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## Preface

### Extract from Maitland's Introduction to *Political Theories of the Middle Age* by Otto von Gierke

*Staats- und Korporationslehre* – the Doctrine of State and Corporation. Such a title may be to some a stumbling-block set before the threshold. A theory of the State, so it might be said, may be very interesting to the philosophic few and fairly interesting to the intelligent many, but a doctrine of Corporations, which probably speaks of fictitious personality and similar artifices, can only concern some juristic speculators, of whom there are none or next to none in this country. On second thoughts, however, we may be persuaded to see here no rock of offence but rather a stepping-stone which our thoughts should sometimes traverse. For, when all is said, there seems to be a genus of which State and Corporation are species. They seem to be permanently organised groups of men; they seem to be group-units; we seem to attribute acts and intents, rights and wrongs to these groups, to these units. Let it be allowed that the State is a highly peculiar group unit; still it may be asked whether we ourselves are not the slaves of a jurist's theory and a little behind the age of Darwin if between the State and all other groups we fix an immeasurable gulf and ask ourselves no questions about the origin of species.<sup>1</sup> Certain it is that our medieval history will go astray, our history of Italy and Germany will go far astray, unless we can suffer communities to acquire and lose the character of States somewhat easily, somewhat insensibly, or rather unless we know and feel that we must not thrust our modern 'State-concept', as a German would call it, upon the reluctant material.

Englishmen in particular should sometimes give themselves this warning, and not only for the sake of the Middle Ages. Fortunate in littleness and insularity, England could soon exhibit as a difference in kind what elsewhere was a difference in degree, namely, to use medieval terms, the

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difference between a community or corporation (*universitas*) which does and one which does not recognise a 'superior'. There was no likelihood that the England which the Norman duke had subdued and surveyed would be either *Staatenbund* or *Bundesstaat*, and the aspiration of Londoners to have 'no king but the mayor' was fleeting. This, if it diminished our expenditure of blood and treasure – an expenditure that impoverishes – diminished also our expenditure of thought – an expenditure that enriches – and facilitated (might this not be said?) a certain thoughtlessness or poverty of ideas. The State that an Englishman knew was a singularly unicellular State, and at a critical time they were not too well equipped with tried and traditional thoughts which would meet the case of Ireland or of some communities, commonwealths, corporations in America which seemed to have wills – and hardly fictitious wills – of their own, and which became States and United States.<sup>i</sup> The medieval Empire laboured under the weight of an incongruously simple theory so soon as lawyers were teaching that the Kaiser was the Princeps of Justinian's law-books.<sup>ii</sup> The modern and multicellular British State – often and perhaps harmlessly called an Empire – may prosper without a theory, but does not suggest and, were we serious in our talk of sovereignty, would hardly tolerate, a theory that is simple enough and insular enough, and yet withal imperially Roman enough, to deny an essentially state-like character to those 'self-governing colonies', communities and commonwealths, which are knit and welded into a larger sovereign whole. The adventures of an English joint-stock company which happened into a rulership of the Indies,<sup>iii</sup> the adventures of another English company which while its charter was still very new had become the puritan commonwealth of Massachusetts's Bay<sup>iv</sup> should be enough to show that our popular English *Staatslehre* if, instead of analysing the contents of a speculative jurist's mind,<sup>v</sup> it seriously grasped the facts of English history, would show some inclination to become a *Korporationslehre* also.

Even as it is, such a tendency is plainly to be seen in many zones. Standing on the solid ground of positive law and legal orthodoxy we confess the king of this country to be a 'corporation sole' and, if we

<sup>i</sup> See the remarks of Sir. C. Ilbert, *The government of India*, p. 55: 'Both the theory and the experience were lacking which are requisite for adapting English institutions to new and foreign circumstances. For want of such experience England was destined to lose her colonies in the Western hemisphere. For want of it mistakes were committed which imperilled the empire she was building up in the East.' The want of a theory about Ireland which would have mediated between absolute dependence and absolute independence was the origin of many evils.

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have any curiosity, ought to wonder why in the sixteenth century the old idea that the king is the head of a 'corporation aggregate of many'<sup>2</sup> gave way before a thought which classed him along with the parish parson of decadent ecclesiastical law under one uncomfortable rubric. Deeply convinced though our lawyers may be that individual men are the only 'real' and 'natural' persons, they are compelled to find some phrase which places State and Man upon one level. 'The greatest of all artificial persons, politically speaking, is the State': so we may read in an excellent First Book of Jurisprudence.<sup>3</sup> Ascending from the legal plain, we are in the middle region where a sociology emulous of the physical sciences discourses of organs and organisms and social tissue,<sup>vi</sup> and cannot sever by sharp lines the natural history of the state-group from the natural history of other groups. Finally, we are among the summits of philosophy and observe how a doctrine, which makes some way in England, ascribes to the State, or, more vaguely, the Community, not only a real will, but 'the' real will,<sup>vii</sup> and it must occur to us to ask whether what is thus affirmed in the case of the State can be denied in the case of other organised groups: for example, that considerable group the Roman Catholic Church. It seems possible to one who can only guess, that even now-a-days a Jesuit may think that the real will of the Company to which he belongs is no less real than the will of any State, and, if the reality of this will be granted by the philosopher, can he pause until even the so-called one-man-company has a real will really distinct from the several wills or the one man and his six humble associates?<sup>viii</sup> If we pursue that thought, not only will our philosophic *Staatslehre* be merging itself in a wider doctrine, but we shall already be deep in *Genossenschaftstheorie*. In any case, however, the law's old habit of co-ordinating men and 'bodies politic' as two kinds of Persons seems to deserve the close attention of the modern philosopher, for, though it be an old habit, it has become vastly more important in these last years than it ever was before. In the second half of the nineteenth century corporate groups of the most various sorts have been multiplying all the world over at a rate that far outstrips the increase of 'natural persons',<sup>ix</sup> and a large share of all our newest law is law concerning corporations.<sup>4</sup> Something not unworthy of philosophic discussion would seem to lie in this quarter:

<sup>2</sup> A late instance of this old concept occurs in Plowden's *Commentaries* 254.

<sup>3</sup> Pollock, *First book of Jurisprudence*, 113.

<sup>4</sup> In 1857 an American judge went the length of saying 'It is probably true that more corporations were created by the legislature of Illinois at its last session than existed in the whole civilized world at the commencement of the present century.' Dillon, *Municipal Corporations*, §37 a.

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either some deep-set truth which is always bearing fresh fruit, or else a surprisingly stable product of mankind's propensity to feign.

## Notes

- i The particular jurist Maitland has in mind is John Austin, whose *The province of jurisprudence determined* was published in 1832. This text contained the classic positivist definition of the state as an institution characterised by its unique sovereignty: 'The meanings of "state" or "the state" are numerous and disparate: of which numerous and disparate meanings the following are the most remarkable – 1. "The state" is usually synonymous with "the sovereign". It denotes the individual person or the body of individual persons, which bears the supreme power in an independent political society. This is the meaning which I annex to the term . . . ' (J. Austin, *The province of jurisprudence determined*, ed. W. E. Rumble (Cambridge: Cambridge University Press [1832] 1995), p. 190 n.1).
- ii This was axiomatic from 1158 at the latest, when the Emperor Frederick I convened the Diet of Roncaglia, at which he laid claim to all jurisdiction in the kingdom of Lombardy. Among other things, Justinian's law taught that the *Princeps* was the sole source of law and not subject himself to the law.
- iii The East India Company received its first charter from Elizabeth I on 31 December 1600, to last for fifteen years. It became a joint stock company in 1657, and acquired quasi-sovereign rights over its affairs in a series of charters granted by Charles II beginning in 1661. In 1684, with the fortification of Bombay, it began to assume the military, administrative and fiscal character of a kind of state. Only in 1784 did the government of British India come under the jurisdiction of a British government department. In 1813, the Company lost its monopoly of trade in the territories it had controlled, and in 1858, following the Indian mutiny, its possessions were transferred to the Crown.
- iv 'The Governor and Company of Massachusetts Bay in New England' received their charter in 1629, modelled on the earlier charter given to the Virginia Company in 1609. However, unlike the Virginia company, the Massachusetts company transferred its management and charter to the colony itself, from where it was able to establish strong religious rule under conditions of effective self-government. Massachusetts was given a new charter only in 1691, which provided the colony with a royal governor and reasserted rule from London, albeit of a more tolerant kind than the previous theocratic regime. The state of Massachusetts became the first state to describe itself as a commonwealth in its own constitution, which it acquired in 1780.

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- v The reference again is to Austin, of whom Maitland says at the end of his introduction to Gierke: 'It will be gathered also that the set of thoughts about Law and Sovereignty into which Englishmen were lectured by John Austin appears to Dr. Gierke as a past stage.' (O. von Gierke, *Political theories of the Middle Age*, ed. F. W. Maitland (Cambridge: Cambridge University Press, 1900), p. xliii.)
  - vi Maitland is alluding to the work of Herbert Spencer, particularly his *Principles of sociology*, the third volume of which had been published in 1896.
  - vii Maitland is referring to the work of Bernard Bosanquet, whose *The philosophical theory of the state* had been published a year previously in 1899, and became the dominant expression of idealist political philosophy in England.
  - viii The problem of the 'one-man company' had come to prominence in a famous case of 1895–7, *Salomon v. Salomon and Co.* Mr Salomon had sold his business to a limited company, the company consisting of himself, his wife and five children (the seven persons required by law). Mr Salomon also issued to himself additional shares and debentures forming a floating security. When the company was wound up, Mr Salomon claimed its assets as debenture holder, leaving nothing for unsecured creditors. In both Chancery and the Court of Appeal Mr Salomon was found liable, it being decided that the business was nothing but a name being used to screen him from liability. In other words, the company had no separate identity apart from the identity of its founder, and the other members of the company served only a nominal purpose (hence 'one-man company'). The early stages of this case, and the initial decision against Salomon are discussed in an article in the *Law Quarterly Review* (E. Manson, 'One man companies', *Law Quarterly Review* (xii, 1895), pp. 185–8) that is certain to have been read by Maitland. There it is argued that the law should not discriminate against enterprises that formally accord with the 1862 Companies Act, for risk of discrediting the whole enterprise of limiting liabilities: 'The giant growth of joint-stock enterprises is one of the marvels of the day . . . It has unlocked by the magic key of limited liability vast sums for useful industrial undertakings; it has made the poor man, by co-operation, a capitalist. Let us beware lest in gathering the tares we root up the wheat also.' (Ibid., p. 188.) Subsequently, the House of Lords found for Mr Salomon, insisting that in strict legal terms the company did exist in its own right. These were, though, technically legal arguments about 'personality' rather than philosophical arguments about 'will' or economic arguments about 'co-operation'. As P. W. Duff puts it in *Personality in Roman private law* (Cambridge: Cambridge University Press, 1938): 'Like most English cases and most Roman texts, *Salomon*

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- v *Salomon and Co.* can be reconciled with any theory but is authority for none' (p. 215).
- ix This process was of course to continue throughout the twentieth century. For example, the number of profit-making corporations increased five-fold in the United States between 1917 and 1969, and the number of limited companies ten-fold in the Netherlands between 1950 and 1994, rates of growth which far outstrip growths in population (see M. Bovens, *The quest for responsibility. Accountability and citizenship in complex organisations* (Cambridge: Cambridge University Press, 1998)).

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The Essays

## I

## The Corporation Sole

Persons are either natural or artificial. The only natural persons are men. The only artificial persons are corporations. Corporations are either aggregate or sole.

This, I take it, would be an orthodox beginning for a chapter on the English Law of Persons, and such it would have been at any time since the days of Sir Edward Coke.<sup>1</sup> It makes use, however, of one very odd term which seems to approach self-contradiction, namely, the term ‘corporation sole’, and the question may be raised, and indeed has been raised, whether our corporation sole is a person, and whether we do well in endeavouring to co-ordinate it with the corporation aggregate and the individual man. A courageous paragraph in Sir William Markby’s *Elements of Law*<sup>2</sup> begins with the words, ‘There is a curious thing which we meet with in English law called a corporation sole’, and Sir William then maintains that we have no better reason for giving this name to a rector or to the king than we have for giving it to an executor. Some little debating of this question will do no harm, and may perhaps do some good, for it is in some sort prejudicial to other and more important questions.

A better statement of what we may regard as the theory of corporations that is prevalent in England could hardly be found than that which occurs in Sir Frederick Pollock’s book on Contract.<sup>3</sup> He speaks of ‘the Roman invention, adopted and largely developed in modern systems of law, of constituting the official character of the holders for the time being of the same office, or the common interest of the persons who for the time being are adventurers in the same undertaking, into an artificial person or ideal subject of legal capacities and duties’. There follows a comparison which is luminous, even though some would say that it suggests doubts touching the soundness of the theory that is being expounded. ‘If it is allowable to

<sup>1</sup> *Co. Lit.* 2 a, 250 a.

<sup>2</sup> Markby, *Elements of Law*, §145.

<sup>3</sup> Pollock, *Contract*, ed. 6, p. 107.



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illustrate one fiction by another, we may say that the artificial person is a fictitious substance conceived as supporting legal attributes.’

It will not be news to readers of this journal that there are nowadays many who think that the personality of the corporation aggregate is in no sense and no sort artificial or fictitious, but is every whit as real and natural as is the personality of a man.<sup>i</sup> This opinion, if it was at one time distinctive of a certain school of Germanists, has now been adopted by some learned Romanists, and also has found champions in France and Italy. Hereafter I may be allowed to say a little about it.<sup>4,ii</sup> Its advocates, if they troubled themselves with our affairs, would claim many rules of English law as evidence that favours their doctrine and as protests against what they call ‘the Fiction Theory’. They would also tell us that a good deal of harm was done when, at the end of the Middle Ages, our common lawyers took over that theory from the canonists and tried, though often in a half-hearted way, to impose it upon the traditional English materials.

In England we are within a measurable distance of the statement that the only persons known to our law are men and certain organised groups of men which are known as corporations aggregate. Could we make that statement, then we might discuss the question whether the organised group of men has not a will of its own – a real, not a fictitious, will of its own – which is really distinct from the several wills of its members. As it is, however, the corporation sole stops, or seems to stop, the way. It prejudices us in favour of the Fiction Theory. We suppose that we personify offices.

Blackstone, having told us that ‘the honour of inventing’ corporations ‘entirely belongs to the Romans’, complacently adds that ‘our laws have considerably refined and improved upon the invention, according to the usual genius of the English nation: particularly with regard to sole corporations, consisting of one person only, of which the Roman lawyers had no notion’.<sup>5</sup> If this be so, we might like to pay honour where honour is due, and to name the name of the man who was the first and true inventor of the corporation sole.

Sir Richard Broke<sup>iii</sup> died in 1558, and left behind him a *Grand Abridgement*, which was published in 1568. Now I dare not say that he was the

<sup>4</sup> Dr Otto Gierke, of Berlin, has been its principal upholder.

<sup>5</sup> 1 *Comm.* 469.

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father of 'the corporation sole'; indeed I do not know that he ever used precisely that phrase; but more than once he called a parson a 'corporation', and, after some little search, I am inclined to believe that this was an unusual statement. Let us look at what he says:

*Corporations et Capacities*, pl. 41: Vide Trespas in fine ann. 7 E. 4 fo. 12 per Danby: one can give land to a parson and to his successors, and so this is a corporation by the common law, and elsewhere it is agreed that this is mortmain.

*Corporations et Capacities*, pl. 68: Vide tithe *Encumbent* 14, that a parson of a church is a corporation in succession to prescribe, to take land in fee, and the like, 39 H. 6, 14 and 7 E. 4, 12.

*Encumbent et Glebe*, pl. 14 [Marginal note: *Corporacion en le person*:] a parson can prescribe in himself and his predecessor, 39 H. 6, fo. 14; and per Danby a man may give land to a parson and his successors, 7 E. 4, fo. 12; and the same per Littleton in his chapter of Frankalmoin.

The books that Broke vouches will warrant his law, but they will not warrant his language. In the case of Henry VI's reign<sup>6</sup> an action for an annuity is maintained against a parson on the ground that he and all his predecessors have paid it; but no word is said of his being a corporation. In the case of Edward IV's reign we may find Danby's dictum.<sup>7</sup> He says that land may be given to a parson and his successors, and that when the parson dies the donor shall not enter; but there is no talk of the parson's corporateness. So again we may learn from Littleton's chapter on frankalmoin<sup>8</sup> that land may be given to a parson and his successors; but again there is no talk of the parson's corporateness.

There is, it is true, another passage in what at first sight looks like Littleton's text which seems to imply that a parson is a body politic, and Coke took occasion of this passage to explain that every corporation is either 'sole or aggregate of many', and by so doing drew for future times one of the main outlines of our Law of Persons.<sup>9</sup> However, Butler has duly noted the fact that just the words that are important to us at the present

<sup>6</sup> 39 Hen. VI, f. 13 (Mich. pl. 17).

<sup>7</sup> 7 Edw. IV, f. 12 (Trin. pl. 2).

<sup>8</sup> Lit. sec. 134.

<sup>9</sup> Lit. sec. 413; *Co. Lit.* 250 a. Other classical passages are *Co. Lit.* 2 a; *Sutton's Hospital* case, 10 Rep. 29 b.