holmes** – Legal right is nothing but a permission to exercise certain natural powers and upon certain conditions to obtain protection, restitutio or compensation by the aid of public force.
- **Kant**, **Hegel** and **Hume** also supported it.
- Greatest supporters in Germany and Historical School.
- **Puchta (German)** – Power over an object which by means of this right be subject to will of the person enjoying the right.

Criticism:

Negative:

(1) **Duguit:** The basis of law is social solidarity and not subjective will. The idea of will is anti-social.

(2) They fail to make a distinction between 'what is' and 'what ought to be'.

Positive:

(1) **Purpose of law** – balance between individual will and social will.

(2) Law does not create right from a vacuum but picks them from individual wills.

(3) Law respects wills of individual but curtails them in light of will of others.

(4) **Paton:** Will is an essential element in the general conception of legal right but it is not the only element.

(2) **Interest Theory**

- **Ihering** (German) (Propounder of the theory).
- 'A legally protected interest ..... law always has a purpose.
- The state chooses out of the various interests of the community.
- **Salmond** – adds enforceability to the above.
- Support to the theory. Rights without a will e.g. lunatics, infant, corporations.

Conclusion:

- The two theories are not much opposed to each other – human will is directed towards an end i.e. an interest.
- **Allen:** The essence of legal right is legally guaranteed power to realise an interest.

General comments on the theories:

- "The theories are based not as much on an analysis of rights as on the theories of law of state."
- **Duguit's theory:** Social solidarity – totalitarian approach to 'right' – 'state is all and the only reality' (e.g. U.S.S.R., China etc.) – There are only nominal rights in these states.
- **Two other elements of rights –**
  - (a) Recognition by State
  - (b) Protection by state (controversy on this point) – It distinguishes a legal right from a moral right.

However, the protection element is not absolute:

(a) Imperfect rights e.g. time barred debt.

(b) Cases where enforcement of rights is not there but remedies (damages) are there.

(c) Lack of enforcement machinery e.g. international law.

Note:

(a) Taking enforceability as an essential ingredient would be taking a very narrow view.

(b) Enforceability is not an essential element in modern times.

Elements of a legal Right:

1. Subject
2. Act or forbearance
3. Object of right
4. Person of incidence

given by Paton and Holland.

Salmond adds 5th element: **Title**

Legal personality: Just as a sovereign must have subjects or a state has its citizens, each legal system must have persons who are subject to its laws. If a person or a group of persons has legal personality it means that he is subject to the law of a particular legal system. **Person:** In every day life, when one speaks of a person, one means one individual human being ,but in legal terminology, the word has different meaning. 'Person' is derived from the Latin 'Per Sonare' (to sound), for in ancient times 'person' signified an actor's mask through which his voice came to audience.

Salmond – "So far as legal theory is concerned a person is a being whom the law regards as capable of rights and duties. Any being that is so capable is a person, whether a human being or not and no being that is not so capable is a person even though he be a man."

Under the IPC, the word person includes any Company or association or body of persons whether incorporated or not.

Persons subject to law:

A. **Natural persons**: Individuals are the social units and pre-existed prior to both law and society. Since laws are made by man and for jural relation between individuals, it is no wonder that jural relations of each individual came to be one of the first and most important entities for legal purpose. As such there is no distinction between natural and legal persons.
B. **Juristic persons**: Quite apart from granting legal personality to each human being, the concept of legal personality is applied for certain entities which it considers capable of exercising legal rights and incurring legal liabilities.

There are **several distinct varieties of Juristic Persons:**

Corporation: An entity which has been given a corporate legal personality is known as corporation. Such corporations have a legal personality which is completely separate from the individuals that form them and they have a life that will continue irrespective of death of their individual members. Corporations, are created and ended by the operation of law.

Types of corporation

1. **Corporation sole**: A corporation sole is some recognised official person that is filled by one human person who is replaced from time to time *e.g.* the Crown, the Postmaster General the Attorney General, the Advocate General.

   The main purpose of the corporation sole is to ensure continuity of an office. As observed by **Salmond,** in case of corporation sole, under each of the above names two persons live. One is a human being administering for the time being (one which the law can perceive). The other being is the office which is never extinguished or vacated.
2. **Corporation Aggregate**: A corporation Aggregate consists of a number of human persons. It has an existence, independent of the existence of its members.

   Salmond – "a corporation aggregate is an incorporated group of co-existing persons, and corporation sole is an incorporated series of successive person."

Corporation Aggregate may be classified in accordance with their mode of creation.
(a) By charter
(b) By statute
(c) Corporation registered under the companies act.

A. **Chartered companies**: Incorporated under a special charter granted by King or Queen
B. **Statutory companies**: Created by special Act of legislature *e.g.* RBI, SBI, LIC
C. **Registered companies**: Registered under the companies act, they may be

Company limited by shares: Liability of member is limited by memorandum to amount unpaid on shares.

ii) Company limited by Guarantee: Liability of member is limited by memorandum to such an amount as the members undertake to contribute to assets of the company in case of it's winding up.

iii) Unlimited Company: Liability of the members is unlimited.

Courts treat corporation as having an existence apart from its members (***Salomon v. Salomon***.)

The most important purpose of incorporation today is to enable trade to embark upon commercial ventures with limited liability.

The fiction of corporate personality is introduced for the purpose of bestowing the character and features of individuality on collective and changing body of persons. This fictitious person is endowed by law with capacity of dealing with the property as the representative of the co-owner and figuring in legal proceedings on behalf of the members.

Acts and liabilities of a corporation:

A corporation is a legal person is incapable of conferring authority upon an agent to act on its behalf. The authority of the agents and representative of a corporation is therefore conferred, limited and determined not by the will of the principal but either by

i) The will of some human beings who are for this purpose identified in law with the corporation, or

ii) The law itself.

An important rule in connection with companies incorporated by special statute is that their powers are restricted by law.

In India, an idol of Hindu temple stands in the same position as that of a corporation. So also Mosque. They are juristic persons capable of owning property. An idol can therefore be sued in respect of a tort. Committed by its manager or trustee.

[In ***Poultron v. London &.S.W. Rail Co.*** it was held that the Rail Company was not liable, remedy for illegal arrest would be against the Station Master.]

The state as a corporation:

In India **Article 300** of constitution creates a legal personality of the union of India.

Brown: "Prohibited from admitting the personality of the state, either by the poverty of new ideas or by the conservatism of our temperament. We are driven to the device of attributing privileges and responsibility to king, which no one can suppose to be really his. A sounder of legal theory, however, knocks loudly at our door and someday we shall awake to find we have been talking in our sleep – The legal recognition of the state as a collective real person is simply a matter of time".

Unincorporated Associations: In law nothing more than sum of their members e.g. small social club, trade unions, etc.,

Some entities which stand midway: Partnership and registered trade union.

A partnership is not a legal person but yet resembles one in certain ways. It can sue and be sued in its own name

Trade unions: No action lies against a trade union in respect of any tortuous act. The immunity however does not extend to illegal strike or lockout.

Double Capacity and Double Personality

English law recognises many different capacities in which a man may act. Double capacity does not mean double personality.

Legal status of a dead person:

A person's personality may be said to commence at his birth and cease to exist at death, and in general the law takes the same view. Dead men are not legal persons for they have neither duties nor rights.

A corpse is the property of no one in the eyes of law. It cannot be disposed off by testamentary disposition.

In Re Vaughan, 1886, a permanent trust for the maintenance of the deceased's tomb was held illegal and void.

In **Williams vs. Williams (1882)** it was laid down that a person can not during his life time make a will disposing off his body.

In **R vs. Ensor (1887)**- Libel to dead is not an offence known to our law; the dead have no rights and can suffer no wrongs.

Libelous attacks against the dead may, however render the defamer liable to an action at the instance of the relatives of the dead when its publication is an oblique attack upon the descendants.

Under Section 499 of IPC it may amount to defamation to impute anything to a deceased person.

Legal status of unborn children:

Paton – "the child in the womb is not a legal personality and can have no rights".

This view is not correct for not only children "en ventre sa mere", but even children unborn in the sense of children not yet conceived have legal personality. There is nothing in the law to prevent a person from owning property before he is born.

THEORIES OF CORPORATE PERSONALITY

1. **Purpose Theory:**

This theory given by **Brinz** primarily and developed in England by **Baker**, is based on the assumption that 'person' is applicable only to human beings; they alone can be the subject of jural relations. The so called juristic persons are not persons at all. Since they are treated as distinct from their human substratum and since jural relations can only vest in human beings, they should be regarded simply as 'subject-less properties' desired for certain purposes. It should be noted that this theory assumes that other people may owe duties towards these subject-less properties without there being correlative claims which is not impossible although critics have attacked the theory on this ground.

To **Duguit**, 'Purpose' assumed a different meaning. The endeavor of law in its widest sense is the achievement of social solidarity. He rejected the idea of collective will as unproven, but there can, he said, be a **collective purpose**.

2. **The Theory of Enterprise Entity**

In this theory, the corporate entity is based on the reality of the underlying enterprise. Approval by law of the corporate form establishing a *prima facie* case that the assets, activity and responsibility of cooperation are part of the enterprise where there is no formal approval by law, the existence extent of responsibility and so forth of the unit are determined by the under lying enterprise.

This way of looking at it does explain the attitude of the law towards unincorporated association and also leaves room for the miscellaneous situations in which the corporate unity is ignored. The theory is a utilitarian one.

3. **Symbolic or Bracket Theory**

According to **Ihering**, the members of a corporation and the beneficiaries of a foundation

are the only persons. Juristic person is but a symbol to help in effectuating the purpose of the group, it amounts to putting a bracket around the members in order to treat them as a unit.

This theory assumes that use of the word, person is confined to human beings. It does not explain foundation for the benefit of mankind generally or for animals.

4. **Holfeld's Theory**

Holfeld drew a distinction between human beings and juristic persons. The latter he said are the creation of arbitrary rules of procedure. Only human beings have claim, duty, power and liability. Transactions are conducted by them and it is they who ultimately become entitled and responsible. There are however, arbitrary rules which limit the extent of their responsibility in various ways e.g. to amount of the shares. The corporate person is merely a procedural form, which is used to work out in a convenient way for immediate purposes, a mass of jural relations of a large number of individuals, and to postpone the detailed working out of these relations among the individual inter-se for a later and more appropriate occasion.

5. **Kelsen's Theory**: Kelsen began by rejecting for purposes of law, any contrast between human being natural person and juristic person. The law is concerned with human being only in so far as their conduct is the subject of rules, duty and claim. Kelsen also rejected the definition of person as an entity which has claims and duties.
6. **Fiction theory**: Its principle supporters are **Savigny** and **Salmond**. Juristic persons are only treated as if they are persons *i.e.* human being. It is thought that Sinibald Fieschi who became Pope Innocent IV in 1234 was first to employ the idea of persona ficta. It is clear that the theory presupposes that only human beings are properly called persons.

Savigny declared

"Every single man and only single man is capable of rights."

and said – "The original concept of personality must coincide with the idea of man. All that fiction theory asserts is that some groups and institutions are regarded as if they are person and do not find it necessary to answer why. This gives it flexibility to enable it to accommodate the cases in English law where the mask is lifted and those where it is not cases where groups are created as persons for some purposes but not for others.

7. **Concession Theory**

This is allied to the fiction theory. In fact supporters of the one tend also to support the other. Its main feature is that it regards the alignity of being a juristic persons as having conceded by state *i.e.* by a law. The identification of law with state is necessary for this theory, but not for the fiction theory.

8. **Realist and Organism Theory**

The Realist theory of which **Gierke** is the principle exponent and **Maitland** a supporter, asserts that juristic person enjoy a real existence as a group. A group tends to become a unit and to function as such. The theory is of German origin.

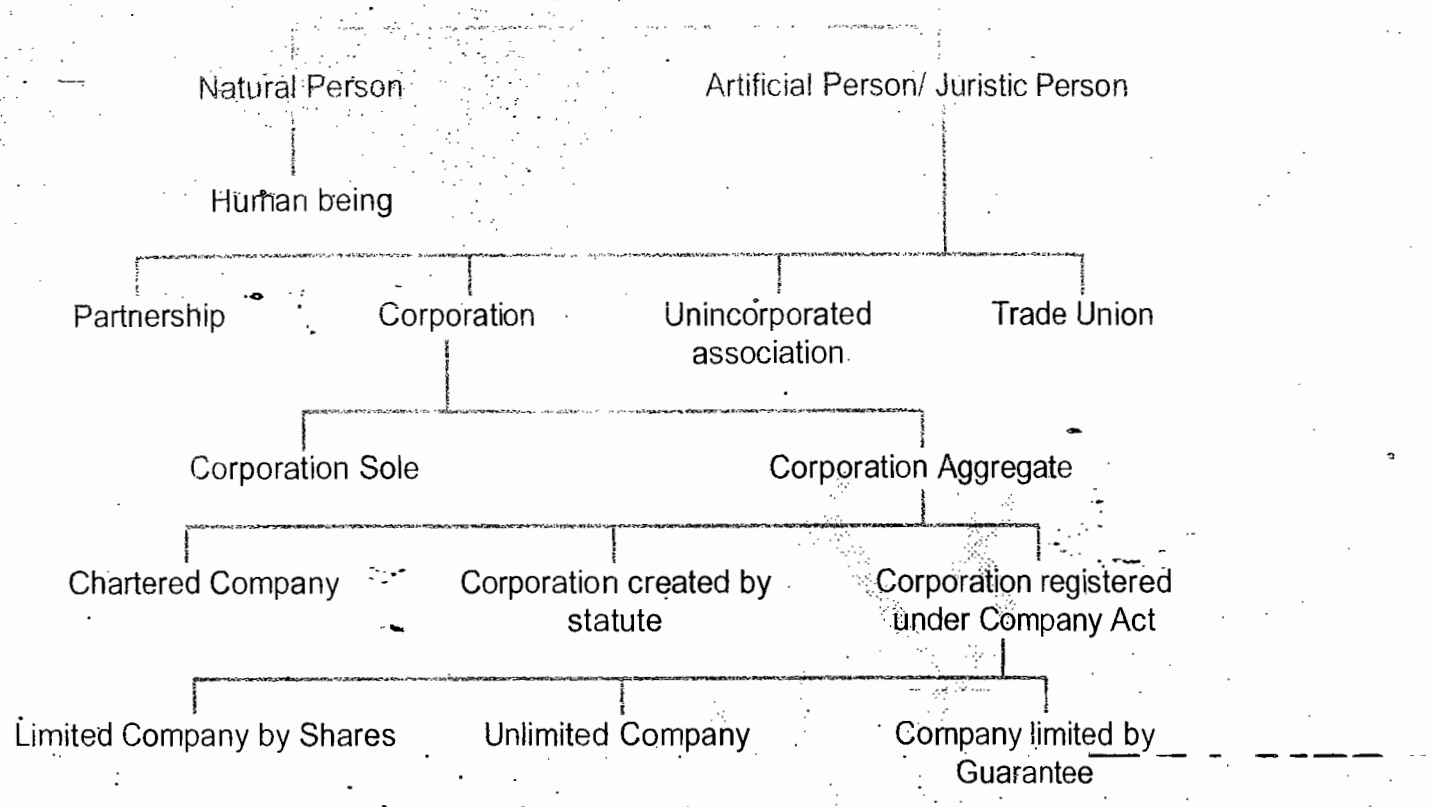
The organism theory with which the realist theory is closely associated asserts that groups are person because they are organism and correspond biologically to human being. This is based on the special use of the term organism and the implications of such biological comparison can lead to absurdity. It is said that they have a real life. **Professor Wolff** points out that if this were true, the 'group will' is only the result of mutually influenced wills.

Gray: "To get rid of the fiction of an attributed will by saying that corporation has a real general will is to drive out one fiction by another."

9. **Institution Theory:**
   - Based on Realist Theory.
   - Hauriou (French) is the exponent.
   - Collectivist outlook.
   - Individual is integrated into the institution and becomes a part of it.
   - Pluralist interpretation – many institutions within the supreme institution of state.

- Fascist interpretation: Other institutions are a part of the only institution i.e. State

Persons Subject to Law



Problems of corporate personality

A corporation has a distinct personality from its members.

Cases:

- ***Saloman v. Saloman and Co. Ltd. (1897)*** – Shareholder is distinct from the company – a shareholder could claim the preferential rights of a bond holder against the company.
- ***Farrar v. Farrar (1889)*** – A sale by a member of a corporation to the corporation itself is in every scope, valid in equity as well as in law.
- ***People's Pleasure Park Co. v. Rohleder (U.S. Case)*** – A covenant that a title to land could not pass to a black. A corporation with all members black. Held: The corporation was distinct from the members ⇨ Title could validly pass to the corporation.

The doctrine of lifting the veil:

The whole law of corporation is based on the theory of corporate entity but the separate personality of the company and its statutory privileges should be used for legitimate business purposes only. The individuals concerned will not be allowed to take the shelter behind the corporate personality where the legal entity of the company is being used for fraudulent and dishonest purpose. The court in such cases shall break through the corporate shell and apply the principle of what is known as "lifting or piercing the corporate or piercing the corporate veil".

The corporate veil of a company may be lifted to ascertain the true character and economic realities behind the legal personality of the company in the following cases.

1. Where the corporate personality has been used for fraud or improper conduct.
2. Where a corporate façade is in reality only an agency.
3. Where the company is engaged in activities which are against the public policy.
4. Where it is necessary to determine the real character and status of the company

5. Where the corporate façade of the company has been used for evasion of taxes or duties
6. Where it is found that the sole purpose of the formation of the new company was to use it as a device to avoid or reduce payment of bonus to workers.
7. The courts have sometime lifted the corporate veil of the companies in quasi criminal cases relating to companies in order to look behind the legal person and punish the real persons who have violated the law.

- When corporation created for some ulterior motive the veil of the corporation is lifted to see the realities behind the corporation ⇨ dilution of the rule of ***Saloman v. Saloman***.
- **Case:** ***Daimler Co. v. Continental Tyre Co. (1916)*** – 'Lifting of veil' applied – all shareholders were Germans (enemy) ⇨ Enemy co.
  U.S. v. Lehigh Valley Rail Road Co. (US) – Law – no transportation of coal by person who was mining it – Railway co. bought all the shares of the coal co. ⇨ 'lifting of veil' applied.
- The policy followed by the courts has been one of convenience and policy – no definite theory followed.

Divergence between practice and theory of legal personality:

Friedman: 'Legal theory and legal practice have developed, independent of each other' → 'concession theory' more applicable in a totalitarian system.

Liability of a corporation

(1) For Contracts:

- **Form of contract** – Through agents under the seal of the corporation. The form is the same in cases of individuals or corporations.
- **Capacity** – In England – (a) If formed by the royal charter, same capacity as individuals, (b) If by a statute – depends on the memorandum of the incorporation/statute.
  In India, no common law – depends upon the statute.

(2) For Torts:

A corporation can not personally commit a tort. It is an artificial person having no brain and body of its own. However, it may be held liable for the wrongful acts committed by its agents or servants during the course of their employment,

Vicarious liability for intra-vires but there is difficulty with respect to ultra vires acts – (a) Acts without any authority – company is liable, (b) Acts under express authority – U.S. – not liable.

Goodhart – Liable (rejected in U.S.)
Winfield – Liable as joint tort feasors
Case – ***Campbell v. Paddington Corporation (1911)*** – company liable

(3) For Criminal acts:

In England, earlier – not liable
Now –

- (liable even when mens rea is required)
- Particularly in cases when fine is an alternative punishment.

Cases:

- ***D.P.P. v. Kent & Sussex Contractors Ltd. (1944)*** – Manager of a company sent false returns for obtaining petrol compensation – company liable.
- ***R. v. C.R. Haulage Ltd. (1944)*** – Company liable for conspiracy to defraud.
- ***Moor v. Bressler Ltd. (1944)*** – Company liable for criminal act of its secretary.

India – Specific provisions made by statutes containing penal provisions made by statutes containing penal provisions. e.g. Companies Act: Both the persons in charge