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SUBMITTED IN FULFILLMENT OF THE REQUIREMENTS FOR THE DEGREE OF PHD

# Normative Organizations of the Person

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Permitted and Forbidden Democratic Narratives

**Author: Honor McAdam**

## ABSTRACT

This thesis is the culmination of doctoral research that sought to examine the relationship between the professions, the public, and democracy. To that end, the research traces how different normative organizations of the person dominant during successive historical periods have influenced the emergence of permitted and forbidden democratic narratives. For instance, when moral ideas of the person enjoyed dominance, associational practices were thought to constitute the public good with the state and law facilitating their development by prohibiting certain designated acts (MacIntyre: [1981] 2007, Ferguson: [1767] 1995, Gierke: [1868] 1990). Following challenges to the moral organization of the person during the Enlightenment and Industrial Revolution (Polanyi: [1944] 2001), the dominance of the moral person came to be gradually supplanted by the legal person; a middle position emergent from but discursively independent of moralist and materialist extremes (Maitland: [1911] 2003, Laski: [1921] 1989, Supiot: 2007). The median position of the legal person would profoundly re-organize social values and relations between the individual, civil society, and the state, and to some extent it is the legal organization of the person that continues to guide the development of permissible and forbidden democratic narratives today.

However, all is not well with the organization of the legal person. Emerging from the legal person's centralizing dynamic, a new regulatory ideal of the person as corporation is starting to contest the legal order's dominance (Ireland: 2005, Gershon: 2011). This idea of the corporate person advances certain permitted democratic narratives, such as those identified with contemporary 'public value' perspectives (Moore: 2005, Benington: 2009) while forbidding others based on the preservation of collective identities and the pursuit of social justice (Offe: 1985). Insofar as the professions share a collective identity based on ethical codes of conduct and autonomy from the state, they will not be easily accommodated in their current form within this new normative constellation. Through an understanding of the challenge posed by the emergence of the corporate person we can be better positioned as a public and as public(s) to evaluate the conditions of the corporate person's emergence and the possible positions from which resistance may be generated by an understanding of the democratic narratives a corporate organization of the permits and forbids.

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Any mistakes or inadequacies in what follows are very much my own.

**AUTHOR'S DECLARATION**

I declare that, except where explicit reference is made to the contribution of others, that this dissertation is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution.

Signature: *Honor Elizabeth McAdam*

## Normative Organizations of the Person: Permitted and Forbidden Democratic Narratives

### 1. Introduction

The thesis presented here is in satisfaction of a request for interdisciplinary research examining the relationship between the professions, the public, and democracy. Specifically the project was intended to consider the role that professions play (or ought to play) in a democratic society and how their role interacts with conceptions of the public good, the public interest, and public value. The policy context of the project emanated from the increasing involvement of both professional bodies and professionals themselves in various forms of public engagement exercises conducted at the state level. In particular, the concern animating the project was the explicit adoption of ‘public value’ perspectives by Westminster and devolved governments in the UK (see the Cabinet Office report by Kelly, Mulgen & Muers, 2002, and the Scottish government report by Albert & Passmore, 2008), which broadly appeared to target “the professions” (Albert & Passmore, 2008:9) or “professional culture” (Albert & Passmore, 2008:29) as being insufficiently responsive to public definitions of value and, as such, in need of reform. At the same time, the public value perspective also places a premium on the contributions of certain professionals, primarily ‘public managers’, as experts in the field of defining what public values are by way of public consultation (see: Bennington, 2009) and suggests that professionals operating in the public sector should be required by state policy to adopt a public managerial approach. It is not clear what the public value perspective is answering to, however, as while public consultations are often conducted under the rubric of seeking to foster greater democratic accountability, public participation, and deliberative rationality in the policy process (Bennington, 2009) the ostensible ‘public’ they are meant to involve and engage has often expressed antipathy. Davidson & Elstub (2013) note, for instance, that empirical evidence collected by the Office of the Deputy Prime Minister in the UK in 2005 indicated that people did not want to participate more than they already were (Davidson & Elstub, 2013:13). Further, they suggest, that this is likely reflective of the fact that their review of deliberative practices employed by the UK government up to 2013 indicates, “much of this participation has little or no influence on decisions” (Davidson & Elstub, 2013:13).<sup>1</sup>

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<sup>1</sup> This, perhaps, is best captured by Director of Greenpeace, John Sauven, when he expressed: “*We have never been so consulted*” (2007) in the title to an editorial that he wrote to the *Guardian* newspaper surrounding the public consultations over nuclear energy in the UK. Sauven claimed (and academic

As such, it seemed a compelling question to ask whether these broad-based consultative practices and deeper restructurings of public services and the professions being undertaken with the objective of fostering or creating ‘public value’ really are democratically superior to ideas such as the ‘public good’ or the ‘public interest’ that the professions have historically claimed to advance. To what extent, if any, can the professions, and by proxy professional associations, be said to be undemocratic in their expression of public values and, as such, justifiably reformed by this criteria of public value that the state has increasingly adopted as a legitimate democratic narrative? Of course there are a host of definitional problems associated with the questions as formulated above. It is trite in any academic discipline to note that democracy is a radically contested idea<sup>2</sup> and, as Dan Hind notes in “*The Return of the Public*” (2010), to provide an exhaustive definition of the term ‘public’ “would be all but indistinguishable from a history of the modern world” (Hind, 2010: 6). Similarly, attempting to theorize what the professions are has been a mainstay of modern sociology and unresolved questions about the nature and function of the professions; in particular what (if anything) differentiates the professions from a business (see: Frame, 2005) and/or other occupations in society continues to be a subject of sociological debate (see: Crompton, 1990).

One possibility then in theoretical work on these topics is to simply bracket these preliminary definitional questions and/or superficially address them for the purposes of analytical clarity without giving their resolutely contested nature serious consideration. And, to some extent, I will herein be bracketing the question of the nature of the professions insofar as I accept that however the professions might compare to other occupations in the public or private sector, it is not seriously contested that the professions, at least in their associational form, are not one of many collective institutions affiliated with the idea of civil society. I adopt then Colin Crouch’s formulation:

I include within civil society the professions, by which I mean any occupational group which has developed a set of autonomously derived values about how it practices its activities, which may at times contest the logic of profit maximization. Some occupations have this formally built into their charters and training

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observers agreed) that the consultations were being effectively ‘fixed’ by the market research company that was carrying them out. It is notable that Sauven is referring here to the second consultation on the matter that was, in fact, being carried out as a result of a court order following the judicial review of the first consultation, which determined that the first consultation had been conducted unfairly and as such the decision making process of the government in the matter had been unlawful (See: *The Queen on the Application of Greenpeace Limited v. Secretary of State for Trade and Industry* [2007] EWHC 311).

<sup>2</sup> But, in case it is not, see “*Models of Democracy*” by David Held (2006).

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programmes. In other cases it may emerge in informal understandings among groups of workers. Like voluntary activity, professional work is not primarily set up to campaign and struggle; it is there to do a job, and its practitioners make money doing it. It is, however, rooted in values, and does on occasion provide scope for contesting the dominant logic of state and corporation (Crouch, 2011:159).

Beyond this very basic assumption however, as the project is specifically orientated to analyzing the very terms of civil society, the public, and democracy, in order to determine how the specific institutions associated with them might relate to one other; a reckoning with the underlying ambiguity of these terms and the way these ambiguities manifest in political discourse became on its own a compelling theoretical issue to contend with, particularly in light of the stipulations of the public value framework.

The public value paradigm of governance originally derives from academic Mark Moore's work developed at the Harvard Kennedy School of Government and published in "*Creating Public Value*" (1995), however it has been subsequently developed in the UK context by Moore's frequent collaborator, John Benington, amongst other academics in the field of public management and administration. Benington (2009) summarizes that the main injunction of the public value perspective is that it takes seriously the democratic obligation of the state to determine the question of 'what the public values' and 'what adds value to the public sphere'. He states: "The question of "what the public values" can be seen as a counterbalance to previous traditions in public administration in which 'producers' defined and determined the value of public services—for example, through political goal-setting, expert policy analysis and professional standards" (Benington, 2009:234). Simultaneously, he submits, in also asking the question of how value can be added, the public value perspective recognizes that the concept of value is fundamentally contested. As such it will not be enough to just ask what the public wants, instead there is a role to play by government in defining the public first so value can be created, he writes: "...the public is not given but made—it has to be continuously created and constructed. Part of the role of government is to take the lead in shaping and responding to people's ideas and experiences of the public, of who we are, and what we collectively value—what it means to be part of, and a participant in, the public sphere, at this moment in time and in this place/space, and what adds to public value and what detracts from it. This involves a constant battle of ideas and values, because the public sphere is heavily contested territory, and there are many competing interests and ideologies in play" (Benington, 2009:235).

The public value perspective then accepts that there will need to be a conduit between the state and the broader ‘public’ that translates and intermediates the process of public value creation and attainment. This, public value theorists argue, is to be accomplished through the appointment and transformation of various public sector professionals into ‘public managers’ who, in seeking to generate public value, will also need to engage in processes of dialogue with the public in order to do so. The proposition that the public value perspective invokes as justification then is that public managers and private managers ought to have equivalent goals to create value but the public manager, due to their non-market position in the public sector, must engage in dialogue with the public in order to determine what these public values are. Fisher and Grant (2013) summarize (quoting from Moore): “...the aim of managerial work in the public sector is to create public value, just as the aim of managerial work in the private sector is to create private value....Yet this equivalence only extends so far...while public and private organizations are similar in that they both produce goods and services, public organizations also use authority (legitimate coercion) — in the first instance, to tax, but also to impose other kinds of costs upon individuals — in order to achieve their goals. Consequently...public managers aren’t merely assessed on the basis of the goods and services produced: ‘they must also be able to show that the results obtained are worth the cost’ (Fisher & Grant, 2013:250).

It is clear then that much of the public value framework turns on the concept of value and more specifically the idea that value is contested in order to justify the management of value as a democratic imperative. At the same time, it is also clear that an economic concept of value is prioritized. Benington states: “Public value is a necessarily contested concept, and that, like cultural or artistic value, it is often established through a continuing process of dialogue” (Benington, 2009:235). However, he continues, while: “...value has been debated within disciplines like philosophy, politics, economics, religion, and literature over time...in claiming that public value may be able to offer the public sector an equivalent concept to private value in the private sector...[public value] implicitly accepts the challenge of considering the economic dimensions of public value, among other definitions” (Benington, 2009:235). Fisher & Grant likewise suggest that value is the pivotal concept on which the public value framework turns and agree that it is by necessity conceived as contested. However, they also qualify that the idea of value endorsed by public value frameworks is an individual phenomenon and not societal or collective. They state: “Value is rooted in the desires and perceptions of individuals . . . and not in abstractions called societies. Consequently, public sector managers must satisfy some kinds of desires and operate in accord with some kinds of perceptions...rather than

appealing to a justification of public action that rests upon a societal definition of the good...‘Public Interest,’ for example...” (Fisher & Grant, 2013:251). Public value is in this respect, they suggest, an “ethical theory” (Fisher & Grant, 2013:251) as “...it directs managers to adopt a particular poise with respect to...the grey area between free-choice and the law...providing an account of value that ought to direct the actions of managers, and a heuristic that allows managers to understand the embedded or situational tensions that the activity of management is constituted by” (Fisher & Grant, 2013:251).

The key actors from a public value perspective then are ‘public managers’, who, by accepting that value is a contested individual phenomenon, will strive to generate public value through engaging in stakeholder dialogue with an overarching emphasis on economic concerns. But who are these public managers? The public value perspective suggests that the state should appoint public managers from civil society and/or the cadre of professions that deliver public services. Benington states: “the public value perspective recognizes the importance of the labor of public professionals and managers in the co-creation of public service, through the interaction between producers and users and other stakeholders, for example, in education, health, and criminal justice” (Benington, 2009: 236). He continues: “Public value is not created by the public sector alone. Public value outcomes can be generated by the private sector, the voluntary sector and informal community organizations, as well as by governments. One of the potential roles of government is to harness the powers and resources of all three sectors (the state, the market and civil society) behind a common purpose and strategic priorities, in the pursuit of public value goals” (Benington, 2009:237). Benington suggests then that public value as an idea recognizes the need for “...more active engagement with civil society, in which much public service is ‘co-produced’ with a range of formal and informal partners rather than by the state alone” (Benington, 2009:241) and continues that this “implies a need for governments to discover new ways of indirect influence on the thinking and activity of other organisations and actors, in addition to direct use of state assets and state authority to achieve its ends” (Benington, 2009:241).

Enlisting civil society actors into public managerial roles then, Benington contends, is a fruitful alliance as while value from a public value point of view is not generated by civil society, relationships of “loyalty and trust” (Benington, 2009:242) are. Thus, by co-opting civil society, governments can profit from the “bonds of association that hold families and informal networks together” (Benington, 2009:243) to “mobilize trust and loyalty within local communities, in order to create public value” (Benington, 2009:243). In a revealing

passage Benington suggests that the goal of government must be to establish on a permanent basis, through the implementation of public value techniques, a relationship with the public that resembles that which tends to emerge sporadically in major public emergencies. So, he suggests: “In times of major disasters (for example, the Buncefield oil explosion, the Lockerbie air disaster, the Hillsborough football stadium crush, the Dunblane massacre, the Manchester bombings, New York on and after 9/11, and, earlier, Coventry after the war-time blitz) people have often turned to the public authorities—not only to respond to the crisis, but also for support in their fears and uncertainties; to express their latent desire to belong to a community governed by trust rather than by distrust; and to restore a sense of belonging and public purpose and value” (Benington, 2009:243). Benington argues that the goal of government then should be to ensure, on a more permanent basis, that it is perceived to be government rather than civil society that citizens can turn to and entrust with more everyday concerns. By leveraging select civil society actors as managers and thereby making civil society more governmental rather than antagonistic in character, Benington conjectures it would prompt a move towards replicating a sense of community “in which people are less likely to be aware of their divisions” (Benington, 2009:244) and restore “confidence, trust and loyalty between people and the public authorities” (Benington, 2009:244), recreating in effect the public’s disposition towards government following a major tragedy or public emergency.

One of the primary governance goals a public value perspective contributes to then, Benington suggests, is political legitimization. He states: “...networks can provide opportunities to co-opt a wider range of potentially conflicting or competing interests into shared responsibility for governance and management of the complex cross-cutting problems facing society, and an alternative form of legitimization for the actions and the interventions of the state given the erosion of confidence in elected representative government” (Benington, 2009:245). Political scientists, however, have inveighed against the paradigm as falling short of the demands of parliamentary democracy and responsible government insofar as the ‘public managers’ the public value framework relies upon would not be directly accountable to the electorate. Rhodes and Wanna (2007), for instance, assert: “It misdiagnoses the function of management in the modern public sector and invents roles for public servants for which they are not appointed, are ill-suited, inadequately prepared and, more importantly, are not protected if things go wrong. It asks public managers to supplant politicians, to become directly engaged in the political process, and become the new Platonic guardians and arbiters of the public interest” (Rhodes & Wanna, 2007:406). They ask then, “...who gave these platonic guardians the

right to choose between these conceptions of the public good?" (Rhodes & Wanna, 2007:415). There is a danger in the normative element of the perspective, Rhodes and Wanna argue, insofar as it downgrades party politics and it "...encourages managers to usurp the democratic will" (Rhodes & Wanna, 2007:419). They continue, aghast: "Politics is portrayed as a 'problem' in public value accounts, almost as an illegitimate interference standing in the way of good management" (Rhodes & Wanna, 2007:411).

Advocates of the public value perspective, however, have been quick to dismiss criticism of this ilk as both a misunderstanding of the theory on the basis that there is electoral accountability in the framework for public managers would ultimately be answerable to elected representatives and, more cunningly, suggesting that any departure from more traditional conceptions of democracy inherent in the framework is purposeful (see: Alford & O'Flynn, 2009). It is a deliberate recognition, the theory's advocates argue, that what is and is not democratic and/or of value to the public is contestable. The fact that there is debate over the meaning of value (and in more abstract terms, the fact that there are different abstract meta-theoretical approaches to determining what values are) then is, in a sense, the very premise on which the public value perspective's case for legitimacy rests. If there is a core to the public value perspective as professed, it centers on the idea that there is no fixed content of public value. Thus, while deploying different theoretical definitions of democracy and conceptual definitions of value to critique public value approaches certainly serves to sharpen and maintain the relevancy of alternative narratives, when the framework being criticized instrumentalizes abstract theoretical un-decidability as a justification, the seeming interminability of these more formal types of disagreements can actually be counterproductive as critique. The irresolvability is re-translated in public value's own terms as being suggestive that there is universal merit for deliberative democratic, if not strictly representative, processes of elaboration and compromise. How could anyone then possibly disagree with the framework if disagreement is the framework's horizon of possibility? Smith (2004), for instance, suggests that the virtue of the public value approach is that it could as easily "apply in Westminster as well as in Washington" (Smith, 2004:79). James Crabtree (2004) asks: "Public value: who could possibly be against it? As an objective for public service modernization, it gives motherhood and apple pie a good run for their money" (Crabtree, 2004:55).

But, as Slavoj Zizek cautions in his critique of human rights, it is in exactly these moments when politics appears to cease that we should be the most skeptical. He states: "In human society, the political is the encompassing structural principle, so that every neutralizing of

some partial content as ‘non-political’ is a political gesture par excellence” (Zizek, 2005:6). Instead of abstractly critiquing the public value approach as democratic or not in an essentialized respect then, what I will attempt to suggest herein is that how we discursively define and contest concepts like value and the possibility (or not) in any social order for alternative meanings to continue or emerge, may tell us more about the content and form of democracy or the political associated with a given framework than any attempt to externally impose a fixed definition of what democracy is first and an evaluation of the order thereafter would do. Instead of focusing on whether or not public value as a paradigm is or is not in ‘democratic’ then, the question that will be contemplated herein is how and why has this perspective emerged at this particular historical moment and what normative or political issues does it raise for civil society institutions, such as the professions, which the public value perspective would place in a managerial role? In other words, what hidden political processes are at work and can be discerned in denying the validity of any fixed order of normativity? Frederic Jameson, as quoted by Alex Carp (2014) in his review of Jameson’s oeuvre for *Jacobin*, writes: “All contemporary works of art have as their underlying impulse – albeit in what is often distorted and repressed unconscious form – our deepest fantasies about the nature of social life, both as we live it now, and as we feel in our bones it ought to be lived” (Carp, 2014:1). So too, I will suggest, do contemporary terms of art, or ideas like public value that emerge from our political imaginary. How a given social order at a given time attempts to fix the normative content and ordering of social institutions by reference to specific ideologies of the person and corresponding notions of value, reveal the limits of any particular orders democratic fantasies by what is re-positioned and excluded. This holds whether the framework advocates one particular value or no particular value at all. Thus to understand the deeper implications of the public value perspective and the way it defines, positions, and orders associated terms and institutions requires an understanding of the wider historical and social contexts from which the public value perspective has emerged from, is resolutely inscribed, and defines itself against.

## 1.2 Methodology

Starting from this vantage point then, what I will attempt to do is to position the concept of ‘public value’ and the way this perspective understands the person, civil society, and the state, in relation to ideas about the ‘public good’ and the ‘public interest’ that the theory of ‘public value’ seeks to undermine and displace. The guiding question of the thesis is not

whether governance based on public value is any more or less democratic than these alternative ideas, but rather how and why did the public value perspective emerge in the first place to counter these ideas or, in other words, what is the genesis of the democratic narrative it presents and what are its limits? The agenda then is critical, and will seek to engage in a ‘radical questioning’ that asks of the public value perspective: “What is it for? Why has it taken its particular form and content?” (Cotterrell, 1987:78). As such the method I will deploy is in part historical (in terms of interpretation) and in part sociological (of a social phenomenon).

Providing a history of ideas about the relationship between civil society, the public, and state institutions, is a crucial component of the research and I adopt as guidance in this respect Jameson’s argument (as quoted in Carp, 2014:1):

We must try to accustom ourselves to a perspective in which every act of reading, every local interpretive practice, is grasped as the privileged vehicle through which two distinct modes of production confront and interrogate each other. ... If we can do this ... we will no longer tend to see the past as some inert and dead object which we are called upon to resurrect, or to preserve, or to sustain, in our own living freedom; rather, the past will itself become an active agent in this process and will begin to come before us as a radically different life form which rises up to call our own form of life into question and to pass judgment on us, and through us on the social formation in which we exist. At that point, the very dynamics of the historical tribunal are unexpectedly and dialectically reversed: it is not we who sit in judgment on the past, but rather the past ... which judges us, imposing the painful knowledge of what we are not, what we are no longer, what we are not yet.

Thus, to begin the inquiry I looked at three set texts that expressed concern over the lack of definable values in modern polities and either set out the parameters of alternative historical frameworks for determining value or question the validity of past ideas of value to survive in the future. The three texts that I began with were: Alasdair MacIntyre’s “*After Virtue*” ([1981] 2007), Alain Supiot’s “*Homo Juridicus: On the Anthropological Function of the Law*” (2007), and Claus Offe’s “*Disorganized Capitalism*” (1985). In particular I examined these texts for insights into moral organizations of value, legal organizations of value, and political-economic organizations of value, and the historical periods in which these respective organizations of value could be conceived as dominant. The incommensurability of claims about value, in the past and in the present, is at the heart of these three texts and I draw on the frameworks they present as a way to examine the work of other prominent theorists or schools thought that can broadly be seen as representative of the frameworks focused on and as a means to contemplate the historical

development of fissures in each theoretical edifice. Ultimately I will suggest that there are distinct similarities between the texts of MacIntyre, Supiot, and Offe, insofar as each addresses a contemporary crisis of value, each remarks on the role of a (false) competition between values as a value itself, and each explicitly asserts that the particular constellation of value pluralism characteristic of frameworks such as public value will inevitably favor a particular set of economically powerful actors to the distinct disadvantage of others. However, there are also significant differences in the texts with respect to how these conclusions are arrived at, what institutional features of modernity they place emphasis on, and as such what they ultimately assert as a potential alternative. By reading them together as grappling with the same mediating issue of socially normative organization, what begins to emerge is an overarching framework that pertains to the positioning and repositioning of discursively polar ideas about the person, associations, and the state in different historical moments, and how these ideas set the parameters of permitted and forbidden political narratives within the particular social contexts in which they are dominant and how they relate to subsequent social contexts and narratives that develop in response to their evaluative deficiencies. The concept of value that emerges then is a relational one that is social, historically situated, and connected to dominant collective ideas about the person, as opposed to individual, abstract, and disconnected from any specific discourse.

### 1.3 Outline of Chapters

The first section of the thesis, beginning with Chapter 2, will attempt to trace the development of the idea of the public good and its association with an organization of society in terms of a moral conceit of personhood. In this context I will suggest the associational practices of civil society played a constitutive role, both as the primary site for articulations of public virtues and for the externalization of the idea of material gain as a socially valid end of practice. These ideas will be primarily developed in Chapter 2, through a focus on Alasdair MacIntyre's text "*After Virtue*" ([1981] 2007) and in Chapter 3, through a focus on Adam Ferguson's theorization of 'civil society' and Otto von Gierke's theory of the *Genossenschaft* or 'fellowship'. However, I will suggest, the moral organization of the person, already under strain by the enlightenment focus on empiricism and economy, is more or less displaced during the industrial revolution. Polarizing tensions between the moral organization of the person and an organization of the person by the material concerns the moral order excluded reaches a peak with the advent of the *laissez faire* policies of 19<sup>th</sup> century economic liberalism. This latter proposition will be

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developed in Chapter 4 through a focus on Karl Polanyi's "*The Great Transformation: The Political and Economic Origins of Our Time*" ([1944] 2001).

The second section of the thesis, beginning with an examination of Alain Supiot's description of *homo juridicus* in Chapter 5, will explore the resolution of these developing oppositions through the reorganization of society around the concept of legal personality. Supiot suggests that the legal organization of the person, and the values this order represents, allow for a median position between the two extremes of moral and scientific (or material) value that could not otherwise 'converse'. It is in this context where the development of the idea of the public interest takes centre stage and civil society is repositioned into a regulative role with the state coming to constitute socially legitimate authority. Practices of association then are no longer seen as productive of public goods in and of themselves but are instead conceived as vehicles for interest articulation. Chapter 6 will explore these ideas further through an examination of the development of the idea of legal personality by the English Political Pluralists and, in Chapter 7, I will start to chart the development of an extreme implosive condition that comes to plague the idea of the legal person in the 20<sup>th</sup> century via the law's incapacity to take a coherent position on the legal personality of the for-profit corporation.

In the final section of the thesis, beginning with Chapter 8, I will suggest that the law has firmly entered into what Ugazio (2013) has referred to as the disaster area of middle positions insofar as the law's quest for balance between moralist and materialist extremes and concomitant failure to draw a firm distinction between membership based associations (associations of people) and aggregations of capital (associations devoid of people) has resulted in the displacement of law by the emergence of a new regime of value organized around the corporate person. This will be developed through a focus on Claus Offe's observations on civil society set out in "*Disorganized Capitalism*" (1985) as well as more contemporary texts that examine neoliberal aspects of the state and individual behavior. The public value framework I will offer is an expression of the corporate organization of the person and, as such, is a far more ordered and limited idea of value than advocates of this philosophy of governance suggest. In particular, what I will suggest is forbidden as a democratic narrative by the corporate organization of the person is any legitimate concept of collective identity and, as such, the protection of the status and autonomy of the associations that preserve it. Lastly, I will conclude in Chapter 9 by suggesting that there are some common denominators between the texts of MacIntyre, Supiot, and Offe and,

following this, a brief consideration of the particular difficulties that collective associations like the professions might encounter with the increasing uptake of public value perspectives in the United Kingdom.

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## SECTION 1

### The Moral Person

#### 2. The Moral Person: A Shared Plot

Alasdair MacIntyre in “*After Virtue*” ([1981] 2007) provides a comprehensive account of the classical order of morality or virtue, which he argues dominates social relations up until the Enlightenment and continues to be relevant to current organizations of value. This chapter will provide a summary of the key elements of his account that relate to an understanding of how the organizing idea of the moral person produced social value and meaning. Through identifying the main polarities operative and the relative positions of key social institutions in the moral framework, we can also begin to understand what types of political narratives a moral idea of the person externalized. Drawing on MacIntyre’s account, society organized by an idea of the moral person can be constructed as constituted through associational practices, regulated by an idea of the person as virtuous, and facilitated through absolute prohibitions. The concept of virtue then provided a regulatory heuristic for social behavior and constrained the development of permissible political narratives in the moral tradition. What also becomes clear from his account is that the classical moral order was defined in opposition to a materialist account of values and, as such, was characterized by an explicit externalization of material concerns at all levels of social organization. In contradistinction to MacIntyre then, who suggests that the moral order only diminishes in importance as a result of critiques of teleological reason arising from Enlightenment moral philosophy, at least another possible reason I will suggest pertains to the externalization of values that the moral order rejected: the pursuit of external goods and the universal grant of suffrage and individual human rights.

##### 2.1 Alasdair MacIntyre: A Virtuous Order

MacIntyre traces the state of moral disorder that he identifies as the condition of modernity to the Enlightenment project of the late 18<sup>th</sup> century, which he argues mistakenly set out to rationalize moral decision making independent of the teleological claims that had given classical moral philosophy a rational foundation. This abstract project, MacIntyre sets out, became “central to Northern European culture” (MacIntyre, [1981] 2007:39) and, he suggests, can be identified in most major works of moral philosophy from the Enlightenment onwards finding expression in Kant’s categorical imperatives and

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resurfacing in the development of more contemporary ethical frameworks such as John Rawls' theory of the original position. However, argues MacIntyre, this project of articulating moral claims by reference to certain universal first principles has unambiguously failed and it is essential, he suggests, to understand why in order to conceive of the possibility of a coherent and ordered moral vocabulary for public discourse going forward. He proceeds then to outline the critical aspects of the classical teleological moral tradition based on Aristotelian and Christian human virtues that a number of Enlightenment moral philosophers purported to reject. These Enlightenment ethical theorists, he suggests, thought it would be possible instead to devise a universal abstract moral framework that could be validly imposed on all and this came to constitute what he distinguishes as a 'modern ethos' of numerous competing and conflicting ethical frameworks. However, the project of Enlightenment moral philosophy, MacIntyre suggests, was based on a conceptual error the rejection of which, he argues, is "necessary for a rationally and morally defensible standpoint from which to judge and act" (MacIntyre, [1981] 2007:xvi).

The conceptual error that MacIntyre argues infected and subsumed moral discourse in the Enlightenment is what we might understand today as an example of confirmation bias. On the one hand, he suggests, Enlightenment moral philosophers were thoroughly accepting of certain moral maxims that had been and could have only been developed in the teleological frameworks of classical moral philosophy / Christianity. At the same time, these same moral philosophers came to express a commitment to a rationality based on material or empirical proofs and as such professed to reject teleological claims to authority as fundamentally irrational (incapable of proof). This, MacIntyre argues, presented these moral philosophers with a problem. If morality was not capable of proof then they had to consider "what kind of authority any principle has that is open to us to choose to regard as authoritative or not?" (MacIntyre, [1981] 2007:42). Thus, to substantiate what were essentially dogmatic Christian beliefs that they already held to be authoritative, philosophers like Kant and others set out to develop an account of the authority of these same beliefs, or a universal morality, which could be derived from first principles, rooted in the material world of human nature, and justified as applicable to all human beings. But, as MacIntyre points out, the morality they were seeking to justify was, in fact, their own socially situated and particular morality. He states: "They inherited incoherent fragments of a once coherent scheme of thought and action and, since they did not recognize their own peculiar historical and cultural situation, they could not recognize the

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impossible and quixotic character of their self-appointed task” (MacIntyre, [1981] 2007:55). Essentially, he suggests, they were already deeply embedded in a moral framework that had been and could only have been developed by way of the teleological structures of classical Aristotelian moral philosophy and Christianity and only then did they attempt to derive first principles that could rationally account for the beliefs they already held without reference to this structure. Enlightenment moral philosophers wanted to see themselves as both rational and moral in their own terms, and thus found a way to do so by developing a moral positivism to confirm what they had already decided to be true.

As a result of this conceptual misstep, MacIntyre argues, cracks quickly started to show in their newfound embrace of Enlightenment positivist philosophy insofar as one after the other of the so-called universalizable claims and frameworks were refuted and competing claims and frameworks were introduced. When morality becomes a-temporal and a matter of analytical first principles; detached from a view of morality as temporal and apposite to an entrenched teleological analytic, then morality, MacIntyre insists, degenerates into a conflict over moral preferences rather than a true or false relation. Once this occurs, MacIntyre suggests, morality and moral argument are easily marginalized as a matter of individual or subjective preference even if at the same time moral or ethical vocabularies are regularly drawn upon to express these preferences in the public sphere. It is not then that morality loses its power post-Enlightenment, says MacIntyre, as ethical arguments have not disappeared. The issue is that when there are a number of competing and contradictory frameworks for ethical decision making morality becomes only about power. The authoritative moral view becomes, in effect, the view of whoever holds the authority to declare it and loses any claim it might have held as a comprehensive system of order with the internal resources to distinguish in an impersonal fashion between moral and immoral conduct.

MacIntyre argues, however, that this value incoherence in modern life should not lead to a dismissal or abandonment of the concept of moral virtue altogether as the incoherence relates to the incomprehensibility of ethical theories in modern life, not to the core concept of virtue itself and the tradition of moral philosophy from which it originally derives. As such, MacIntyre undertakes an examination of the concept of virtue as “the concept itself in some sense embodies the history of which it is the outcome” (MacIntyre, [1981] 2007:186). The notion of virtue for MacIntyre requires then three prior accounts, which make the identification of a virtue intelligible; he sets out: “The first stage requires a

background account of what I shall call a practice, the second an account of...the narrative order of a single human life and the third an account...of what constitutes a moral tradition. Each later stage presupposes the earlier, but not vice versa. Each earlier stage is both modified by and reinterpreted in the light of, but also provides an essential constituent of each later stage" (MacIntyre, [1981] 2007:187). Thus to understand the moral organization of the person, each of the staged accounts outlined by MacIntyre will be taken in turn.

### **2.1.1 Practice and Internal Goods**

The most important concept in MacIntyre's sequential scheme is the notion of practice as it is this idea, MacIntyre claims, that provides the arena through which human virtues are displayed (acted on) and defined (given a consistent meaning). MacIntyre defines a practice as follows: "By a 'practice' I am going to mean any coherent and complex form of socially established cooperative human activity through which goods internal to that form of activity are realized in the course of trying to achieve those standards of excellence which are appropriate to, and partially definitive of, that form of activity, with the result that human powers to achieve excellence, and human conceptions of the ends and goods involved, are systematically extended" (MacIntyre, [1981] 2007:187). MacIntyre unpacks this definition by noting that it first requires a distinction between goods internal to a practice and goods external to a practice. External goods of a practice he identifies are goods such as prestige, status and money. These are external, he argues, as "there are always alternative ways for achieving such goods, and their achievement is never to be had only by engaging in some particular kind of practice" (MacIntyre, [1981] 2007:188). Further, he notes: "It is characteristic of what I have called external goods that when achieved they are always some individual's property and possession. Moreover characteristically they are such that the more someone has of them, the less there is for other people...External goods are therefore characteristically objects of competition" (MacIntyre, [1981] 2007:190). Internal goods, by way of contrast, he argues, can only be specified in terms defined by reference to the practice itself and as such "...they can only be identified and recognized by the experience of participating in the practice in question. Those who lack the relevant experience are incompetent thereby as judges of internal goods" (MacIntyre, [1981] 2007:188-189). Further, these internal goods are not the objects of competition in the same way, he writes: "Internal goods are indeed the outcome

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of competition to excel, but it is characteristic of them that their achievement is a good for the whole community who participate in the practice” (MacIntyre, [1981] 2007:191).

It is from this distinction between internal and external goods that MacIntyre argues the concept of virtue derives. He sets out: “a virtue is an acquired human quality the possession and exercise of which tends to enable us to achieve those goods which are internal to practices and the lack of which effectively prevents us from achieving any such goods” (MacIntyre, [1981] 2007:191). Virtue, for MacIntyre, “belongs to the concept of a practice” (MacIntyre, [1981] 2007:191) and “can only be achieved by subordinating ourselves within the practice in our relationship to other practitioners...Every practice requires a certain kind of relationship between those who participate in it...the virtues are those goods by reference to which we define our relationships to those other people with whom we share the kind of purposes and standards which inform practices” (MacIntyre, [1981] 2007:191). The purpose of a practice, MacIntyre submits, develops from the ongoing revision of standards by the participants in the practice. So, he offers, practitioners associated with a given practice collaborate in determining the evaluation of the product of the practice, the performance of practitioners understood historically within the practice, as well as the pursuit of the progression of the practice, so as to maintain the good of being a member or a practitioner (MacIntyre, [1981] 2007).

MacIntyre argues that a broad range of human activity could potentially qualify then as a practice. But, what is striking about his definition is the associational nature of his claim, put starkly: only activity performed in association with select others would by definition qualify. So, he notes, the individual performance of a technical skill is not on its own a practice as it would not have meaning outside the broader associational or collective context of the activity, which provides the exercise (the act) with an interpretive context (identifies it as a skill). Thus, he argues: “Bricklaying is not a practice; architecture is. Planting turnips is not a practice; farming is. So are the enquiries of physics, chemistry and biology, and so is the work of the historian, and so are painting and music. In the ancient and medieval worlds the creation and sustaining of human communities – of households, cities, nations – is generally taken to be a practice...” (MacIntyre, [1981] 2007:187-188). MacIntyre then unpacks that the idea of the public good also derives from associational practices as it is encapsulated by the standards of excellence, which develop in the context of these particular associations. So, he sets out:

A practice involves standards of excellence and obedience to rules as well as the achievement of goods. To enter into a practice is to accept the authority of those standards and the inadequacy of my own performance as judged by them. It is to subject my own attitudes, choices, preferences and tastes to the standards which currently and partially define the practice...In the realm of practices the authority of both goods and standards operates in such a way as to rule out all subjectivist and emotivist analyses of judgment (MacIntyre, [1981] 2007:190).

He does however qualify that this did not mean that the standards or ‘public goods’ of practice and the virtues required to achieve them were conceived as being immune from criticism: “Practices of course have a history” (MacIntyre, [1981] 2007:190).

### **2.1.2 Narrative and Collective Tradition**

To fully understand the notion of virtue, according to MacIntyre, it is also necessary to give an account of how the practices described above interact in the context of the life of an individual (narrative) and in the constitution of a particular social world (tradition). MacIntyre argues that the classical tradition required that a human life be viewed as a unity or a narrative, with a beginning, middle, and end. For a virtuous concept of the person to function as a regulatory idea the belief in a unified human existence is critical as it is “this conception of a whole human life as the primary subject of objective and impersonal evaluation, of a type of evaluation which provides the content for judgment upon the particular actions or projects of a given individual” (MacIntyre, [1981] 2007:14). His criticism of the modern ethos then is that this unity has become unthinkable as a result of the tendency of modern institutions to divide an individual from their life as a narrative to an existence compartmentalized into roles. People, argues MacIntyre, are storytellers and when existence is institutionally demarcated; “So work is divided from leisure, private life from public, the corporate from the personal” (MacIntyre, [1981] 2007:204), we interrupt what MacIntyre argues is the ‘natural’ tendency “to think of the self in a narrative mode” (MacIntyre, [1981] 2007:206). MacIntyre argues that however trite this observation may be it has direct consequences for how human agency and behavior is to be understood. He suggests:

We identify a particular action only by invoking two kinds of context, implicitly if not explicitly. We place the agents intentions...in causal and temporal order with reference to their role in his or her history; and we also place them with reference to their role in the history of the setting or settings to which they belong. In doing this, in determining what causal efficacy the agent’s intentions had in one or more directions, and how his short-term intentions succeeded or failed to be constitutive of long-term intentions, we ourselves write a further part of these histories. Narrative

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history of a certain kind turns out to be the basic and essential genre for the characterization of human actions (MacIntyre, [1981] 2007:208).

Thus, for MacIntyre, every human action is an enacted narrative, which includes much more than the act itself and the importance of action then is simply that it is something for which we can give an account and as such makes us accountable. This does not mean, however, that we are the sole authors of these accounts. MacIntyre opines: "...we are never more (and sometimes less) than co-authors of our own narratives...In life, as both Aristotle and Engels noted, we are always under certain constraints...Each of our dramas exerts constraints on each other's, making the whole different from the parts, but still dramatic" (MacIntyre, [1981] 2007:214). MacIntyre opines then that this narrative mode of thinking about the self, as inextricably attached to the social groups and collective history of which the self is a part, is a fundamentally different way of conceiving of the self than the Enlightenment philosophers proposed. He states:

It is important to be clear how different the standpoint presupposed by the argument so far is from that of those analytical philosophers who have constructed accounts of human actions which make central the notion of 'a' human action. A course of human events is then seen as a complex sequence of individual actions...But the point about such sequences is that each element in them is intelligible as an action only as a-possible-element-in-a-sequence...a sequence requires context to be intelligible...the concept of an intelligible action is a more fundamental concept than that of an action as such (MacIntyre, [1981] 2007:209).

So for MacIntyre the Enlightenment tendency to focus on individual isolated actions over narrative accounts of those actions was problematic: "...the characterization of actions allegedly prior to any narrative form being imposed upon them will always turn out to be the presentation of what are plainly the disjointed parts of some possible narrative" (MacIntyre, [1981] 2007:215).

But narratives too, argues MacIntyre, require a context to be understood. They are told and are indeed bounded by what MacIntyre offers is a tradition. He asserts: "We live our lives, both individually [narratives] and in our relationships with each other [practices], in the light of certain conceptions of a possible shared future, a future in which certain possibilities beckon us forward and others repel us, some seem already foreclosed and others perhaps inevitable..." (MacIntyre, [1981] 2007:215-216). Traditions are the constraints that render any narrative intelligible because, he sets out:

...it is not just that different individuals live in different social circumstances; it is also that we all approach our own circumstances as bearers of a particular social identity. I am someone's son or daughter, someone else's cousin or uncle; I am a citizen of this or that city, a member of this or that guild or profession; I belong to this clan, that tribe, this nation. Hence what is good for me has to be the good for one who inhabits these roles. As such, I inherit from the past of my family, my city, my tribe, my nation, a variety of debts, inheritances, rightful expectations and obligations. These constitute the given of my life, my moral starting point (MacIntyre, [1981] 2007:220).

Thus, in MacIntyre's scheme we are bearers of a tradition of thought that we are born into and this constitutes the limits of our possibilities. However, says MacIntyre, this does not mean that we may not come to challenge these limits. In fact, he argues: "traditions when vital embody continuities of conflict" (MacIntyre, [1981] 2007:222) and, by contrast, when a tradition becomes stable "it is always dying or dead" (MacIntyre, [1981] 2007:222). An institution then, as the bearer of tradition in a virtue framework, will be engaged in a constant questioning of itself as an institution bearing a tradition of practice – about what that practice is and what that practice ought to be. MacIntyre digresses further: "A living tradition then is a historically extended, socially embodied argument, and an argument precisely in part about the goods which constitute the tradition...the history of a practice in our time is generally and characteristically embedded in and made intelligible in terms of the larger and longer history of the tradition through which the practice in its present form was conveyed to us; the history of each of our own lives is generally and characteristically embedded in and made intelligible in terms of the larger and longer histories of a number of traditions" (MacIntyre, [1981] 2007:222). The moral concept of the person then is collective and situated in the framework of duty and expectations that traditionally define social roles.

### **2.1.3 Law as the Index of Virtue**

MacIntyre also recognizes the role of law in a society organized by a moral concept of the person and points to the presence of law in Aristotle's scheme to defend the classical conception as one that is teleological but not consequentialist. This is so, MacIntyre argues, because law does play a (dogmatic) role in crafting the practice of virtue, the narratives that can be told and the telos of human life inhabited. Insofar as virtues are developed in the collectivity where each individual is situated, laws, like virtues, prescribe certain conduct in the context of this community as a "deprivation of the good" (MacIntyre, [1981] 2007:152). As such law and virtue are not unrelated. MacIntyre does

not, however, equate law and virtue as the deprivation of the good they are concerned with, he argues, is of a very different kind. What Macintyre proposes is that there are two levels of ‘evaluative practice’ in the classical moral tradition, both of which are necessary for intelligible collective action. To institute and sustain a collective project, MacIntyre argues, those who participate in it must first recognize in the terms of the project a certain set of actions that would be taken by participants in the context of the project as virtues; “...qualities of mind and character which would contribute to the realization of their common good or goods” (MacIntyre, [1981] 2007:151) and a further set of related actions as vices. Thus, within the particular project or practice, the virtues and vices sustaining the particular relations between the participants will be outlined and, as the practice progresses over time, refined. The second evaluative practice in which the participants of the project must engage is to “identify certain types of action as the doing or the production of harm of such an order that they destroy the bonds of community in such a way as to render the doing or achieving of good impossible” (MacIntyre, [1981] 2007:151). It is this second order of evaluation that MacIntyre identifies with the applicable law, which he asserts emerges from the interaction between practices over time. The two evaluative orders are inextricably related to each other as acting in a way that is contrary to either of them will “both injure the community and make its shared project less likely to be successful” (MacIntyre, [1981] 2007:152). However, MacIntyre notes, the two levels of evaluative practice are not co-identical as they operate in distinctive ways, on different levels, and entail different sanctions on the particular member of the community found to be falling short of their dictates.

With respect to the first evaluative operation; the associational practices that MacIntyre places in the constitutive position, if a participant fails to live up to the virtues encapsulated by the standards of the practice posited by the practitioners, they will not contribute to the achievement of the community good. As such, they may incur shame or some other form of reputational sanction by other practicing members but they are not, he argues, necessarily by their action (or lack thereof) taken to be exiting the community. If a participant commits a risible action in the second evaluative context, however, and as such violates the law governing the practicing community as a whole, the person is taken by their action to exclude themselves from the practicing community. Or, in other words, their desire to depart from the community is imputed to them as the result of their conduct, which is understood by the whole community as intolerable if the community is to exist. Committing an offence of the law then, MacIntyre notes, is not the same as being a good or

bad practitioner as in the first instance. Instead, a breach of the law destroys the relationships between members of the community that makes the common pursuit of the good possible. They are offences, MacIntyre argues, which if tolerated would mean “...the community’s common life has no point” (MacIntyre, [1981] 2007:152).

This initially appears clear enough, insofar as it posits the law as a boundary operation in which all practices (and therefore their practicing members) are inscribed. However, MacIntyre asserts, this is not exactly the order in a moral scheme. MacIntyre notes that “an account of the virtues while an essential part of an account of the moral life of such a community could never be complete by itself....[an] account of the virtues has to be *supplemented* by some account, even if a brief one, of those types of action which are absolutely prohibited” (emphasis added) (MacIntyre, [1981] 2007:152). This feature of law as a ‘supplement’ to or facilitative of the virtues developed in the context of practice is not a conceptual slip but a critical positioning. Law, in a moral or virtuous organization of the person, only plays a role to the extent that it is necessary to make up for a functional deficiency inherent to the definition of virtue itself insofar as virtues and vices do not identify explicitly prohibited actions. By making commission of particular offences actionable then, law gives the concept of virtue developed through practice and elaborated in the narrative accounts of the community a deeper and extended intelligence. Law is in this sense a necessary supplement to a virtue framework but it is always ancillary, facilitative not constitutional. It is to some extent a recognition that even in a comprehensive moral order there will inevitably be conflict in discrete instances on how the virtue/vice framework applies to a particular action not contemplated in the context of the practice, and if and only if disagreement on this conflict rises to a threshold where it is threatening to collapse the entire community then law, which by definition only represents and extends the virtues of practices developed therein, will need to suppress the conflict. Law then, is in a significant respect, *after* virtue.

Thus, law does have an explicit moral function in MacIntyre’s outline of the moral organization of the person but it is implied by MacIntyre that it is a more passive element. Still, having identified law as an evaluative practice in and of itself, related but distinct from the practice of virtue and, moreover, one that is necessary for the practice of virtue to be sustained; MacIntyre spends very little of the text examining the legal aspect. When he does speak about the law generally, it is clear that MacIntyre takes an extremely dim view at least of law’s present dominance in the normative hierarchy. So, for instance, he

criticizes the role law has come to play in the promotion of a philosophy of liberal individualism insofar as law is conceived as “neutral between rival concepts of goods, serving only to promote law-abidingness but not to inculcate any particular moral outlook and as such neglecting its role as a parental authority” (MacIntyre, [1981] 2007). He notes that the breakdown of a systematic moral order and the rise of legal personhood to displace moral ideas of the person has led to a popular conceit that to comply with the law is itself moral, full stop, without any consideration of what the law represents. Under this elevated view of law as the legislator of virtue, MacIntyre argues, the only virtue capable of an existence independent of law is self-command, which we will only be inclined to follow so as not to fall afoul of the law and incur sanctions that would jeopardize our competitive position with others in the wider context of the ‘market.’

MacIntyre then says very little about how law would (or would not) function differently in the facilitation of a virtuous organization of the person and this is a curious omission. But perhaps it is less so if we understand the text as a whole to represent a dramatic confrontation between what MacIntyre posits as the two rival evaluative levels of a classical moral tradition: law and virtue. Recall that for MacIntyre, and here he confesses to departing from Aristotle, a tradition requires conflict to be a living one. It is the ‘tragic drama’ of conflict that is necessary to ensure the vitality of a tradition and “it is through conflict and sometimes only through conflict that we learn what our ends and purposes are” (MacIntyre, [1981] 2007:164). Law, perhaps, In MacIntyre’s view would not necessarily operate differently in a virtue framework per se as the tension between an ethical and a legal order is formative. Instead, what MacIntyre is seeking to do with his text is to restore the tension between law and virtue, to suggest there is, in fact, a conflict, and thereby recuperate the authority of virtue in our understanding of law. Law continues to be necessary to any virtuous organization of moral governance, but the role of law and as such the state in the constitution or order of social life would be, as it is in the composition of the text, dramatically subverted to the superior evaluation of the public good imposed through associational practice (or civil society). Thus by purposively focusing on virtue and marginalizing the role of law; a point is being made, a de-centering of the law is taking place, a fall from eminence or change of fortune to an order that exists now is being postulated by MacIntyre as possible.

This idea is made to some extent explicit in MacIntyre’s treatment of the notion of taboo. Taboo rules, argues Macintyre, can only be made understandable in the context of their

operation. So, he says, it would never be enough to understand the rules and to follow blindly, instead they require: "background beliefs" (MacIntyre, [1981] 2007:112) as without them "the rules have been deprived of any status that can secure their authority and, if they do not acquire some new status quickly, both their interpretation and justification become debatable. When the resources of a culture become too meager to carry through the task of reinterpretation, the task of justification becomes impossible" (MacIntyre, [1981] 2007:112). Thus, MacIntyre argues a set of rules on its own will not provide an "adequately demarcated subject matter for investigation or autonomous field of study" (MacIntyre, [1981] 2007:112). Instead he argues that one would need to understand the cultural background as rules cannot be made intelligible without reference to their history. If we wish to understand then, argues MacIntyre, how and why "rules became the primary concept of modern life" (MacIntyre, [1981] 2007:119) and "how character came only to be prized because it will lead us to follow the rights set of rules" (MacIntyre, [1981] 2007:119:) then, he suggests, it is the ordering of evaluative concepts that we must turn to. He states: "...on the modern view the justification of the virtues depends upon some prior justification of rules and principles; if the latter become radically problematic, as they have, so also must the former. Suppose however that in articulating the problems of morality the ordering of evaluative concepts has been misconceived by the spokesmen of modernity...suppose that we need to attend to virtues in the first place in order to understand the function and authority of rules; we ought then to begin the enquiry in [a] quite different way..." (MacIntyre, [1981] 2007:119).

Thus, MacIntyre argues, there is a need to attend to virtue in the first place in order to contextualize the function and authority of law. Understood in this way, law can then take on, in MacIntyre's view, its proper subsidiary or facilitative role, which he argues is "to keep the peace between rival social groups adhering to rival and incompatible principles of justice by displaying fairness and evenhandedness in its adjudications" (MacIntyre, [1981] 2007:253). In a moral order, or organization of value by human virtue, the nature of society will never be encompassed by laws alone, instead law must be understood in a more limited fashion as merely "an index of its conflicts" (MacIntyre, [1981] 2007:214). What the inflation and expansion of the domain of law then shows today, MacIntyre suggests, is not that we are living in an ordered and moral society but, on the contrary, "the extent and degree to which conflict has to be suppressed" (MacIntyre, [1981] 2007:214). It is a compelling and clever narrative: the disorder of modern society or, more specifically, the lack of a coherent framework of value, is caused by the order of the

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evaluative orders being in disorder. On this view, it becomes clear why law plays such a small role in MacIntyre's re-telling of the history of moral virtue as the role of law, he suggests, would have been less significant in a society where a virtuous or moral concept of the person dominated the permissible political narratives and the evaluation of social conduct; passively providing an arena for organizational action but no more.

Still, in MacIntyre's attempt to put law in its place I am afraid that law may not have been given its due: both in terms of why it became perceived to be necessary to expand the jurisdiction or domain of law and how this expanded jurisdiction or domain also played a role in not just reflecting the particular 'emotivist' or modern outlook MacIntyre decries but instituting it. What MacIntyre leaves out in his haste to suggest the moral organization of the person was undone with the Enlightenment critique of teleological reasoning is that there were certainly other factors that contributed to the disorganization of the moral order post-Enlightenment. In fact, the rejection of teleological reasoning was not on its own enough to prevent new defenses of the moral organization of the person emerging during the Enlightenment and the following chapter will examine two of these perspectives: one from Adam Ferguson in Scotland and the other from Otto von Gierke in Germany. What becomes clear from these texts is that while a moral organization of the person, regulated by virtue, provides a wonderful critique of commerce and the value of free association, moral perspectives also tend to be opposed to the idea of universal suffrage and individual human rights in conditions where the opportunity to be or become virtuous is not equally distributed. What some might conceive of as the minimum condition of democracy today then is contrary to the public good in accordance with the moral view. So long as the state remained in a passive position this could potentially be defended. But once the state started to play a more constitutive and interventionist role and started to support narratives of the public good in direct conflict with moral values, limiting the right to participate in the governance of the state became, with good reason, materially indefensible.

### 3. The Moral Person and the Public Good

As MacIntyre established the moral organization of the person was constituted through an idea of the public good as being an internal good to the practices of associations, regulated by a conception of the person as a social and collective being, and facilitated through the legal prohibitions of certain acts within the communities that emerged. This framework was given definition by what it externalized from the normative organization of moral persons: external goods, a materialist conception of individuals, and individual human rights. Although MacIntyre locates the decline of the moral person from dominance in the shift during the Enlightenment away from teleological frameworks, what the defenses of the moral person during the Enlightenment reveal is that this was not the only factor that made the moral organization of the person less palatable. In this chapter I will examine two Enlightenment social theorists, Adam Ferguson in Scotland and Otto von Gierke in Germany, who can be seen to provide a defense of the moral organization of the person and in particular the associational basis for intelligible social or public action. However, as elegant as their defenses of associational practices are, the incapacity of the moral framework to incorporate a more multidimensional view of human beings as both social actors but also material beings in their own right starts to reveal some of the deficiencies inherent to the moral organization of the person that will make it difficult to maintain relevance in a period where greater demands for suffrage and economic protection as a response to the more interventionist acts of the state were beginning to emerge.

#### 3.1 Adam Ferguson: Essay on the History of Civil Society

Scottish social historian, philosopher, and somewhat elusive figure from the Scottish Enlightenment, Adam Ferguson's unique theoretical contributions have never been easy to square with those of his contemporaries. On the one hand, certainly his work shares many of the defining features of Scottish Enlightenment philosophy. In particular his positing of a stadal view of social history, a universal view of human nature, his emphasis on empirical evidence, his critique of individualist perspectives, and his acceptance of the doctrine of unintended consequences place him firmly on Scottish Enlightenment terrain (See: Berry, 1997). On the other, perhaps his most famous work: "*An Essay on the History of Civil Society*" ([1767] 1995) (hereinafter referred to as *ECS*) is in crucial respects a polemic against the more widely read figures of the Scottish Enlightenment and his colleague Adam Smith in particular. Ferguson is skeptical of the unidirectional view of

progress that much of Scottish Enlightenment philosophy represented and, specifically in respect of Smith, he is extremely critical of his theory that the cultivation of wealth through the division of labor would, without more, lead to an unquestionably more progressive political polity.

Before launching into the debates between Ferguson and Smith, it must be understood that at the time Ferguson was writing Scotland was in the midst of a transition from an independent state to one recently, and not without turbulence, united with England.<sup>3</sup> Further, Scotland was also facing an internal identity crisis; the country being deeply divided into what were then considered Lowland and Highland Scots. Ferguson's unique views then can, to some extent, be attributed to his own unbound identity. Although Ferguson, in many respects shared the distinctive traits that would have been identified with Lowlanders; he had held a variety of posts abroad in Europe, he was an ordained Presbyterian minister, he was a Hanoverian who supported the Whig party (unification with England), and he was a member of the moderate party within the Church of Scotland; unlike any of his other Lowland contemporaries, Ferguson was not by birth a Lowlander but had been born and raised in the Scottish Highlands, spoke fluent Gaelic, and in his professional life had also spent time in the military. Fania Oz-Salzberger (1995) notes in her “*Introduction*” to Ferguson’s *ECS* that this “first-hand and early encounter with both ‘raw’ clansmen and ‘polished’, anglicized lowlanders was a formative experience in his life” (Oz-Salzberger, 1995:7). Indeed, the tension between them is often revealed in his thought; Ferguson, to some extent at war with himself in his work, uniquely sympathizing with both the Lowland and Highland perspectives; perspectives that in practice radically rejected each other.

This tendency of Ferguson’s to vacillate between what were viewed in his time as dichotomous views frequently exposed him to criticism from his colleagues. Smith, for instance, was furious with Ferguson over the publication of *ECS* for a variety of reasons, not the least of which included Ferguson’s dismissal of Smith’s forthcoming work “*An Inquiry into the Nature and Causes of the Wealth of Nations*” ([1776] 1981) as merely a

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<sup>3</sup> Following Scotland’s failed attempt to become a colonial power, known today as the Darien Scheme, a fiscally embittered Scotland united with England in 1707, entering into an agreement that would abolish the Edinburgh parliament in return for what was effectively a fiscal bail-out. The process of unification was a source of heated and often violent political controversy in Scotland at the time and the controversy continues to the present day. For a comprehensive account of the political and economic context of unification see: Watt (2007).

theory of economy not society.<sup>4</sup> David Hume too also rejected the work as being too political and humanistic.<sup>5</sup> But, for Ferguson, inner and outer conflict was inherent to the practice of theory as well as to the social nature of human beings and any comprehensive theory of civil society would need to embrace and encourage this aspect of thought and human nature not ignore or renounce it as unseemly. Lisa Hill in “*The Passionate Society: The Social, Political and Moral Thought of Adam Ferguson*” (2006) states: “It has been mentioned that Ferguson was a disorderly, sometimes exasperating scholar. This is partly related to the tension between his romantic idealism and pragmatic realism but it also has a lot to do with his appreciation of the complexity of the human condition and his belief that it is not only reason, but the unseen, unplanned, sub-rational and visceral forces, that keep the human universe in motion. Ferguson’s profound appreciation of this fact, and his ability to make social science of it, was a major accomplishment” (Hill, 2006:236). Ferguson then, it could be said, had a very acute awareness of the uncertainty of the order of society emergent with the Enlightenment and it is here in his tendency to waver and sometimes outright conceal his political positions that the roots of Ferguson’s often unacknowledged pluralism is exposed. But, before discussing Ferguson’s work in more detail and trying to illuminate his position through his disagreements with Smith, it is necessary to first explain the Scottish Enlightenment’s pioneering notion of civil society as it was this concept that Smith and Ferguson were at odds over and yet, in both of their work, it denotes a very different idea from what the term civil society tends to express in political discourse today.

### **3.1.1. Civil Society in The Scottish Enlightenment Context**

Adam Seligman in his book “*The Idea of Civil Society*” (1992) traces the genesis of the concept of civil society as developed by key thinkers of the Scottish Enlightenment, noting that the Scots’ view is entirely distinct from the notion of civil society as a separate and limited sphere of private action that tends to be the consensus of contemporary social and political discourse. Instead, civil society for the Scots philosophers was more or less a way of denoting and evaluating any given society and the idea expressed for them a desire to forge a dialectic unity between the public and the private constituted through an encompassing notion of civic self-hood that was differentiated from both collective or

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<sup>4</sup> See Ferguson in *ECS* ([1767] 1995:140) where he states: “But I willingly quit a subject in which I am not much conversant, and still less engaged by the views with which I write” and includes a footnote to Smith’s forthcoming text.

<sup>5</sup> A similar sentiment accusing of Gierke of being “a little too republican” will be made by one of his German contemporaries (see: Black, 1990:25).

communal existence and the egoistic desires of the purely self interested individual. Seligman notes that the Scots' organic notion of civil society developed out of specific historical conditions unique to Scotland and his genealogy is worth discussing in more detail to get a better sense of how the fostering of 'good' practices in civil society came to be seen in Scotland as both a means to check the exercise of arbitrary political power but, at the same time, operated to sustain the status quo of limited political participation, which characterized the time it became persuasive.

As a point of contention with previous political philosophies, and in particular the transcendental orientation they saw as compromising the political philosophy of John Locke (See: Seligman, 1992), the philosophers linked to the Scottish Enlightenment aimed to take on the question of social order but to do so without resorting to a purely theological explanation. Recognizing a need to confront the deteriorating social conditions of their day and the developing polarities of wealth, status, and particularly religion they saw as divisive to common life, the moralists sought to devise a philosophy of society that would embrace, unfold, and ameliorate these antagonisms rather than ignore their existence under a rubric of divine ordinance. In this respect, for their time, the Scottish moralists represented a radical break with orthodox philosophical inquiries that tended to ignore social questions and empirical conditions in favor of religious speculation and scriptural interpretation. However, to explain social order without any assistance from the otherworldly realm would have been a risky (and for some an unconscionable<sup>6</sup>) endeavor so they too incorporated a notion of divine presence in their theoretical edifice. As such, what they attempted to do was to subvert the transcendental source of divine providence by positing a notion that god's presence could only be divined in the world from the social or other-regarding motives of human action. Thus, the Scottish moralists located the ultimate source of social morality, and as such society, in the make-up of the human mind or conscience and the corresponding logic of the common good in the way this public logic was (or was not) displayed through the actions of social actors and institutions.

It is with the Scottish Enlightenment then, argues Seligman, that the notion of the common good as immanent to human action in society as opposed to a solely transcendent or divine phenomenon starts to find its initial expression. Similarly Robert Devigne (2006),

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<sup>6</sup> Adam Ferguson, for instance, had studied divinity at Edinburgh and was an ordained minister. See: MacIntyre (1988) for further detail on the relationship between the theological background of some of the prominent figures of the Scottish Enlightenment and its impact on their philosophical positions (pp.241-280).

examining the Scottish Enlightenment's 'natural religion', describes the significance of the break as follows:

Those who founded the enlightenment saw themselves as engaged in a bitter, long, drawn-out battle with the adherents of religious orthodoxy who continued to have faith in such supernatural phenomenon as miracles, creation and heaven. Biblical dogma, what Hobbes called the "kingdom of darkness," had to be pushed into the background to allow for civil peace and rational pursuit of truth. The problem ran deeper than the hierarchy and superstition promoted by the ecclesiasts. By establishing that revealed truth is a standard above government laws and by anointing themselves the sole interpreters of such truth, religious dissenters and zealots undermined political authority and induced lawlessness throughout society...(Devigne, 2006:19).

This focus on a grounded civic religion as the basis for society as opposed to a transcendentalist religious orthodoxy distinguished the Scottish Enlightenment philosophers and provided a common philosophical thread between what were otherwise divergent philosophical outlooks. Gordon Graham in "*Morality and Feeling in the Scottish Enlightenment*" (2001) recognizes that more than anything else it was their common search for a "science of the mind" (Graham, 2001:273) and the rooting of moral conceptions of the good in the human or secular realm that marked each of the Enlightenment philosophies and established what is now acknowledged as the moralist tradition. It is worth emphasizing again, however, that this did not mean that they broke entirely, as is commonly assumed, with the notion of a deity. Devigne remarks: "The reformers claimed a natural religion, establishing an understanding of God through the exercise of cognitive powers" (Devigne, 2006:17) and simultaneously claimed that they "had as much right to the religious argument as their opponents..." (Devigne, 2006:17). And, it is this break with the tradition of a transcendent god to a god grounded and internal to human nature itself, Devigne argues, that provided the rupture necessary for the emergence of the modern state. He sets out:

The simple doctrinal core of the Enlightenment's new natural religion accomplished the goal of civil peace by limiting the possible challenges to God's will by ambitious religious ideologues and moralists who escaped and subverted positive law through appeals to a higher law. Modern natural law theorists stated that we can determine what it is that God wills for humanity not by consulting Scripture but by considering 'what must be done' if a human being, made as God has made it, is to be preserved among other human beings... Christianity itself was addressing the basic characteristics of human nature created by God: an instinct for self-preservation and sound judgment as to what makes life with others possible. God's command to humanity, as discovered by human reason (as opposed to revelation) was to live in conformity with these natural laws. That is to live in accordance with natural justice:

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giving each his due, refraining from harm to others. Based on these natural laws we can have a society, and thereby the fundamental elements of moral life, whereas if we neglect them and act based on that neglect, we can have neither society nor humanity (Devigne, 2006:19-20).

We can see from this doctrinal core then how the basic notion of society or the social held a tremendous amount of influence under Enlightenment moral philosophy. But, as Devigne begins to concede, there was a more intrinsically political element to this as well. Religious argument in Scotland was not merely an argument over a private matter of belief. The Church of Scotland, where these arguments played out, had, as Christopher Berry notes in “*Social Theory of the Scottish Enlightenment*” (1997), become the primary forum for political debate in Scotland following the union of 1707 and the abolishment of the Scottish parliament. The church itself became characterized by a party structure, with the moderate party to which the Scottish philosophers were aligned gradually rising to prominence. So, while the philosophy of civil society of the Scottish moralists was far more concerned with articulating a moral basis for social action in the absence of a theocratic justification rather than seeking to pose a direct challenge to the political authority of Westminster, this should not suggest that the Enlightenment theorists were in the thrall of the state. In fact, what the moralists were proposing was, in an indirect fashion, radically subversive of state orthodoxy – they did not for instance replace theocratic ordinance with sovereign command. In this critical aspect, clearly the notion that human beings (or the people) and not god (or the state) were responsible for the social ordering of society was always intended to be more than just metaphysical speculation. Its undercurrent expressed a deep-seated frustration with state inaction to the problems of an increasingly fraught and fractured social condition developing as a result of the absence of feudal ties, the unchecked rise of industry, the pervasive visibilities of widespread social division (see: Seligman, 1992). The Scots perceived a danger that if the Scottish people did not act on their own to address these issues, Scotland was at risk of becoming a “nationally coherent province on the political periphery” (Haakonssen, 1994:16).

However, once the common good was situated at the level of human beings another issue called for immediate address. If the common good was not pre-ordained how could one distinguish between different conduct as ‘good’ or ‘not good’? Or, put another way, how could one guarantee, if ultimate accountability was between people and not to a higher authority, that people would in practice act to ensure the well being of others and not simply exploit the well-being of others to further their own private ends? This question, argues Seligman, was unique to the Scottish moralists. So long as society or the common

good, as in Locke or other philosophies with a theological base, is premised as emanating from the equal responsibility of each human being to a divine source it could be assumed that man acted in all of his affairs as god's agent, thus "cutting through real or rather historically existent differences of property and status" (Seligman, 1992:23). Whereas, once the very basis for society is postulated as emerging from rather than determining the conduct of human affairs, the normative status of civility is open to question or, in more contemporary terms, the public/private distinction becomes an issue (Seligman, 1992). For the moralists, however, the issue of the public/private distinction did not present an insurmountable problem for their approach. It was, to the contrary, the exact problem that they had been seeking to address.

Seligman notes that by the eighteenth century, the underlying basis of social order in Britain (and elsewhere) was becoming increasingly problematic. The Scottish Enlightenment then, he suggests, was "an attempt to find, or rather posit, a synthesis between a number of developing oppositions that were increasingly being felt in social life" (Seligman, 1992:25), in particular the oppositions "between the individual and the social, the private and public, egoism and altruism" (Seligman, 1992:25). Having chosen to reckon with these divides, the Scottish moralists were faced with a considerable task. By positing the source of morality as internal to the individual and immanent in social relations, Seligman argues, the Enlightenment ideal had to admit that man is motivated by two contradictory principles: altruism and egoism, or, in Devigne's terms: an instinct to self-preservation and a concern for others. This then became the contradiction the Enlightenment theorists had to overcome in order to posit a unified framework of civil society that would be based in man but inherently good for all. They could not, Seligman argues, just ignore one in favor of the other. It was not enough to simply say: man is social. For a notion of civil society to hold together as an idea capable of constituting social action, argues Seligman, they needed to reckon with both and thus institute and at the same time overcome the public/private distinction: "the public space of interaction in civil society is thus a public space only insofar as it is distinguished from those social actors who enter it as private individuals. Where there is no private sphere, there is, concomitantly, no public one: both must exist in dialectic unity for sense to be made of either one" (Seligman, 1992:5).

Thus, to overcome the public/private distinction it required a second position. To be consistent they had to suggest that not only is man social but also that man could not be

abstracted from the social; "...the individual self could never, in this reading, be totally disengaged from society, nor could reasoned self interest be abstracted from those passions which, through moral sentiment, rooted man in society" (Seligman, 1992:32). To do this, Seligman suggests, the Enlightenment theorists made the notion of the social inherent to the concept of individual consciousness by positing an innate human mutuality as an intrinsic element of the human mind and, perhaps more importantly, constitutive of it (Seligman, 1992:27). Civil society could then be as comprehensive in scope as the human mind was comprehensive in scope. Instrumental reason, premised as it was on the individual divorced from sociality, could not explain human actions and, similarly, a segregated notion of civil society divorced from the public realm was also inadequate to the synthesis the concept was intended to express. Seligman states that in the 18<sup>th</sup> century then, through the positing of the "social in the individual...the thinkers of the Scottish Enlightenment managed to articulate a representative vision of civil society where the particular and the universal, the private and the public, were indeed united within one field of meanings" (Seligman, 1992:35).

Berry argues that this rejection of individualism had consequences to the Scot's explanation of the origin of society. Prior to the Scots' injunction, it was generally accepted that to account for the origin of society one would need to account for why human beings would enter into society in the first place. But, in the Scot's view, if one accepts from the outset that humans are inherently social then the idea that humans are social does not need to be, and more importantly cannot be, explained by abstract reason. Berry qualifies: "The Scots do not reject that humans are rational but it is not their reason that explains their sociality" (Berry, 1997:30). This premise, notes Berry, was an important strand in their thought on civil society as it led the Scottish philosophers to reject the idea of the social contract and, following from this, the related idea that to live in civil society is the outcome of a collective rational decision. Berry argues: "In their own account of sociality they are also putting forward an alternative normative account of the authority of government" (Berry, 1997:31) and that the rejection, even superficially, of the social contract as the foundation of social order also had repercussions for the Scots' view of law. He states:

...if the 'natural condition' of humans is life in society then the premise from which norms are generated must also be social...We cannot meaningfully assess the legitimacy of a government...by, so to speak, stepping out of our social selves. The legitimacy has to be found within society. It is still possible to talk of 'natural rights'

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as Ferguson and other Scots do but given natural sociality these rights are not divorced conceptually or normatively from actual social existence (Berry, 1997:31).

As an example, Berry suggests, Ferguson was a vehement critic of the idea that laws can be explained by the jurisprudential theory of ‘grand legislators’ or, in other words, the view that one particular jurist or leader could define an area of law and that these laws would then determine social reality. For Ferguson this theory of ‘grand legislators’ wreaked of the individualism that his entire edifice was constructed against. A classicist and Laconophile he draws on historical empirical evidence from Rome and Sparta to reject such posturing. Berry writes: “For Ferguson the ‘rise’ of the Roman and Spartan governments came not from ‘the projects of single men’ but from ‘the situation and genius of the people’ (Berry, 1997:38). He continues: “Ferguson’s chief observation is that this whole individualist approach cannot provide institutional explanations...Ferguson thought recourse to Great Men could not provide an adequate explanation of social institutions; the supposed link between intention and institution is missing” (Berry, 1997:40). For the Scots, law then emanated from below, from within and as a result of civil society, and both Ferguson and Smith as well as other Scottish philosophers agree on this basic principle. What they often do not agree upon however, as will be elaborated in what follows, is what this principle in practice implied for civil society and how it could be given form to politically.

Still, it would be wrong to say that any of the Scottish Enlightenment philosophers, including Smith and Ferguson, ever attacked the authority of the British state directly. Smith viewed the state as complimentary and necessary for the implementation of his market-based approach (see: Berry, 1997:46 & 125-129). Ferguson, while far more circumspect about the state’s role and a vocal critic of authoritarian regimes abroad (see: Hill, 2006:31-32 on Ferguson’s shifting stance on the French Revolution), was always quick to suggest that the British state, with the important qualification that it allow for group autonomy in its constitution, represented an acceptable compromise (see: Hill, 2006:224). The implication of the British state then in any ignorance to social conditions was always (and perhaps conveniently as all of the Scots literati, including Smith and Ferguson, supported union with England) more a fortuitous side-effect of the stage of the development of civil society in Britain and, as such, it would be more accurate to say that the Scottish Enlightenment theorists by positing the notion of civil society were attempting to think of a way to act outside of - rather than attack - the strictures of political authority that they saw as largely irrelevant and ineffectual on social issues. Thus, the civil society

mandate that emerged from Scottish Enlightenment discourse was intended at the time to be a distinctly moral vision of society at large that could be fostered by various social associations and institutions within the state (and within Scotland specifically), but without the immediate assistance of the state (or the parliament of Westminster). It is only anachronistically, with knowledge of the historic political consequences the Scots' theory of civil society would have on the development of the modern state, that it is acknowledged today as not only a political theory but perhaps the precursor to the very existence of the idea of the political as a contest between public and private interests.

### **3.1.2. The Debate Between Smith and Ferguson**

Up to this point in the discussion the views of Ferguson and Smith do not in significant respects diverge. Both posit a social basis for society and both posit at least a formal rejection of contractarianism as the basis of social, legal, and political order. To some extent, these views were generally shared across the Scottish Enlightenment theorists and it is partially what allows them to be distinguished from Enlightenment theorists elsewhere on the continent (see: Berry, 1997; Robertson, 1997). However, while there may have been broad foundational agreements between Smith and Ferguson and indeed other Scottish theorists on the desirability of developing a notion of civil society as a constitutionally organizing construct to define the relationship between persons and the state, this does not mean that they always agreed with each other on the optimal mode by which to foster the development of civil society in practice, the values or principles that ought to be prioritized, and, by implication, what form of government would best be able to ensure said values and principles were advanced. In fact, with respect to Ferguson and Smith specifically, the two of them do not even entirely agree on how the very idea of civil society was to be conceptualized, which will not only lead to numerous misunderstandings between them, but will also lead to a tendency in modern discourse to conflate Ferguson's approach with Smith's when in fact the two are irreconcilable and in some instances antagonistic.

Fania Oz-Salzberger in her "*Introduction*" to *ECS* notes that in the text Ferguson is very careful not to distinguish between a private or a public sphere. Instead, she argues, Ferguson conceived of civil society as the polity in totality or "the polity itself" (Oz-Salzberger, 1995:19). It is not then a state of being that can be brought about by philosophy or law but a universal category, which moves through historical stages that are

not “along an ascending moral scale” (Oz-Salzberger, 1995:20) or a “unilinear process of civilization” (Oz-Salzberger, 1995:20). Although, she acknowledges there was a stadal element to some aspects of his approach, his theory was critically not evolutionary as he makes it excessively clear in the text that “highly developed societies are in near and clear danger of retreating into...despotism” (Oz-Salzberger, 1995:20). In this respect, she argues, Ferguson differed from contemporaries like Smith who tended towards evolutionary perspectives that embraced a unilinear understanding of progress. For Ferguson, she inveighs, history, and as such the present and future, are radically indeterminate and he embeds this idea in the very structure of *ECS*; forsaking the composition of a chronological narrative and starting instead from modernity and moving back through time to the Romans and the Ancients. She suggests this ordering was deliberately conceived to set up a tension between the ‘polish’ of modernity with the virtue of Ancient civilization via the often unfavorable comparison and observes that Ferguson’s concept of civil society recognizes that “civil society is always an imperfect reality...good citizens must be restless and a robust polity mildly turbulent” (Oz-Salzberger, 1995:20). His thought, she argues, unlike Smith’s, sought to emphasize that not all unintended consequences are for the better and, at a very foundational level then, it becomes clear that the actual content of the idea of civil society; a universal notion for Ferguson and a state not-yet obtained for Smith; was a far more contested idea within Scots theory than many historiographies (including Seligman’s account) allow.

As noted above, both Smith and Ferguson agreed on the social basis of society and both of their theories are premised on this initial proposition. However, for Smith, once this premise was accepted it also made it possible to say that every human drive regardless of orientation had a social basis. Thus, in his view, even the drive towards egoism had a social character. Seligman notes in this respect that Smith’s market driven philosophy of the invisible hand is premised on the notion that it is the inherently social individual whose need for recognition and consideration by others grounds the drive towards market/economic behavior in the first place. For Smith, notes Seligman, human motivation derives from the instinct towards vanity or ‘vainglory’, which revealed a drive within the individual for the recognition of others insofar as “we become who we are through others perceptions of us” (Seligman, 1992:28). It was an all-encompassing vision and even the concept of the free market was framed within terms of recognition. Seligman states: “The critical idea of an interdependence between men that went beyond interest motivated action remained. This interdependence and mutual validation of selves through

the very workings of the market invested the public arena of civil society with a critical representative dimension, as an ethical locus where private interests and passions were not only realized but were themselves constituted through mutual recognition. Here the public/private distinction has been recognized and met through a conception of privateness whose very sources are deeply rooted in public recognition" (Seligman, 1992:33).

John Hall and Frank Trentmann in "*Contests over Civil Society: Introductory Perspectives*" (2005) also emphasize the underlying social basis of Smith's theory, arguing that Smith must be read as premising the regulative device embedded in his view of civil society as not the invisible hand *per se* but what it symbolizes, which they assert was a sort-of "omniscient universal spectator" (Hall & Trentmann, 2005:9). They write:

Civil society within his [Smith's] work is best seen as a medium for forging new bonds of solidarity or for teaching new forms of discipline...The fact that we hate to be disturbed, especially by the pain of others, makes us wish not to disturb others – for we learn to judge our actions as if they were seen by a 'universal spectator.' Self-command and other-direction accordingly rule the day. Civility, orderliness and manners matter in this world, and most certainly militate against any unbridled assertion of the romantic self (Hall & Trentmann, 2005:5).

And, they continue (quoting from Smith):

Smith's view was...subtle and highlighted the paradoxical workings of civil society. Individuals might have become locked into a status-seeking game paying more regard to what 'the spectator' thought than their own free will. Yet, from the perspective of civil society as a whole, this 'deception' also had virtuous consequences. For it was 'this deception which rouses and keeps in continual motion the industry of mankind', leading to new technologies, better and more food, and communication between peoples. Competitive status-seeking and the pursuit of greater wealth also, Smith argued, carried a built-in mechanism for social harmony: being able to fantasize becoming rich made the poor person accept a culture of social inequality, rather than opting for violence or anarchy. Commerce and consumption, in short, created and stabilized a civil society (Hall & Trentmann, 2005:9).

To some extent then, the underlying social value that Smith prioritizes in his version of civil society is stability or an absence of conflict and the best way to achieve this public good, he hypothesizes, is through the mutual recognition of everyone's individual right to pursue economic prosperity in an open market. While he does not necessarily formulate a theory of the state, his approach has certain political implications. For his ideal civil society to inure the role of the state should then be limited to providing a legal infrastructure that would facilitate the optimal market conditions emergent in and

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demanded by civil society; or, in other words, securing individual rights to accumulate and the protection of private property legally acquired. Otherwise, there was little need in Smith's view for state intervention into the institutions of society as they would naturally develop and self-regulate through the imposition by law of market discipline, which would be, by nature, rooted in the approbation or censure of society at large. The signals sent by society through the device of the market would indicate the social acceptability and value of any given action and as such it was the market then, for Smith, and not necessarily the state, that society needed to be enfranchised to via legal institution for the optimal state of civil society to thrive. So long as open market conditions were present, the result would be greater net wealth for all members of society and a reduction of social conflict in the aggregate. This was not, it must be emphasized, because the market would bring about a reduction in economic inequality between citizens. Instead, it was because everyone would be better off or, put another way, society as an aggregate would be wealthier or less impoverished, even if the disparities between individual members of the society remained large or even widened.

Like Smith, Ferguson too rejects the social contract theory of society but does so through an empirical critique arguing that there is simply no evidence of a time when humans were not social. Berry notes that Ferguson postulated three reasons for the social nature of human beings. The first of these pertains to natural instincts and specifically the drive for self-preservation, which was also emphasized by Smith. These drives, Ferguson argued, could be observed in animals, which he divides into two camps: social animals and predatory. Human beings are firmly for Ferguson social animals as their instinct to persevere is buttressed by a specifically human capacity, which is that for esteem. Here too we see in Ferguson a hint of Smith's notion of interdependence coupled with the capacity to recognize others and hold them in regard. The social basis of these drives also carries over into the second consideration Ferguson posits as evidence of the social nature of human beings, which is the universal category of the family unit. Again, Ferguson reasons that this too is to some extent a necessity for human life. However, Ferguson argues, the continuity of the familial bond after it becomes necessary cannot be put to an instinct to subsist alone. Over time it becomes a force of habit and esteem and Berry notes that here: "...Ferguson refers to a principle that plays a central role in the Scots' social theory" (Berry, 1997:28) and, he observes that Ferguson "...states as a further consequence of the durability of the child-parent relation that the instinctive attachments 'grow into habit.' Habit expands the family tie so that it encompasses not only siblings but

also a third generation and collaterals. This, for Ferguson, explains how consanguinity is regarded as a ‘bond of connection’” (Berry, 1997:28). Again, we are not too far from Smith here; Smith’s view being that the initial necessity of the family for survival fosters a recognition of interdependence and a desire to obtain recognition or status within the unit.

Where Smith and Ferguson begin to part company, however, comes from the fact that Ferguson does not consider the two grounds of human sociality posited above to be of much interest to a theory of social development. Berry notes that although Ferguson acknowledges humans’ social nature in the very drives that Smith emphasizes; specifically: self-preservation and esteem, these connections between people are the least important for Ferguson. Instead, Berry argues, Ferguson placed greater emphasis on the third argument he advances for human sociality, which is the desire for friendship and loyalty. Berry sets out, at length:

For Ferguson, there was more to human sociality than either ‘parental affection’ or a ‘propensity...to mix with the herd’. Once some durability has been established then the independent principles of friendship and loyalty come into play. In each case they represent a sphere of human conduct that is not reducible either to animal instinct or to self-interested rational calculation. Ferguson indeed declares that the bonds formed by these principles are the strongest of all and this is precisely because they transcend the self-centered quality of the other two. They are for that reason the most genuinely social...

Friends are those who cling to each other ‘in every season of peril.’ But that is not because they derive some quid pro quo benefit...Rather, it is an expression of the intrinsic non-instrumental quality of their relationship. The quality of friendship is one of ‘resolute ardour.’ Friends differ from kin because they are selected. Selection implies discrimination, hence the important distinction between friends and others. But Ferguson does not see this consequence as anti-social; on the contrary he places great emphasis on the fact that this discrimination is a crucial component in the bond of friendship.

This mutually reinforcing duality of friend/other is extendable into the more general relationship of loyalty...Time after time, instance after instance, it has been seen that humans are willing to risk their lives for the sake of their patria. This can only be explained by the human capacity to bond on principles that go beyond both the instinct for self-preservation and judicious calculation of self-interest...(Berry, 1997:28-29).

So, if Smith’s view saw sociality in an abstract omniscient spectator that to some extent represented all others and the individual in relation to them, Ferguson’s beacon of sociality was a far more circumscribed reference, which came from real inter-subjective interaction or, indeed, *participation*, within distinct and select associations. We do not, in Ferguson’s

view seek to imitate or indeed recognize just anyone's actions as significant, instead we place far greater significance on the social groupings in which we are actively and voluntarily involved and, as a result of our involvement, develop loyalty towards.

As we will see in the following section Ferguson's thoughts here will be echoed and expanded on by Otto von Gierke in his theory of the *Genossenschaft* (fellowship), but for now it should become apparent that Ferguson's conjecture of a friend/other distinction is beginning to lay the groundwork for a move away from Smith. Smith's unit was always society in the abstract and human sociality based primarily on instinct and the habit of esteem and imitation formed initially from necessity in the family and capable of expansion to others via the institution of the market. While Ferguson does not deny these grounds of sociality and accepts along with Smith that there is some social concourse in economic behavior, he does not think that the social drives capable of expression through commerce are the only, or even the most interesting, facets of human sociality. Self preservation may be able to explain why we start as social beings and self-interest and habit why we remain as such beyond necessity, but for Ferguson they do not explain the endurance and extension of social congress that begins in the family unit to *some but not all* outsiders, bonds that Ferguson is quick to note often do not advance and can sometimes contradict our self-interest. He states:

Men are so far from valuing society on account of its mere external conveniences, that they are commonly most attached where those conveniences are least frequent; and are there most faithful, where the tribute of their allegiance is paid in blood. Affection operates with the greatest force, where it meets with the greatest difficulties: in the breast of the parent, it is most solicitous amidst the dangers and distress of the child: In the breast of a man, its flame redoubles where the wrongs or sufferings of his friend, or his country, require his aid. It is, in short, from this principle alone that we can account for the obstinate attachment of a savage to his unsettled and defenceless tribe, when temptations on the side of ease and safety might induce him to fly from famine and danger, to a station more affluent and secure. Hence the sanguine affection which every Greek bore to his country, and hence the devoted patriotism of an early Roman. Let those examples be compared with the spirit which reigns in a commercial state, where men may be supposed to have experienced, in its full extent, the interest which individuals have in the preservation of their country. It is here indeed, if ever, that man is sometimes found a detached and a solitary being: he has found an object which sets him in competition with his fellow-creatures, and he deals with them as he does with his cattle and his soil, for the sake of the profits they bring. The mighty engine which we suppose to have formed society, only tends to set its members at variance, or to continue their intercourse after the bands of affection are broken (Ferguson, [1767] 1995:23-24).

Ferguson's view then is not then that we are incapable in practice of acting in self-interest or that self-interest cannot have a social component through interdependence and the desire for esteem, but he observes that in our relationships and associations we often do not act in a purely self-interested way and human capacities for benevolence, friendship, and/or loyalty and the relations that engender them are not something society should seek to discipline but, to the contrary, encourage. Ferguson then articulates an opposing view to Smith on the relative value of social deception and social affection. Where Smith argued there was a utilitarian value to social deception to the extent that it suppressed conflict, in Ferguson's view, to the extent that men are deceived to value an abstraction rather than their real situation and the real situation of their associates, the social basis of participation in society is maligned and, as such, society becomes less not more civilized. So, while social association based on bonds of affection may lead to conflict within a society, the conflict at least is precipitated by a real perception of inequitable conditions not a false sense of security that as an individual the condition could be overcome.

In essence, Ferguson was really the first theorist to recognize that Smith's edifice made his rejection of the social contract as the basis for order in society entirely superficial. To accept that the society of men is based on a belief that other men can further our own individual wealth is simply to substitute the abstraction of the market and private interests for the abstraction of the sovereign and public interests not radically question the premise. If Smith's view of civil society then prioritized the self-interest incumbent in social recognition, Ferguson's view of civil society prioritized the self-sacrifice incumbent in social participation; participation fuelled by the 'romantic' or, simply, engaged political subjectivity brought about by fellowship and fraternity in association with others that Smith's edifice sought to repress. The specific points of disjunction between Smith and Ferguson on the idea of civil society and its applications in the realm of self determination, national defense and the division of labor are worth elucidating in more detail as they help to give a clearer picture of Ferguson's thought and how he articulates an original, if sometimes cautious, theory of the moral value of civic associations and the public good, which sets him apart from his contemporaries moving in the polar opposite direction.

### The Fate of the Highlands

The distinction between economic and political subjectivity was a critical component in the debate between Ferguson and Smith and we can see how this plays out in their

differing views regarding the fate of the Scottish Highlanders. Peter France (1985) in “*Primitivism and Enlightenment: Rousseau and the Scots*” notes: “Scotland was more than the Enlightenment of Edinburgh and Glasgow. Since 1745 the Highlands had been the scene of a large-scale repression of a native population who appeared like representatives of a vanished world. Scotland...was poised between the ‘rude’ and the ‘refined’ states of society...Eighteenth-century Scotland was in fact a rapidly changing country where the primitive and modern existed in striking proximity” (France, 1985:70-71). This circumstance was not lost on the Scottish Enlightenment philosophers and many used the Highlands as a way to explicate their theoretical principles. Berry notes that Smith in particular prominently pointed to the communal life and recurrent conflict of the Highland clans as an example to demonstrate the consequences incumbent on the underdevelopment of the division of labor. While Smith recognized that the Highland clans could be virtuous and hospitable, he was far more inclined to emphasize the superiority of the culture of the Lowlands, specifically in respect of the development of commerce and the stability he perceived it to create. Smith’s views were also those favored by the parliament based in Westminster, resulting in the passage of a variety of legislative initiatives designed to dismantle the Highland clans including the *Annexing Act* (1752) that confiscated Jacobite Highland establishments with the aim of using the rents acquired to assimilate Highlanders into Lowland culture and the *Heritable Jurisdictions (Scotland) Act* (1746) that abolished the heritable jurisdiction of local Highland clan chiefs to administer justice in order to incorporate them into the broader polity (see generally: Rackwitz, 2007). Smith’s view then that the Scottish Highlands were a largely ‘underdeveloped’ portion of Scottish society in need of maturation, as opposed to a distinct political community with rights to self-determination, was the dominant view of the Lowland literati and in accordance with, or at least well-suited to, the Westminster decrees. In fact, Smith, to be fair, was actually much kinder in his assessment of the Highlands than some of his contemporaries. While Smith recognized that there were some positive features of the clans, others like David Hume and William Robertson did not; the latter famously declaring in a sermon at the University of Edinburgh where he was Principal that the Highlands were “society...in its rudest and most imperfect form” (France, 1985:70).

Although Ferguson did not declare his opposition to Smith’s (or other colleagues) view of the Highlands, or denounce the Westminster legislation publicly in his work, it can be expected that such a position on the Highlands would have sat uncomfortably with Ferguson. Recall that Ferguson was the only member associated with the Scottish

Enlightenment to have grown up in the Highlands, who also spoke the language identified with the Highlands (Gaelic), and was himself a military veteran with a deep respect for military valor. It is perhaps surprising then that his most polemical text *ECS*, which can broadly be described as at least a cautious defense of the morality and practices of ‘rude nations’ in comparison to the ‘polished’, does not ever mention the Highlands specifically as a point of departure. However, this does not mean that the Highland issue is absent from the text. To the contrary, Ferguson had a tendency to anonymize his domestic political views in his writing<sup>7</sup> and he certainly would have been aware of the term ‘rude’, or even ‘barbarous’, being applied consistently to the Highlands in Scottish political discourse and the terms ‘polite’ or ‘polished’ to the Lowlands. Thus, while he may have been reserved in his explicit advocacy for the rights of the Highland communities to self-determination he is unreserved in his criticism for this particular mode of political argumentation:

The term polished, if we may judge from its etymology, originally referred to the state of nations in respect of their laws and government. In its later applications, it refers no less to their proficiency in the liberal and mechanical arts, in literature, and in commerce. But whatever may be its application, it appears, that if there were a name still more respectable than this, every nation, even the most barbarous, or the most corrupted, would assume it; and bestow its reverse where they conceived a dislike, or apprehended a difference. The names of *alien* or *foreigner* are seldom pronounced without some degree of intended reproach. That of *barbarian*, in use with one arrogant people, and that of *gentil*, with another, only served to distinguish the stranger, whose language and pedigree differed from theirs (Ferguson, [1767] 1995:195).

Further, although Ferguson does not refer to the Highlands specifically as an example in *ECS*, he draws heavily on descriptions of the ‘North American Indians’ and it is notable here that an explicit identity of the Highlands with the North American Indians was frequently asserted in Scottish Lowland circles at the time (and will later, as noted by France, be made explicit in two famous ethnographic accounts of the Highlands by Samuel Johnson (1775) “*Journey to the Western Islands of Scotland*” and James Boswell (1786) “*The Journal of a Tour to the Hebrides*”). Given Ferguson’s extensive treatment of the North American Indians in *ECS* then it is certainly plausible to suggest that the Highland issue forms an undercurrent of the text and, as such, Ferguson’s remarks in respect of the North American Indians are relevant to the Highlands. France notes that in *ECS* Ferguson, unlike his contemporaries, repeatedly describes the North American Indians in flattering terms. He states (quoting from Ferguson):

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<sup>7</sup> This will be discussed further in relation to Ferguson’s support of a Scottish militia later in this chapter.

This is particularly noticeable where he speaks of the sociability, the independence, and the martial qualities of the Indians. 'They are', he says, 'affectionate in their carriage, and in their conversations pay a mutual attention and regard . . . more tender and more engaging, than what we profess in the ceremonial of polished societies'. In their spirit of independence 'they have discovered the foundation of justice, and observe its rules, with a steadiness and candour which no cultivation has been found to improve'. And as for their warlike qualities, 'the foundations of honour are eminent abilities and great fortitude; not the distinctions of equipage and fortune' (France, 1985:74).

Ferguson further alludes to the idea that the North American Indians were not 'underdeveloped' but had deliberately chosen a different path of development, he remarks: "They carry a penetrating eye for the thoughts and intentions of those with whom they have to deal; and when they mean to deceive, they cover themselves with arts which the most subtle can seldom elude. They harangue in their public councils with a nervous and figurative elocution; and conduct themselves in the management of their treaties with a perfect discernment of their national interest" (Ferguson, [1767] 1995:88). Moreover, in respect to the temptation to judge the Native American Indians as 'uncivilized', Ferguson is also quick to warn: "We are generally at a loss to conceive how mankind can subsist under customs and manners extremely different from our own, we are apt to exaggerate the misery of barbarous times, by an imagination of what we ourselves should suffer in a situation to which we are not accustomed" (Ferguson, [1767] 1995:103). France argues that here:

Ferguson preaches a splendid relativism which is rare in his times; some of his remarks read like anticipations of modern anthropology: 'Addicted to their own pursuits, and considering their own condition as the standard of human felicity, all nations pretend to the preference, and in their practice give sufficient proof of sincerity.' It follows that we may well be mistaken in our estimate of the happiness produced by a given social order. The apparently dirty, violent, and insecure life of the savage or the barbarian may offer joys which civilized man cannot appreciate, and the savage, when offered the choice, 'droops and ... pines in the streets of the populous city' and 'seeks the frontier and the forest.' Ferguson then, while adopting a scheme of history quite like the four-stage theory, does not subordinate this to any global assumptions about the superiority of either the 'rude' or the 'refined' state (France, 1985:73).

France suggests that the most striking acknowledgement in Ferguson's text (*ECS*) of the merits of so-called rude societies comes in the symmetry between the above acknowledgement in respect of the North American Indians and the parallel argument he makes in respect of how so-called polished nations would be tempted to view the Spartans,

a community that Ferguson unquestionably holds up as an exemplary polity. Ferguson here remarks that if the Spartans were to be encountered in modern times by a delegate from a polished society, the virtue of the Spartan community might not be easily recognized. France recounts (quoting from Ferguson):

The strongest praise of barbarism is implied in a striking ironic set piece in Part Iv [of ECS]. Here Ferguson imagines how an unprejudiced visitor from a more 'polished' society might have described the ancient Greeks. His traveler notes the insecurity and discomfort of life, the despicable smallness of the petty kingdoms, the lack of money, and the inadequate clothing of the natives. Rather like the Highlanders, 'they come abroad barefooted, and without any cover to the head, wrapt up in the coverlets under which you would imagine they had slept'. And the traveler, having been informed of the high reputation of these peoples, remarks 'that he could not understand how scholars, fine gentlemen, and even women, should combine to admire a people, who so little resemble themselves.' There is a fine paradoxically reminiscent of Nietzsche about this passage. Against those who would see the Ancients through modern eyes, Ferguson follows Lafitau, who had insisted on the similarity between the savages of North America and the Greeks of antiquity. Compared with these barbarians, the inhabitants of modern commercial society are meant to appear selfish, pampered, and degenerate (France, 1985:74-75).

So, while Smith (and indeed other members of the Scottish Enlightenment) viewed the ‘fanaticism’ of the Highlands as “an embarrassing remnant of a bygone age” (Oz-Salzberger, 1995:6), setting up the Highlanders as an uncivilized society in need of civilization, Ferguson reveals in *ECS* (through the cover of the North American Indians) that he is far more sympathetic with the Highlanders and finds much to be inspired by in the practices of their communities. Oz-Salzberger notes that it was Ferguson’s view that “the rude clans had effectively preserved values that modern society had to its detriment lost” (Oz-Salzberger, 1995:6) and *ECS* expresses a deep regret by Ferguson that the Lowlands had drifted towards a more atomistic view of social life inspired primarily by Adam Smith’s observations.

If Smith then sets up the Highlands as a primitive and therefore less advanced society in comparison with the Lowlands, Ferguson is keen to set up the Highlands as a distinct society from the Lowlands but one that was productively so and by no means inferior. For Ferguson the option was never the Highlands *or* the Lowlands, rude *or* polished, possibly because his own affiliations and loyalties were divided, but also because this uneasy parity fed into his very concept of civil society. France states in this respect: “in his writing...one detects the desire to preserve in 'improved' society the older values which he may have seen embodied, then destroyed, in the Highlands....these threads of

enlightenment and primitivism are interwoven in a way that makes generalization well nigh impossible. It is not a question of one or the other, but of both at once, in varying proportions and in differing degrees of tension or harmony” (France, 1985:79). While Ferguson did not eschew all of the advantages customarily identified with polished society, *ECS* can to some extent be seen as a polemical text against Smith’s view that the polished society of the Scottish Lowlands represented unqualified progress in comparison to the so-called rude society of the Highland settlements.

### Standing Armies vs. Militias

A second issue exemplary of the differences between Ferguson and Smith on the meaning of or public good of civil society was on was the desirability (or not) of a Scottish militia. But again, here as with the Highlands issue, Ferguson was cautious. Richard Sher (1989), in “*Adam Ferguson, Adam Smith, and the Problem of National Defense*” provides the historical context:

The militia act of 1757 had deliberately excluded Scotland, largely because of English fears about arming a nation that had given considerable support to the Jacobite rebellion of 1745-46. Throughout the duration of the Seven Years’ War Scottish militia supporters schemed to extend the provisions of the English bill to the North, and serious, though ultimately unsuccessful, campaigns to enact such a Scots militia bill in Parliament were mounted in 1759-60 and 1762. Scotland’s proud tradition of military glory and supposed mistreatment at the hands of England formed prominent themes in those campaigns. Among the cause’s most active and zealous spokesmen was Adam Ferguson, who had already published one anonymous pamphlet on behalf of a British militia before Scotland’s exclusion from the provisions of the militia act. Besides writing promilitia pamphlets and letters, Ferguson was instrumental in establishing early in 1762, the Poker Club, which met weekly at an Edinburgh tavern to stir up zeal for a Scots militia in a convivial setting (Sher, 1989:243-244).

Despite the fact that these events immediately proceeded the publication of Ferguson’s *ECS* and although he treats the problem of national defense as a separate section in *ECS*, Ferguson, once again, does not cover the Scottish militia issue in the text. Sher observes: “There was no mention of Scotland’s quest for a militia – no mention, in fact, of the word ‘militia’ at all” (Sher, 1989:244). Sher further notes that if one compares his actual lecture notes to his lectures published in “*Principles of Moral and Political Science: being chiefly a retrospect of lectures delivered in the College of Edinburgh*” (1792) it is clear that he omits from the published text the lectures given on the Scottish militia issue. Sher reasons that the omission was deliberate, he states:

The militia issue was highly controversial during the second half of the eighteenth century, and Ferguson always took care to shield himself. The convivial militia club he helped to found in 1762 was deliberately secretive in almost every respect, from the cryptic name "Poker" that Ferguson chose for it to the clandestine political activities that the club may or may not have performed. His two known militia pamphlets were both published anonymously, and Ferguson never publicly acknowledged authorship. When Ferguson published under his own name he either avoided the subject of national defense entirely or dealt with it in an abstract or theoretical manner (Sher, 1989:258-259).

Both the Highlands and the militia issue were at least publicly perceived in Scotland at the time to be Scottish nationalist causes, and perhaps this too is why Ferguson is careful to conceal his involvement. This is not to imply that Ferguson was a latent nationalist. Whatever Ferguson may be (and it is not always easy to discern from his texts) a nationalist he was emphatically not, and it is one of the few issues that he was uncharacteristically candid about. Instead Ferguson's frequent (if secretive) support for nationalist causes is perhaps better attributed to his unique conception of civil society that saw him not 'taking a side' per se but recognizing the legitimacy and importance of opposition generally in a conception of the society at stake. France also confirms that here, like his views on the Highlands, there was certainly a social and political element to his argument in favor of a Scots militia but, again, it was more of a republican than a national interest that motivated him. France states:

Ferguson's arguments for a militia are in fact not so much military as social. A militia is good for relations between members of a community, but it may not be the best form of national defence. He notes, twenty years after Culloden, that 'with all this ferocity of spirit, the rude nations of the West were subdued by the policy and more regular warfare of the Romans.' And as one reads this, thinking of the place and date of composition, one cannot help wondering how much one should read through the images of savage, barbarous, and ancient nations to the recent history of Scotland, where a ferocious and rude nation (as it seemed to contemporaries) had indeed been subdued, to put it mildly, by the 'regular warfare' of their more 'polished' neighbours (France, 1985:75).

So, Ferguson does not necessarily advocate a Scottish militia because he thought it was a superior military organization. More importantly he sees in the practice of militias a participatory public spirit or public good that cannot be replicated through the alternative organization of a standing or professionalized military. Berry too concurs that Ferguson's stance on the militia issue had far more to do with his civic humanism generally than with any latent nationalism or misguided assumption that a militia was more effective when faced with an external threat. He stresses that Ferguson equated a people's ability to

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defend their property and honours with their political virtue or civic personality and, as such, “went a good deal farther down the civic humanism path than Smith was prepared to do” (Berry, 1997.) As a result, the issue of the Scots militia became a further source of barbed disagreement between the two theorists of civil society.

Smith, perhaps unsurprisingly then, was an advocate of standing or professional armies, seeing in their organization an example of the broader application of the division of labor to matters of public policy and, in their demonstrated effectiveness against ‘unruly’ forces, proof of the principle’s superiority. Sher notes: “Standing armies were associated with modernity not only because they were literally the products of the modern European nation-state but also because they appeared to embody modern principles of efficiency and economic rationality. Above all, they embodied the principal of the division of labor and its corollary, specialization of function, which made for a more efficient army” (Sher, 1989:243). Berry too comments (quoting from Smith): “For Smith in ‘modern armies’ where artillery is a decisive factor, itself the product of technological advance, what matters is ‘regularity, order and prompt obedience to command.’...For Smith in an ‘opulent and civilized nation’ a professional army is the means to preserve civilization against invasion from a ‘poor and barbarous nation’ (Berry, 1997:147-148).

So far, Ferguson would have been unlikely to take issue with Smith’s argument (except, perhaps, in his use of the term ‘barbarous.’) Recall that Ferguson did not attempt to assert that militias were more effective and might have agreed that the maintenance of a standing army had a role to play in the protection of a polity from outside threats. Instead, as noted by Ernest Gellner in “*Conditions of Liberty: Civil Society and Its Rivals*” (1994), Ferguson was far more concerned with the possibility that a professional army would tend to disqualify untrained citizens from participation and therefore disengage ordinary citizens from broader national defense debates. So long as this could be preserved alongside a standing army via a militia or similar body, Ferguson may not have taken quarrel. Gellner states: “It is not the external danger which troubles him, it is the internal consequences of the diminished participation in coercion by a population of a ‘polished’ society, whose citizens turn to production rather than martial honour, and allow legitimate coercion to be not just seen as a specialism but a monopolistic specialism of a single institution, the state...” (Gellner, 1994:64.) Ferguson’s advocacy in favor of the re-establishment of militias was not an argument against the existence of standing armies, both could coexist in society and produce different public goods.

Smith, however, did not limit his advocacy of standing armies to external protection but also thought they would be beneficial against what he viewed to be internal threats. Berry argues that Smith, believing that the presence of a standing army was the only reason for the defeat of the Highland clans in the Jacobite rebellion in 1745, argued that not only was a standing army necessary for protection against external enemies but it was also critical for a state's capacity to develop and enforce rule of law internally. He writes: "Smith sees in its [standing armies'] ability to enforce the laws of the sovereign throughout the 'provinces of empire' a way of bringing civilization to the barbarians" (Berry, 1997:148). So, Smith could not accept a position that a standing army and a militia could co-exist or, at least not until, in his view, the 'barbarians were civilized.' In this respect, Smith incurred Ferguson's scorn and Sher notes that Ferguson in a letter to Smith in 1776 writes: "You have provoked, it is true, the church, the universities, and the merchants, against all of whom I am willing to take your part...but you have likewise provoked the militia, and there I must be against you" (Sher, 1989:246). And, he continues: "The gentleman and peasants of this country do not need the authority of philosophers to make them supine and negligent of every resource they might have in themselves, in the case of certain extremities, of which the pressure, God knows, may be at no great distance" (Sher, 1989:246). This developing volatility marks the beginning of an increasingly acrimonious relationship between Ferguson and Smith but also starts to illuminate a broader difference between them, which is their view of law and the related issue of civilian status.

Ferguson, as noted in the previous section, did not view the Highlands or other rude nations as being law-less in the way Smith appears to suggest. Recall his description that "they have discovered the foundation of justice, and observe its rules, with a steadiness and candour which no cultivation has been found to improve" (Ferguson, [1767] 1995: 86). Further, Ferguson was quick to dismiss the idea that the laws customarily observed by these groups were in any way inferior to the written laws observed in more formal or polished legal systems. He states, in a telling passage:

When a basha, in Asia, pretends to decide every controversy by the rules of natural equity, we allow that he is possessed of discretionary powers. When a judge in Europe is left to decide, according to his own interpretation of written laws, is he in any sense more restrained than the former? Have the multiplied words of a statute an influence over the conscience, and the heart, more powerful than that of reason and nature? Does the party, in any judicial proceeding, enjoy a less degree of safety, when his rights are discussed, on the foundation of a rule that is open to the understanding of mankind, than when they are referred to an intricate system, which

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it has become the object of a separate profession to study and to explain? (Ferguson, [1767] 1995: 249)

His thoughts here begin to express a commitment that law as a source of normativity was subordinate to social organization and an exposure of the underlying political claim being made by Smith when he so casually justifies the exercise of sovereign power over an internally differentiated part of society.

Ferguson then does not accept the separation of law from politics that Smith's view is premised upon and openly questions any justification professing the assertion of law by force as being in the best interest of the recipient repressed group. He states: "Even with the best intentions towards mankind, we are inclined to think, that their welfare depends, not on the felicity of their own inclinations, or the happy employment of their own talents, but on their ready compliance with what we have devised for their good...But the sword, which in this beneficent hand was drawn to protect the subject, and to procure a speedy and effectual distribution of justice, was likewise sufficient in the hands of a tyrant, to shed the blood of the innocent, and to cancel the rights of men..." (Ferguson, 1995 [1767]:250). Ferguson's views can be attributed to not only what he had recently witnessed take place in the Highlands but also to Scotland's exclusion as a whole from the terms of the *British Militia Act* (1757), he states: "Men who have tasted freedom, and who have felt their personal rights, are not easily taught to bear with encroachments on either, and cannot, without some preparation, come to submit to oppression" (Ferguson, 1995 [1767]: 248). Arguably, Ferguson saw in the revocation of the right to form a Scots militia by law the very 'preparation' for a submission to oppression that concerned him. He continues: "Liberty results, we say, from the government of laws; and we are apt to consider statutes, not merely as the resolutions and maxims of a people determined to be free, not as the writings by which their rights are kept on record; but as a power erected to guard them, and as a barrier which the caprice of man cannot transgress....[But] if forms of proceeding, written statutes, or other constituents of law, cease to be enforced by the very spirit from which they arose; they serve only to cover, not to restrain, the inequities of power" (Ferguson, 1995 [1767]: 249). Ferguson was emphatically a unionist, but for him this meant that Scotland should not be treated in any way as inferior to its neighbor to the South under the guise of a purportedly neutral exercise of legal power.

The militia issue then forms part of a broader and more abstract argument by Ferguson. In his view, unlike Smith's, civil society could not be brought about by law but he certainly

recognized that the development of a particular version of civil society would be impacted, for better or worse, by the way relations in that society were formalized, positioned, and subjected by law. In Ferguson's view, at the heart of the reason for government and jurisdiction, and as such their source of power, is the inequality between persons and groups of persons that attends when territories of rule are developed outside the clan or smaller communities. Formal systems of law and government are not perceived as necessary by Ferguson without the essential condition of inequality, which he argued was a lesser part of smaller scale and more egalitarian 'rude' nations. That inequality will persist when society is expanded to the national level is in Ferguson's view an empirical fact but, unlike Smith, for Ferguson the fact of inequality must then be acknowledged by the law developed to contend with it, and any form of government must be flexible enough to accommodate the diversity of political positions, and indeed conflicts, that flow from this essential condition. Berry notes (quoting from Ferguson): "As part of his argument to puncture the superiority that 'polished nations' like to parade, he observes that their institutions arose not from their superior wisdom but from 'successive improvements that were made, without any sense of their general effect; and they bring human affairs into a state of complication, which the greatest reach of capacity with which human nature was ever adorned, could not have projected'" (Berry, 1997:41). For civil society to thrive then, in conditions of inequality, participation by all groups within the society must be encouraged, even if it will lead to conflict therein. Berry states (quoting from Ferguson): "Ferguson writes that liberty is maintained by 'continued differences and opposition of numbers' and that in 'free states' the 'wisest laws' emanate from the compromise 'which contending parties have forced one another to adopt. It is through each party striving to uphold their own particular concerns that the general interest is fostered'" (Berry, 1997: 42). The general or public good in Ferguson's view then could not be imposed by sovereign command but had to come instead from a legal or constitutional structure that would emerge from divisions in society and allow for political differences therein to actively contend with each other without being suppressed by the false consensus Smith's version of law represented. Thus, what initially appears as a fairly innocuous difference between Smith and Ferguson on the militia issue actually emanates from a broader and more fundamental disagreement between them regarding the relationship between moral, political, and legal order and how this related to the position and definition of civil society.

Gellner notes that the argument between Ferguson and Smith on this issue had an economic dimension as well. Although Ferguson did not deny the advantages of the

division of labor in the industrial production of goods, he was extremely skeptical of the import of economic language into the domain of public policy and the military in particular. Gellner argues: “Ferguson’s basic model is one involving the interaction of honour and interest” (Gellner, 1994:68) and, he suggests, Ferguson saw in the increasing use of economic conceptions of interest and their use to justify major public policy changes: “...a shift from honour to interest in modern European nations” (Gellner, 1994:71). For Ferguson, such a shift was not intelligible insofar as interest when employed in such a limited economic sense could “not surely be thought to comprehend at once all the motives of human conduct” (Ferguson, [1767] 1995:20). He states: “The foreigner, who believed that Othello, on the stage, was enraged for the loss of his handkerchief, was not more mistaken than the reasoner who imputes any of the more vehement passions of men to the impressions of mere profit and loss” (Ferguson, [1767] 1995: 36). Politics, and as such political practice, for Ferguson, had to be the pursuit of more than mere economy / external goods if men were to continue to be free. He argues:

To love, and even to hate, on the apprehension of moral qualities, to espouse one party from a sense of justice, to oppose another with indignation excited by inequity, are the common indications of probity, and the operations of an animated, upright, and generous spirit. To guard against unjust partialities, and ill grounded antipathies; to maintain that composure of mind, which, without impairing its sensibility or ardour, proceeds in every instance with discernment and penetration, are the marks of a vigorous and cultivated spirit. To be able to follow the dictates of such a spirit through all the varieties of human life, and with a mind always master of itself, in prosperity or adversity, and possessed of all its abilities, when the subjects in hazard are life, or freedom, as much as in treating simple questions of interest, are the triumphs of magnanimity, and true elevation of mind. ‘The event of the day is decided. Draw this javelin from my body now,’ said Epaminondas ‘and let me bleed’ (Ferguson, [1767] 1995: 42).

Insofar as the division of labor had the tendency to reduce political relations to material questions of economy, Ferguson was concerned that the necessary distinction between virtue and interest or politics and economy is not preserved in Smiths model. Further, insofar as Smith ignored the impact that the economic inequality incumbent in his model might have on people’s ability to participate in defining the public interest Smith privileged over the public good, Ferguson was concerned that Smith’s view would tend towards the alienation of man from society and foster imitation over participation to society’s detriment. Gellner notes: “Long before Hayek expressed the view that the abolition of the market would constitute a ‘road to serfdom,’ Ferguson feared the very opposite: the market itself, and not its elimination, would lead that way” (Gellner, 1994:71). Sher too summarizes: “The contrast appears in their priorities and emphases:

whereas Smith's thrust was on the positive aspects of the division of labor and economic growth generally, Ferguson's was on the dangers they posed. And whereas Smith was willing to treat nations and individuals from an economic point of view, Ferguson spurned this 'modern' approach and insisted on the priority of Stoic and civic humanist moral ideals" (Sher, 1989: 242). Ultimately, Ferguson is concerned with civilian status, or moral personality, in conflict with the division of labor and the underlying concern that participation in public life would come to be based on wealth instead of virtue. It will ultimately be Smith and Ferguson's contrasting views on the division of labor then that inspires their most lasting and public feud and it is here where we get perhaps the most insight into Ferguson's radical rejection of wealth as a public good.

### Commerce, Politics, and the Division of Labor

The concept of the division of labor provoked not only a substantive disagreement between Ferguson and Smith on its significance for a theory of civil society, but also prompted a professional feud between the two that would last from 1780 until a reconciliation prior to Smith's death in 1790. Primarily this latter dispute pertained to an accusation of plagiarism leveled against Ferguson by Smith, who suggested Ferguson had "borrowed some of his ideas without owning them" (Hamowy, 1968:249) regarding his discussion of the division of labor in *ECS*. Ferguson disputed the charge and contemporary research has, to his credit, concurred that Smith's claim was unfounded. In fact, today it is Ferguson's analysis of the division of labor that many suggest is to be applauded for its originality in addressing the subject. Ronald Hamowy (1968), for instance, in "*Adam Smith, Adam Ferguson, and the Division of Labor*" concludes after a careful review of the evidence: "Concerning the question of who was right in the controversy, there seems to be no doubt that a charge of plagiarism against Ferguson was thoroughly unjustified" (Hamowy, 1968:256) and adds "...it can, I think, be legitimately argued that Ferguson, in dealing with the division of labor, can claim priority over Smith in offering, not an economic analysis of the question which was original with neither writer, but rather, the first methodical and penetrating sociological analysis..." (Hamowy, 1968:259).

Partially, Smith's confusion emanated from his own conceit that in advancing a theory of the division of labor in the "*Wealth of Nations*" he was implicitly advancing a theory of civil society, which placed the division of labor at its core. Smith insists in this work that the stage of the development of the division of labor as a total social fact of a given society

is equivalent to the stage of development of the particular society and, as such, forms a universal measure by which the progress of societies throughout history and across distance can be compared. For Smith, the extent to which the division of labor had penetrated every institution in society, not only industry but also social and political institutions, could be conceived as the hallmark of civility as, in his view, wherever the principle was put into operation one could not only expect greater efficiency but also the abolishment of social dependency. Lisa Hill (2007) summarizes Smith's position (quoting from Smith) as follows:

Smith did not agree that the division of labor destroyed community insisting, rather, that it merely transformed the quality and means of interdependence while at the same time enhancing personal and private independence. The division of labor is positive *because* it is a key cause of the dissolution of charitable, philanthropic, paternalistic and dependent relationships. In order to obtain their wants and secure the cooperation of their fellows pre-commercial agents had 'no other means of persuasion' than to 'gain the favor of those whose service' was required. That meant having to resort to the demeaning, inefficient and unreliable method of 'servile and fawning attention to obtain [the] goodwill' of others. But in civilized society agents are afforded greater levels of independence, paradoxically, because each stands at all times in need of the cooperation and assistance of great multitudes.' The ability of humans to specialize and exchange the products of this specialization makes them 'mutually beneficial to each other' (Hill, 2007:23).

Ferguson, by way of contrast, while accepting that the division of labor brought about some economic benefits in commerce: "Manufacturers, accordingly, prosper most, where the mind is least consulted, and where the workshop may, without any great effort of imagination, be considered as an engine, the parts of which are men" (Ferguson, [1767] 1995:174) is also alert that even in the narrow commercial application of the principle there is a hefty social consequence: "...the labourer, who tolls that he may eat; the mechanic whose art requires no exertion of genius, are degraded by the object they pursue, and by the means they employ to attain it..." (Ferguson, [1767] 1995:176). As such, he argues: "In every commercial state, notwithstanding any pretensions to equal rights, the exaltation of a few must depress the many" (Ferguson, [1767] 1995:177).

Smith as well, to be fair, also expressed some reservation about the potential ancillary impacts of the division of labor on the human condition. In an often quoted passage from the "*Wealth of Nations*" he states: "The man whose whole life is spent in performing a few simple operations, of which the effects too are, perhaps, always the same, or very nearly the same, has no occasion to exert his understanding, or to exercise his invention in finding out expedients for removing difficulties which never occur. He naturally loses, therefore,

the habit of such exertion, and generally becomes as stupid and ignorant as it is possible for a human creature to become. The torpor of his mind renders him, not only incapable of relishing or bearing a part in any rational conversation, but of conceiving any generous, noble, or tender sentiment, and consequently of forming any just judgment concerning many even of the ordinary duties of private life" (Smith, [1776] 1981:782). Despite expressing this sentiment, however, it was Smith's view that these possible consequences could be counteracted by the provision of a minimum level of public education, which would offset any potential 'mental torpor' that might transpire. Virtue and active intelligence then, according to Smith, could be instilled in a different setting.

Berry notes that Smith's view, which posited education as the antidote to social ills, was actually a fairly common refrain of Scottish Enlightenment philosophy. He states: "The power that education, in a broad sense, possesses was a crucial premise in the belief in progress" (Berry, 1997:6) and he argues that the belief was based, at least in part, on the emergent bourgeois sphere of the time, made up of educated lawyers and merchants and characterized by an emphasis on manners and civility (Berry, 1997). The Scots' view then was that this bourgeois mentality, visible in 'polite' society, could be instilled in all members of society so long as access to at least a minimum level of education was available. The idea, argues David Allan (1993) in "*Virtue, Learning and the Scottish Enlightenment*", was not entirely without foundation. Although education elsewhere in Europe was intended primarily "to train people to assume specific social roles...education existed to teach people to accept their station in life" (Montgomery, 1994:3) and as such was a selective system to control the society and the relations within it, Allan argues that education in Scotland was conceived differently and had always been embedded within a discourse of improvement. He asserts that in the eighteenth century public education was, in fact, "being adopted by Scotland as a way to deal with the poverty in the region as much as it was to develop its resources" (Allan, 1993:233) and he argues that the ideology of education in Scotland, unlike Europe, was closer to what we might today recognize as "American" (Allan, 1993: 237). Learning, in Scotland was, at least in the 18<sup>th</sup> century, equated with the possibility for change and civic renewal.

And yet, here again is another area where Ferguson adamantly departs from his contemporaries and from Smith in particular. Ferguson did not see education as a driver of change but as already compromised by the very division of labor and commercial spirit that it was now being asserted to cure. In Ferguson's view "every mechanic is a great man

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with the learner” (Ferguson, [1767] 1995:32) insofar as his capacity for action is rooted in the pursuit of “society and human affairs” (Ferguson, [1767] 1995:32). To the extent then that some men in society, and not others, were being perceived as having an elevated capacity for pursuit of the public good simply because of their level of educational attainment, *without more*, was at the root of the problem of the division of labor not its solution. He states: “The meanest professions, indeed, so far sometimes forget themselves, or the rest of mankind, as to arrogate, in commanding what is distinguished in their own way, every epithet the most respectable claim as the right of superior abilities” (Ferguson, [1767] 1995:32). Ferguson disagreed that learning in a classroom had any more validity than learning through active participation in civic life. In fact, he argued, the implicit segregation of theory from practice and the compartmentalization internal to academic study may actually be a hindrance. Ferguson states: “The superior capacity leads with a superior energy, where every individual would go, and shows the hesitating and irresolute a clear passage to the attainment of their ends. This description does not pertain to any particular craft or profession; or perhaps it implies a kind of ability, which the separate application of men to particular callings, only tends to suppress or weaken. Where shall we find the talents which are fit to act with men in a collective body, if we break the body into parts, and confine the observation of each to a separate track?” (Ferguson, [1767] 1995:32)

For Ferguson the principle occupation of man was political: “To act in view of his fellow creatures, to produce his mind in public, to give it all the exercise of sentiment and thought, which pertain to man as a member of society, as a friend, or an enemy, seems to be the principal calling and occupation of his nature. If he must labor, that he may subsist, he can subsist for no better purpose than the good of mankind, nor can he have better talents than those that qualify him to act with men” (Ferguson, [1767] 1995:33). Insofar as education in combination with the division of labor was being used as an argument to limit this occupation to a cadre of professionals, for no other discernable reason beyond the attainment of this status, Ferguson cautioned: “Withdraw the occupations of men, terminate their desires, existence is a burden, and the iteration of memory is a torment” (Ferguson, [1767] 1995:45). The division of labor he observed tended to divide the educated from the un-educated, the professional from the laborer, even profession from profession. These divisions too were subject to a further division of labor in the public sphere, a division of who was qualified to labor and pronounce on the public good and who was not, and this, argued Ferguson, could not be justified by educational status alone. He

states: "...the human mind...collected its greatest abilities, and received its best informations, in the midst of sweat and dust. It is peculiar to modern Europe, to rest so much of the human character on what may be learned in retirement, and from the information of books" (Ferguson, [1767] 1995:33).

Ferguson then, perhaps unsurprisingly, was particularly concerned when the principle of the division of labor was extended outside the commercial realm and into matters of what he considered to be public policy. He considered that the "general welfare [of society] is to us the supreme object of zeal, and the great rule of our conduct" (Ferguson, [1767] 1995:53) and, as Berry argues (quoting from Ferguson), "what really exercises Ferguson about the division of labor is that it compartmentalizes society such that none of its various separated elements is 'animated with the spirit of society itself'" (Berry, 1997:147). This, Berry suggests, animated his position on specific domestic issues such as the Scottish militia: "Ferguson's critique centers on his desire to keep the active 'rights of the mind' alive. Commerce not only threatens to tie up the 'active virtues' but it also extends its specialization into the very heart of the social spirit by making the art of war a technical profession" (Berry, 1997:147). Further, Ferguson was also concerned that it was being employed to foster the development of a form of governance by consensus, which arose when the division of labor was applied to public policy so that an issue was divided and subdivided and subdivided again until an illusory consensus could be reached. Andreas Kalyvas and Ira Katznelson (1998) comment (quoting from Ferguson) in "*Adam Ferguson Returns: Liberalism through a Glass Darkly*":

He insisted that one cannot accept the fact of pluralism and simultaneously seek a general agreement. The acknowledgement of plurality is not a mere rhetorical device. Being real, plurality carries factual weight. From the premise of inescapable and incommensurable differences...Ferguson directly attacked the fiction of a general consensus and sought to undermine its normative function. An attempt to reach agreement among all members of society to justify particular policies and institutional arrangements 'amounts to something that has never been realized in the history of mankind, still more, if its objects be such as cannot be realized, there is reason not only to doubt its validity, but actually, to consider it as altogether nugatory and absurd.' The search for consensus, moreover, not only is impossible but dangerous. Only violent suppression can transcend pluralism to impose an artificial agreement on substantive issues... (Kalyvas & Katznelson, 1998:185).

Ferguson here formulates a striking statement about the impact of what we might today refer to as ideology in what he refers to as 'casual subordination.' Casual subordination could not be avoided, he states: "In every society there is a casual subordination,

independent of its formal establishment, and frequently adverse to its constitution. While the administration and the people speak the language of a particular form, and seem to admit no pretensions to power, without a legal nomination...this casual subordination, possibly arising from the distribution of property, or from some other circumstance that bestows unequal degrees of influence, gives the state its tone and fixes its character" (Ferguson, [1767] 1995:129). Although Ferguson did not believe this aspect of society could be eliminated by any normative organization of society entirely, he recognized that certain normative organizations could make it a more pronounced problem in some societies over others. In Ferguson's view, the division of labor when combined with a legal and political philosophy that masked the inequality inherent to the idea under a rubric of best or public interest, contained a worrisome potential for the development of casual subordination on a massive scale. Gary L. McDowell (1983) in "*Commerce, Virtue, and Politics: Adam Ferguson's Constitutionalism*" summarizes Ferguson's position as follows: "The division of labor can lead to a new and frightening variety of subordination...a natural distinction of talents and dispositions, a distinction based on the unequal division of property, and a distinction based on the habits acquired by the practice of different arts...Ferguson sketched a vivid scene of class oppression arising out of commerce..." (McDowell, 1983:543).

Thus, Ferguson was lead into a somewhat difficult position. The growth of commerce in Scotland had, in his view, already corrupted not only individual political subjectivity but, through the extension of the division of labor as a policy, had also entered into the social institutions supposed to alleviate its impact. McDowell reiterates: "While Smith believed that public education would mitigate the inconveniences of the commercial spirit with its corruption of all the nobler parts of the human character...Ferguson did not... To check the unhealthy effects of commerce, it was necessary to step outside commerce" (McDowell, 1983:540-541). To accomplish this step outside commerce, however, would require Ferguson to subtly reposition his organic view of civil society. Although he continues to affirm that civil society is not something that can be 'brought about' by law and government but emerges from the 'genius and situation of the people', he has to concede that when a society has already been corrupted by a principle like the division of labor then there will need to be some form of institutional intervention. Kalyvas and Katznelson note: "...institutions, Ferguson underscored, must not aim to eliminate or even contain difference; rather, they should convene forums for political struggle without bursting the bounds of a shared system of adjudication and decision. Institutions

paradoxically affirm conflict through the exclusion of total conflicts that Ferguson understood to be those that threaten plurality, difference, public contest, and the autonomous, active person” (Kalyvas & Katzenelson, 1998:189-190). So, in Ferguson’s view, the best legal and/or political system would be one that in the particular circumstances of the society at issue would facilitate the conflicts arising from the casual subordination present in that society to come to the fore. McDowell asserts: “...his criterion for civilization is the development of the political aspects of human life” (McDowell, 1983:541) and, as such, it was Ferguson’s contention that “civilization both in the nature of the thing and derivation of the word, belongs rather to the effects of law and political establishments, on the forms of society, than to any state merely of lucrative possessions or wealth” (McDowell, 1983:541). In his view then, some form of re-invigorated base of moral organization becomes necessary in a commercial society otherwise “...he argued that the spirit of commerce left unchecked could lead to a new and suffocating form of tyranny” (McDowell, 1983:541).

The question then, for Ferguson, becomes what form of political order could potentially check the impacts of commerce while, at the same time, not over-determining the society at issue by asserting this as an imperative. In an ideal society, untouched by the division of labor, Ferguson’s ideal political base might be democratic. He states:

In democracy, they must love equality; they must respect the rights of their fellow-citizens; they must unite by the common ties of affection to the state. In forming personal pretensions, they must be satisfied with that degree of consideration they can procure by their abilities fairly measured with those of an opponent; they must labor for the public without hope of profit; they must reject every attempt to create a personal dependence. Candour, force, and elevation of mind, in short, are the props of democracy; and virtue is the principle of conduct required to its preservation. How beautiful a pre-eminence on the side of popular government! And how ardently should mankind wish for the form, if it tended to establish the principle, or were, in every instance, a sure indication of its presence! (Ferguson, [1767] 1995:67)

However, the public good for Ferguson did not merely mean the institution of universal suffrage thus, he immediately qualifies his glowing sentiments with the admission that democracy would not be particularly well suited for every society. He states: “But perhaps we must have possessed the principle [equality], in order, with any hopes of advantage, to receive the form; and where the first is entirely extinguished, the other may be fraught with evil, if any additional evil deserves to be shunned where men are already unhappy” (Ferguson, [1767] 1995:67). Democracy, he stipulates, is “preserved with difficulty, under the disparities of condition, and the unequal cultivation of the mind, which attend the

variety of pursuits, and applications, that separate mankind in the advanced state of commercial arts" (Ferguson, [1767] 1995:179) and continues "...we do but plead against the form of democracy after the principle is removed; and see the absurdity of pretensions to equal influence and consideration, after the characters of men have ceased to be similar" (Ferguson, [1767] 1995:179).

Here Kalyvas and Katznelson argue that although Ferguson favors democracy as an ideal, he also recognizes its futility in a society where the political order had already on the one hand allowed commerce and the division of labor to introduce mass inequalities among the circumstances of the people while, at the same time, purporting to protect their rights on the other. Kalyvas and Katznelson underline the legal and political nature of Ferguson's argument, they state (quoting from Ferguson):

Ferguson convened a debate between two different types of rights. Whereas political rights 'bestow on the citizen a certain share in the government of his country.' Individual rights 'in every particular instance, must consist in securing the fairly acquired conditions of men, however unequal.' The full realization of the one threatens the existence of the other...(Kalyvas & Katznelson, 1998:177).

And continue (quoting from Ferguson):

For Ferguson individual liberties are not organically connected to democracy. On the contrary. 'The principal objections to democratical or popular government,' he argued, 'are taken from the inequalities which arise among men in the result of commercial arts.' The liberal state may protect property rights, increase the wealth of a nation, promote cultural development, and respect the private spheres of individuals and the plurality of values, but if 'the disparities of rank and fortune which are necessary to the pursuit or enjoyment of luxury, introduce false grounds of precedence and estimation; if, on the mere consideration of being rich or poor, one order of men are, in their own apprehension, elevated, another debased, democracy becomes impossible' (Kalyvas & Katznelson, 1998:178).

These ideas tie back to Ferguson's earlier comments about the dangers of casual subordination. While democracy was the preferable condition because it was based on equal participation it ceased to be so if the reality of people's material circumstances prohibited them from being able to participate politically on an equal footing. It is a torturous position as Ferguson's entire edifice is geared to the importance of equal public participation but, and as Gellner comments: "...it is this anxiety and vacillation which inspires his excellent and profound reflection" (Gellner, 1994:65).

If Smith saw the virtue in imitation and stability, Ferguson saw the virtue in confrontation and instability and was not afraid to apply this same civic logic to his own principles and so was willing to sacrifice the procedure of equal participation in public life in order to substantively restore the possibility of equal participation. The essay is polemical in this respect, it is "...a bid to reclaim the idea of civic virtue on behalf of the modern, commercial state" (Oz-Salzberger, 1995) and an attempt to shift the discourse in a different direction from that being taken by Smith. Kalyvas and Katznelson here too note: "Ferguson treats the specificity of political conflict as consisting of the contestation of authority" (Kalyvas & Katznelson, 1998:183) and continue that, as such, he "...sought to embrace the political significance of pluralism. More than being a sheer fact to be tolerated pragmatically because it cannot be abolished, Ferguson affirmed, even at times glorified, political conflict as the hallmark of any 'civilized, polished nation'" (Kalyvas & Katznelson, 1998:184). Lisa Hill too remarks:

One of the most compelling aspects of Ferguson's history is his reliance upon conflict in the explanation of historical processes...Conflict brings with it many positive unintended consequences: it leads to the formation of large scale communities, the state, and formal defence institutions and plays a pivotal role in the development of the moral personality. Conflict also contributes to the maintenance of social cohesion and the preservation of free constitutions. Ferguson seems to anticipate a dialectical view of history but if anything it should be regarded as an anticipation of a pluralist theory of conflict (Hill, 2006:215).

The meaning of politics, for Ferguson then, as a moralist was deeply rooted in the possibility of political conflict as a public good established by civil society and his concern about universal suffrage and individual rights was that they had the tendency to inspire an atomistic view of political participation, which he thought would not be capable of collectively contesting the condition of apathy the division of labor was implicated in producing. McDowell argues that in Ferguson's view:

The diseased commercial state must not be abandoned but must be cured. Politics is not to be transcended in Ferguson's scheme...In fact, Ferguson opted for a tumultuous public arena: to restore health to the body politic, it is necessary to return to an older (i.e. Greek and Roman) way of thinking zealously about the public, and away from modern Europe's tendency to think only of the individual and only with compassion. It is to the national institutions, and in particular a constitution, that Ferguson insisted we must look to find the cure for the distemper of the modern commercial state (McDowell, 1983:544).

Similarly, Kalyvas and Katznelson add (quoting from Ferguson):

Ferguson underscored the socioeconomic structural conditions for democracy. Built on extreme economic disparity, political equality becomes empty and ceremonial. ‘In every commercial state, notwithstanding any pretension to equal rights, the exaltation of the few must depress the many.’ Thus capitalism turns ‘the foundation on which freedom was built...to serve a tyranny.’ Ferguson argued that capitalism corrodes public virtue and neutralizes the substantive content of democracy by transforming it into an ensemble of empty laws and making of it a sheer formality...Economic liberalism and the ‘admiration of riches’ promote social inequalities so huge that popular self-determination becomes impossible...(Kalyvas & Katznelson, 1998:178).

To really establish democracy, for Ferguson, would require a political debate on the minimum social conditions in which a democracy could prosper and a direct confrontation with the casual subordination implicit in the view of equal individual rights in law but unequal opportunities in reality to exercise these rights and/or to participate in the definition of what they entailed. Kalyvas and Katznelson contend (quoting from Ferguson) that it was Ferguson’s argument that: “...any political community based on the plurality and representation of groups, values and interests must confront two questions ‘still open for discussion: 1<sup>st</sup>, Who are to be admitted on the rolls of the people, and to have a deliberative or elective voice? 2<sup>nd</sup>, In the case of a people too numerous to meet in any one body, in what divisions are they to act?’” (Kalyvas & Katznelson, 1998:188). Ferguson never explicitly advocates against universal suffrage but it is implicit in his position as he does suggest that it is worth considering whether or not this solution, *without more*, would be the best mode by which to build the conflict that he saw as necessary to confront the casual subordination implicit in a pretense of individual political equality in combination with collective economic inequality. For, Ferguson: “In such fleeting and transient scenes, forms of government are only modes of proceeding” (Ferguson, 1995 [1767]) and it was not clear to him that the ascription of individual rights with the corrosion of collective political rights this entailed, was the best way to ensure the confrontation with commerce that would allow an ideal, participatory, civil society to continue.

### **3.2 Ferguson and Gierke in Germany**

Ferguson’s influence, as with many of the Scottish Enlightenment philosophers, extended outside the United Kingdom. In fact, as noted by John Robertson (1997) the Scottish Enlightenment was far more European than British. Most of the literati identified as central to the Scottish Enlightenment had attained their professional education overseas and/or had held posts in overseas institutions. Further, their correspondence was often addressed to other Enlightenment figures in France, Germany and the Netherlands rather

than their English contemporaries, of which there were few. It was in Germany, specifically, where Ferguson found the widest audience and he was perhaps more influential for a time in Germany than he was in Britain. Fania Oz-Salzberger (1995) in “*Translating the Enlightenment: Scottish Civic Discourse in Eighteenth Century Germany*” notes that of his French, German, Dutch and Italian translations “none matched the speed and the intensity of his German readership” (Oz-Salzberger, 1995:131). She further reports that: “The German reception began as early as 1768, when the well-informed *Göttingische Anzeigen von gelehrten Sachen* was able to welcome the translation of the *Essay* [ECS], ‘the important and profound philosophical work by Ferguson’. Ferguson's four major works were all published in German within one to four years of their appearance in Britain” (Oz-Salzberger, 1995:131). Ferguson also spent time in Germany, occupying an academic post in Leipzig early in his career from 1754-1756 and returned again on his retirement in 1793 when he was elected as an external member of the Royal Prussian Academy of Sciences and Arts. Oz-Salzberger states: “in the three last decades of the eighteenth century Ferguson was favorite reading for educated, literary-minded Germans... In the manner of the period, superlatives abounded: ‘the noble Ferguson’ and ‘a sage of our century’, were just a few of the plaudits awarded to the Scottish author” (Oz-Salzberger, 1995:130).

One of the German centre's where Ferguson's influence was particularly discernable was the University of Gottingen, a newer university at the time notable for its emphasis on historical study and strong connections to Britain, admitting relatively high numbers of overseas British students each year (Oz-Salzberger, 1995:229). Devoting a chapter in “*Translating the Enlightenment*”(1995) to the relationship between Ferguson and the Gottingen scholars, Oz-Salzberger notes:

The reception of Ferguson's works is typical of Gottingen's cultural alertness. The university library, uniquely well stocked with English titles, was widely considered to be the best of its kind in Germany. It was exceptionally quick to acquire recent books and foreign periodicals.... The library acquired the first English editions of Ferguson's four books, as well as one pamphlet, most German translations, and Tourneisen's English-language reprints. The learned journal associated with the university, *Göttingische Anzeigen von gelehrten Sachen*...alerted its readers to Ferguson's new works as soon as they appeared in the English original (Oz-Salzberger, 1995:230).

Oz-Salzberger argues that Ferguson was of particular interest to the Gottingen establishment as history was instrumental to the school's intellectual project, particularly

in the faculty of law. As will be discussed in more detail in respect of Gierke, law in Germany from the 18<sup>th</sup> to the 19<sup>th</sup> century was always combined with an understanding of legal history, political theory, and political economy, as legal and political arguments in Germany had become virtually indistinguishable. To make an argument about the providence of law in Germany from the 18<sup>th</sup>-19<sup>th</sup> century, during the transition of the country from the Roman Empire to German unification and independence was, simultaneously, to project a normative argument about Germany's political past and future as the country entered a long period of political reorganization. Oz Salzberger remarks in reference to the political allegiance of the faculty of law at Gottingen:

The law faculty continued the interest in public law which had been sparked off at the University of Halle before the foundation of its Gottingen rival. Public law had a unique significance in the German context, and its study was closely linked with history. It required a historical approach, a methodology of 'pragmatic jurisprudence', which investigated the causes and the changing circumstances of the Roman and German codes of laws. Historical research into the legal structures of the Holy Roman Empire inevitably carried political undertones: Gottingen, a university supported by aristocratic sponsors and students rather than an absolute monarch, placed a strong emphasis on the constitutional traditions which preceded absolutism and its regalist legislation. History thus played an important role in the study of law, and the meticulous textual analysis practiced by the Gottingen theologians and philologists was echoed in the work of jurists (Oz-Salzberger, 1995:231).

Ferguson's distinct essay on the history of civil society then, with its pioneering use of historical examples and broad support for constitutionalism was a natural fit with the tradition of the Gottingen jurists. Further, Ferguson was often referred to as the 'Old Roman' and was heralded by the *Edinburgh Review* as the "Scottish Cato" (Oz-Salzberger, 1995:106) pointing to his shared interest with his German audience in the rise and fall of Roman civilization and, upon which, many German juridical and political arguments turned. On Rome, Ferguson published a specialized manuscript: "*The History of the Progress and Termination of the Roman Republic*" in 1783, which Oz-Salzberger notes appeared in "an abbreviated and annotated German translation in 1784 and 1786" (Oz-Salzberger, 1995:245). This latter text, she observes, quickly found a readership in Gottingen, becoming the standard textbook for introductory courses on Roman history and was for the most part admired by the Gottingen establishment, albeit with some reservations. Oz-Salzberger sets out:

The German reception of the *Roman Republic* was thus characterized by the familiar blend of laudatory acclaim, 'pedagogic' reorientation (in this case, simplification for young readers), and a new scaffolding of superior source criticism. There was also a

political dimension. ‘Not least among the editorial services which Herr Professor Beck has rendered to the work’, so Heyne says, ‘is the correcting [of] the judgments of Herr F., who is dazzled time and again by the beautiful side of the Romans’ character: for, basically, the Romans were nothing more than a rude people of barbarians, devastators of the globe to their own ruin. They made little intentional contribution to the well being of mankind, though this cannot be expected anyway from a military state (Oz-Salzberger, 1995:246).

This was a familiar chorus of the Gottingen scholars in respect of Ferguson as they were critical of his praise of military valor and did not share his emphasis on civic virtue, linking these ideas to the legacy of the Roman Empire they were actively trying to leave behind. Oz-Salzberger argues: “the Gottingen professors of law and history could not espouse the intertwined participationism and voluntarism which Ferguson put forward in this very language. Neither the jurists, seeking the history of laws, nor the historians, seeking the laws of history, could approve of Ferguson’s doctrine. Theirs was a strongly legalist language, rooted both in natural law and in the traditions of positive law” (Oz-Salzberger, 1995:253). Still, what may have been discarded by the establishment in Ferguson’s time would be picked up a century later by a future Gottingen doctoral student (although he later moved to the University of Berlin), Otto von Gierke, who attacked the legal positivism the Gottingen school relied upon as the real legacy of Rome and repositioned Germanist scholarship through a similar emphasis on the voluntarism and participationism found in Ferguson’s *ECS* but ‘made German’ through Gierke’s conceit of pre-Rome German fellowships.

It is interesting to speculate whether Gierke would have come across Ferguson’s texts in his time at Gottingen but it is difficult to assert conclusively. Gierke was notorious for his creative use of citation<sup>8</sup> and his position on Rome may have led him to distance himself from any work that was not entirely disparaging of the Empire. Still, there are many notable similarities between Ferguson’s *ECS* and Gierke’s four-volume work: “*Das Deutsche Genossenschaftsrecht*” or “*The German Law of Fellowship*” (1868-1913) and it is almost certain that Gierke was influenced by at least one idea from Ferguson, if only indirectly. Ferguson is generally credited as the origin of the notion in Germany that civil society or political community precedes the imposition of formal law and governance (or, to put it differently, political community is not the invention of sovereignty) and, as Oz-Salzberger argues, this idea would go on to inspire some of the most important German theory to emerge from the period; she states: “the *Essay* [*ECS*] formulated the earliest

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<sup>8</sup> Black notes that Gierke could be “a master of selective quotation” (Black, 1990: 24).

doctrine to allow the state to emerge from the communities (*menschlichen Gemeinschaftsverhältnissen*) that preceded it" (Oz-Salzberger, 1995:255) and, she argues, that at least partially as a result of Ferguson: "The concept of civil society, in the sense of a political community which preceded the state, was 'in the air' among German writers as early as the 1770s...in...reference...to a politically significant primitive *Völkerschaft*. Judging from the frequency of Ferguson's appearance in footnotes referring to natural sociability and to civil society, he may well be credited with some responsibility for the circulation of this historical concept" (Oz-Salzberger, 1995:256). *Völkerschaft* can be translated roughly as folk-group and Gierke, of course, draws heavily on the existence of these early human societies as part of his theory of the historical development of the *Gennossenschaft* or fellowship-group and on his observance of the existence and development of folk or common law (*volkrecht*) in contradistinction to what he refers to as jurists' law (*juristenrecht*).

### **3.3 Otto von Gierke: The Law of Fellowship**

German legal historian Otto von Gierke is most often recognized as the founding influence of political pluralist thought, however, most of the credit for this centers on the English translation of volume 3 of "*Das Deutsche Genossenschaftsrecht*" or "*The German Law of Fellowship*" by Frederic William (F.W.) Maitland, renamed with the English title "*Political Theories of the Middle Age*" (1900) at the commence of the twentieth century. Maitland's "*Introduction*" (1900) to this text would have a tremendous influence on the scholarship of his colleagues, Ernest Barker, John Neville Figgis, Harold Laski, and G.D.H. Cole and collectively this group would go on to be distinguished as the English Political Pluralist ("EPP") School. As a result Gierke, by default, became extensively cited as the origin of political pluralist theory. Later work on Gierke, however, has emphasized that the pluralist label is at best an uncomfortable fit with his prolific writings and at worse a flagrant mischaracterization. There was much that Gierke did not share with the EPP School. For instance, Julia Stapleton (1991) in *English Pluralism as Cultural Definition* emphasizes that Gierke's work is inextricably rooted in dialectic, a mode of abstraction the EPP School steadfastly denied the validity of and explicitly, with reference to Hegel's view of the state, criticized. She states that in regard to Gierke, England's pluralists were "less than faithful disciples" (Stapleton, 1991:263). Further, as noted by Paul Hirst in "*The Pluralist Theory of the State*" (1993) all of Gierke's work is orientated towards providing historical support for the unification of Germany under a singular German state. As such,

he explicitly endorsed a version (although not a command version) of state sovereignty putting him directly at odds with the project of many of the English pluralists. Hirst, putting it kindly, states: “Gierke’s views are complex and Maitland and Figgis each adapted them to their own purposes, subjecting them to a definite ‘reading’” (Hirst, 1993:8). Michael Dreyer in the “*German Roots of The Theory of Pluralism*” (1993) simply states: “Gierke himself was not a pluralist” (Dreyer, 1993:33).

Still, despite the fact that Gierke was not a pluralist, even the most careful critics will concede that Gierke’s notion of fellowship would be an important precursor to the theory of political pluralism developed by his English followers. This section on Gierke will provide some context about Gierke’s project and, more specifically, the relationship between law and politics in Germany in the mid nineteenth century when Gierke was writing. It will set out the concept of the *Genossenschaft*, hereinafter referred to as ‘fellowship,’ that is the centerpiece of Gierke’s theory and will be the pivotal idea the English pluralists attempt to adapt in their writings on the legal person, which will be covered in chapter 6. Gierke, however, can be distinguished from the EPP school on the basis that his thought is far more sympathetic to a moral organization of the person and cannot be understood apart from formative ideas about the virtue of association or fellowship. As will be set out, moral ideas of the person were critical to his theory of the real personality of associations, in particular his analyses of the relationship between fellowship and lordship, which was central to the concept of a fellowship’s real personality as Gierke conceived it. Later translations of his work into the English context had a tendency to ignore this aspect of his theory and has led to a misunderstanding that some of his ideas were simply too German too be serviceable in the English context (see: Harris, 2006), rather than an acknowledgement that by the time his ideas reached England some of them were simply too orientated to a moral narrative of social order that would not have been palatable in a newly established democracy. As noted by Hirst above, Gierke’s views are complex and attempting a summary of his multi-volume work is beyond the scope of this chapter. Thus, the review of Gierke here will be limited to his early formulation of the notion of fellowship, his theory of real personality, and his positioning of fellowship in relation to lordship.

### **3.3.1 Fellowship and the Real Personality of Associations**

To explore Gierke's concept of fellowship then, it is helpful to begin with Gierke's early writings, sometimes referred to as "early Gierke" (see: Harris, 2006:1437 and discussion in Black, 1990:xv & xix) or Volume 1 of "*Das Deutsche Genossenschaftsrecht*" ("The German Law of Fellowship"), translated into English for the first time as recently as 1990 and renamed with the English title: "*Community in Historical Perspective*" ([1868] 1990) (hereinafter referred to as "CHP"). It is in this text where Gierke first sets out his understanding and analysis of fellowship, which is advanced on two distinct but inter-related levels. On the surface of the text, Gierke merely chronicles the development and significance of the German notion of fellowship over five distinct historical periods, defining the fellowship slyly as "an organization with an independent legal personality" (Gierke, [1868] 1990:6) and tracing the roots of fellowship to the early societies of 'free-men', defined by Gierke as the "expanded family groups...tribes and inter-tribal groups" (Gierke, [1868] 1990:15) and, later, the protection and craft gilds of the medieval period of German history. Dreyer notes that through the deliberate employment of a historical method Gierke was attempting to demonstrate the empirical existence of a German legal form of association that pre-dated Germany's inclusion in the Roman Empire and that had not been entirely eclipsed through the introduction of Roman law. The purpose here, Dreyer argues, was to show that the earlier and distinctly German popular law had continuity beyond the dissolution of the Empire and was still capable of being resurrected as a foundation for an alternative formulation of distinctly German statehood. Dreyer summarizes: "While the absolute individual and its correlate, absolute sovereignty, reigned supreme at the state level, there was in towns and rural communities an uninterrupted flow of organic law development in the tradition of German fellowship" (Dreyer, 1993:19). Thus, in the first instance, Gierke's argument operationalizes the notion of the fellowship to formulate a legal argument that had political implications. By asserting the very existence of legal personality via the institution of fellowship as a concept prior to the German reception of Roman law, Gierke maintains the view that the assignment of legal status was not dependent on the invention and imposition of Roman law but, to the contrary, had been deprived of an alternative course of development because of it.

In his historical narrative of fellowship Gierke's account shares a distinct similarity to the historical narrative of Ferguson before him, insisting like Ferguson had on the empirical and observable social nature of human beings. Society for Gierke, as in Ferguson, is thus embedded in historical fact and the popular consciousness of mankind not the product of a social contract or legislative imposition. Gierke states (quoted in Black, 1990): "Were we

to think away our membership in a particular people and state, a religious community and a church, a professional group, a family...we should not recognize ourselves in the miserable remainder. We feel that part of the impulse which determines our action comes from the community which permeates us" (Black, 1990:xviii). Black notes in his "*Editor's Introduction*" (1990) to *CHP* that for Gierke the ultimate truth about human society was this "real personality of groups" (Black, 1990:xviii) and their manifestation of human sociality as an existential fact of human existence. Gierke's sentiments here echo those of Ferguson's in *ECS* where Ferguson states: "If both the earliest and latest accounts collected from every quarter of the earth, represent mankind as assembled in troops and companies; and the individual always joined by affection to one party, while he is possibly opposed to another; employed in the exercise of recollection and foresight; inclined to communicate his own sentiments, and to be made acquainted with those of others; these facts must be admitted as the foundation of all of our reasoning relative to man" (Ferguson, [1767] 1995:9).

Further, Gierke also shares with Ferguson the contention that a denial of social contract theory as a foundation for the juridical order of society is not merely an empirical critique but also a political and moral injunction. In a passage from *CHP*, he conjectures:

Those who came up with a contract of submission were entirely favourable to state absolutism; theories of a contract of society, on the other hand, made the state the product of the will of the people, but still posited the state as something separate from the people. Philosophical theories about the ends and the corresponding arrangement of the state all drew very different boundaries between the state and individual, ranging from almost complete destruction of the state to almost complete destruction of the individual; but they all agreed in seeing the state (in so far as they recognized it at all) as a power separate from the people, and the people (in so far as they acknowledged their existence) as the sum of all individuals otherwise not united in any way. Theories of the state, since fundamentally they identified the state with sovereignty and the people with the sum total of subjects, were far removed from recognizing the state as the organized personality of the people; and most importantly, none of them permitted between individual and state the existence of self-substantive intermediaries with the status of lesser commonalities. From standpoints ranging from Hobbes to Rousseau, they all declared themselves against any separate independent grouping within the state and therefore against the citizens rights of free association... (Gierke, [1868] 1990:116).

Gierke, however, is also keen to postulate that the state described in the above passage was not only the result of the social contract supposition that emerged from modern political theory but was equally attributable to the economic theory that had been developed in the 18<sup>th</sup> Century and started to obtain dominance in the 19<sup>th</sup> Century. While he does not

explicitly name Smith, Smith's texts, like Ferguson's, were well known and read in Germany (see: Oz-Salzberger, 1995) and given what we know of Smith's views from our previous discussion, it is not difficult to locate him in Gierke's analysis. He states:

Lastly, from the eighteenth century onwards, the influence of theorists of national economy also worked towards an authoritative design for the state system. For they had proved – rightly or wrongly – that existing economic circumstances were preventing the maximization of national prosperity, and had shown that these could be transformed, and how this could be done. This caused governments to intervene from above in the private lives of individuals, fellowships and communes – furthering, restricting and transforming them. In this way the package of sovereign institutions was being elevated into a principle, and the struggle began against economic organisms originating in the past, in particular the agrarian community and the gild system, which were regarded as fetters upon a freer economic development (Gierke, 1990 [1868]:117).

Gierke can be read here as confirming the occurrence of exactly what Ferguson before him had predicted the extension of the division of labor and jurisdiction of the state over internally differentiated elements of the community would result in: the destruction of affective bonds of association. But, Gierke must go further than Ferguson did here as he is less interested in positing the universality of group life as part of the human experience (or civil society) than in demonstrating that there was something specific to the form of Germanic group life that could be distinguished from the form of group life under Roman absolutism. In attempting to posit the fellowship as a distinctly Germanic concept, Gierke examines the empirical reality of early fellowships in German history and concludes that there was a distinct juridical element to their organization, cementing their existence as not merely groups but, he argues, legal bodies. Gierke opines: "When they first entered history, the Germanic peoples had already developed long ago by those earliest beginnings a communal life which we can still observe among primitive peoples. The family connections, which among peoples too at one time were undoubtedly the only organized associations conscious of their common bond, had extended to form bigger communities, in which individuals are held together by a bond other than the blood relationship" (Gierke, [1868] 1990:13). Runciman in "*Pluralism and the Personality of the State*" (1997) clarifies what Gierke is implying: "These communities were fellowships, and their bonds were based not on blood but on law, albeit of a primitive kind" (Runciman, 1997:51). Gierke contends then that the legal source of this bond came not from above (i.e. a state promulgation or prohibition) but from an idea that was intrinsically a part of the very association of men outside primitive forms of family and territorial community in Germany. Gierke states:

The idea was found. It was the idea of free union. That a fellowship did not – or did not solely – owe its existence to natural affinity or to an external unity imposed by a lord, but had the basis of its solidarity in the free will of its members – this was the new idea which built up a branching structure of popular associations from below during the last three centuries of the Middle Ages, while the old ways of life broke down for lack of support. But long before it was raised to its real significance for transformation and dominating the whole life of the nation, this idea had been active in lesser spheres and from modest beginnings had produced ever expanding legal structures (Gierke, 1990 [1868]:19).

The juristic underpinning of these ever-expanding legal structures or fellowships, he suggests, was rooted in the form of the “conscious constitutive act” (Gierke, [1868] 1990:21). Gierke explains this was expressed most clearly in the German protective and craft gilds of the late feudal era and middle ages: “...this fellowship had come to be at a precise moment: mutual oath taking and a solemn declaration of intent had brought it into being. Therefore, instead of an involuntary link, the free will of the associates had to be recognized as the sole bond; and from now on, once the possibility had been established, similar fellowships could be founded after methodical consideration and a freely taken decision. The state of the conscious constitutive act and of voluntary association had been reached” (Gierke, [1868] 1990:21). In the feudal era, he argues, this act was generally undertaken as an act of resistance, defined in part by the involuntary bonds it opposed. He states: “...the precise origin of a free voluntary fellowship was more often an explicit constitutive act undertaken in defiance of the lord” (Gierke, [1868] 1990: 30). So, while the fellowship certainly resembles and somewhat revolves on the same private ardour of friendship posited by Ferguson, and Gierke too implies there was a juristic element to “tribal and folk friendship” (Gierke, [1868] 1990:13) in the form of a “personal legal relationship [that] constituted the cement of [these] associations” (Gierke, [1868] 1990:15), where the idea of fellowship really starts to reveal its juridical nature, Gierke argues, was in the fellowships defined by conscious constitution against an ‘other’ that embodied an express and opposing juridical principle of domination or, as Gierke will label it, lordship.

Importantly for Gierke, the constitution of fellowship then was not only a matter of the exercise of a private right but, in the conflict with lordship, became a public matter. He draws his evidence of this from the institution where he argues the fellowship as a public idea was, at least historically, most fully realized: the medieval protective and craft gilds. Like the old fellowships, and here he refers again to the free-men noted earlier, he observes that the craft gilds were organized around a similar principle of the equality of all members

and, like the free-men, the fellowship resembled a familial relationship with the important distinction that it was selected and deliberate even if the purposes for which it was constituted were numerous. Gierke states: "Hence they were called brotherhoods, for brothers were the first and closest fellows. The most significant name was the only one which remained common to all forms of voluntary unions. It takes us one step further towards a recognition of their nature. Brothers are not bonded for one specific purpose: their relationship contains the whole person and extends to all aspects of life" (Gierke, [1868] 1990:22). He argues that in this broad conception of purpose the medieval corporations were distinct: "each Germanic gild simultaneously had religious, social, moral and political goals, and aims relating to private law" (Gierke, [1868] 1990:23) and, he continues: "Its purposes were mutual aid, piety, conviviality and advancement of the trade; but also the protection of already acquired rights to freedom and the acquisition of further such rights" (Gierke, [1868] 1990:30). Thus the medieval fellowships were, importantly for Gierke, associations with public standing and purposes, even if some of their purposes also related to private matters.

The significance of the public element of the corporate role for Gierke stood in direct contrast to the definition of corporate groups in Roman law where they were afforded a purely private legal status. This limitation, he asserts, was in contradiction to the 'real personality' of the fellowship as chief among the early functions of Germanic associations was their specifically public character. This was particularly so of the protective guilds, he states: "The gilds did not limit themselves to religion, fraternal love and self-taxation as a means of facing the perils of soul and body; they also took a stand in public law as corporations for resisting injustice. Having come into existence at a time when the safety of person and possessions were equally at risk, when officials, instead of preventing the suppression of freedom and the extortion of fines and forced conveyance of land, took an active part in it, each association was forced to assume the character of a protective gild, which attempted, by means of self-help, to provide legal protection which was no longer given by the state" (Gierke, [1868] 1990:24). He further clarifies that in respect of the craft gilds, although involvement in a common profession often formed a part of the fellowship purpose it was not limited to this, he asserts: "Desire to be part of the union was not motivated by the specific aims of the company but by the community itself, so that the craft gild did not exist either exclusively or chiefly for the purpose of trade...The right to ply a trade was still a means to an end for the craft gild; the gild was not the means of acquiring the right to ply a trade" (Gierke, [1868] 1990:47). He clarifies: "the practice of a

particular craft or trade...was available to them as a collective right. But this collective right did not originally have any of the characteristics we attribute to *private law*, but rather related to *public law*. It was and was called a public office....At the time of civic freedom, this office, in which the concept of *duty* came *before that of rights*, was a duty to the community, a civic duty, public in nature..." (Gierke, [1868] 1990:48). Occupations, and thus the gild, were conceptualized in public terms, to the extent that occupation, gild membership, and political constituency were essentially interchangeable concepts.

As further evidence of the public nature of the gilds, Gierke emphasizes their political standing within the territorial estates that their unity was based around. He argues that the gilds:

...did not exercise the supervisory and judicial powers associated with its office in its own name, but in the name of the town. Beyond this it was usually an elective body within the town; its leaders or deputies were not simply representatives of their corporation on the municipal boards, but helped to represent the entire citizenry. Even when there was no gild constitution, it also had to fulfill political functions. It played an important part in the fiscal constitution of the town. The gilds formed their own divisions in the citizen army...Thus in every respect the gild officials were also officials of the town (Gierke, [1868] 1990:49).

Still, he qualifies, despite their close affiliation with the town this did not mean that the town controlled the gilds, although, he admits, the relationship between the town and the gilds could be fraught. He states in this respect that "...the gild was a body existing in its own right, although its sphere of rights and influence was limited by the opposing rights of the civic overlord and the town, it was nonetheless independent" (Gierke, [1868] 1990:49). As a result, he argues, "...the total *Recht* of the guild was thus a combination of the *Recht* it formulated itself and that which was imposed on it" (Gierke, [1868] 1990:52) but, he continues, "...the true source, even of gild law which was approved by the authorities, was *voluntary corporate agreement* even where the Rulers right was particularly strong" (Gierke, [1868] 1990:52). Thus, Gierke suggests: "Since the gild was an independent fellowship, possessing not only its own capital but also its own independent system of public law...it formed a self-contained legal entity, it could will and act as an entity – or in modern usage as a juristic person..." (Gierke, [1868] 1990:52).

The juristic personality of the gild, however, did not just mean, as in Roman law, that it could make contracts, hold property and sue and be sued in its own name, although this was a part of it. But, more importantly for Gierke, the fellowship was also as juristic

person a vehicle through which its members could participate in the politics or public life of the town, he states: “Through the gild, they were enabled to take part in the government of the town and in municipal duties and obligations. Any of the public affairs of the town, as well as those of the trade, might be discussed in the craft-gild assemblies” (Gierke, [1868] 1990:52-53). It was also a social association: “Wine and beer played an important part in both entrance fees and fines; the provision of a meal for the gild was a necessary condition of gaining full rights of membership...Even the social-artistic school of the Mastersingers, which in many respects extended gild organization into the art of poetry, emerged out of an extension of a community of the craft brothers” (Gierke, [1868] 1990:53). And, critically, a moral one: “...it made practical fraternal love the duty of its fellows in relation to one another, and it exercised control over its members conduct...They were to support each other at all times of need...They were to give financial support to impoverished or sick brothers from the gild coffers, and provide the dead with an honourable burial and care for his soul” (Gierke, [1868] 1990:54). The gild then was conceived as more of a political, social, and moral personality or association rather than a propertied one. Gierke states: “gain was only the means to the end, but the end in itself was personality. This led to moral endeavour in order to fulfill the office incumbent on the gild as loyally and as dutifully as possible; and, on the other hand, to a ban on free competition, and the application of the opposing principles of fraternity and equality among fellows. This protected the rights of personality rather than those of ownership – in economic terms, the rights of labor as against the rights of capital” (Gierke, [1868] 1990:54).

Black contends here that Gierke is both attempting to formulate the ideology appropriate for an independent corporate legal entity and, at the same time, combating the view derived from Roman law “that groups have a merely fictional personality and legal status” (Black, 1990:xvii). The problem inherent in the latter view, according to Gierke, was that it assumed that all groups, regardless of their public significance, were reducible to individuals and did not have a real autonomous existence of their own. This was not, of course, just about the legal status of the individual gilds Gierke is describing but, through the description, Gierke can be construed to be making a broader political statement about the legal status of Germany and attempting to provide an answer to the question of whether or not an entity that could be called ‘Germany’ had continued to exist under the Roman Empire and could potentially exist again. Gierke is overt at times about his motives: “The concept of German association is endangered by foreign influence in the sphere of law

more than in any other and even today the Germanic concept of Right is engaged in persistent struggles to regain many positions which have been wrested from it. For even today national law has been dispossessed, by the majority of jurists, of any characteristic perception of those associations which have developed to independent unity; even today the German system of fellowship is confined in both theory and practice in the strait-jacket of the Latin corporation – not, of course, that of the ancient Romans, but that which was debased to a shadow of its former independence under the Byzantine empire” (Gierke, [1868] 1990:5).

This legal reservoir of private-public status is, according to Gierke, what the Roman law of corporations ‘forged in the laboratories of private law’ would not allow or, at least, would not allow with any real consequence. Gierke attributed the decline (but critically not the disappearance) of German fellowship then to the Roman Law notion that groups have a merely fictional personality and legal status, whether as a state concession or as an artifice of legal construction. His arguments in this context were also a response in his time to the ‘Romanist’ legal historian of the same period Friedrich von Savigny, who, as Dreyer notes, was an ardent proponent of the view that “Roman law was the only guideline and legal source for today and tomorrow” (Dreyer, 1993:11). Janet Mclean in “*Personality and Public Law Doctrine*” (1999) explains Savigny’s position as follows:

In the early part of the nineteenth century...von Savigny was to revisit medieval interpretations of the Roman law of associations. An association in Roman law, as interpreted to us by Savigny, obtains its legal status not from social fact but from an act of state. This is consistent with Hobbes premise that without the state there can be no civilized society – either *universitas* or *societas*. Savigny was to go further than Hobbes, invoking the concession theory to the effect that *all* forms of association owe their existence to an explicit authorization by the state (that is not allowing any role for general law) (McLean, 1999:128).

McLean notes that the fiction theory of corporate status was often partnered with the concessionary theory, resulting in the Roman idea that the state confers a legal or ‘fictitious’ personality on associations and therefore the state was not only the authority over all associations but also the author of all juristic personalities. McLean sets out:

Arising out of the struggle between church and empire, the debate centered on the question of whether groups could form intention and will, and thereby have moral personality. The fiction theory allowed groups to hold property and to contract but not to undertake moral obligations. The concession theory...was to the effect that the state alone could create and legitimate such bodies. It treated all associations (profit-making or otherwise) as ‘conjurations’ and ‘conspiracies’ except as far as

they derived their powers from the state. Under this view, everything was delegated from above and was the subject of royal licenses and charters...Arguably, the doctrine served the claims of an emerging nation state against rivals such as religious congregations, guilds, communes and the like (McLean, 1999:129).

Clearly this is not a doctrine that Gierke can accept, his argument being that the foundations of German statehood had continued to exist in the very ‘rivals’ the Roman view would assert the Empire to have authored. Further, the concession and fiction theories of group status also had implications for the formation of a hierarchy between public and private law, a hierarchy that Gierke was critical of. McLean states: “The concession theory clearly disavows a right to associate absent state authorization, and the fiction theory conceives of all juristic persons as fictions whose author is the state. Neither theory allows a right of association. All private associations, so called, owe their existence to a state act - to public law” (McLean, 1999:129). Under this view, all private law is developed from public law and thus public law retains the superior hierarchical position. For Gierke, this was the exact view his theory was formulated to combat. He states:

The idea of the *Genossenschaft* postulated a world in which men formed, and were loyal to, groups which were neither mere collections of individuals nor mere creations of a superior legal authority. Fellowships were groups in their own right, and in consequence might be deemed ‘real’ group persons. A *Genossenschaft* was a person because it was a legal entity – it was a subject of rights. It was real, however, just because it was not an entity created by law – it was not the product of some contingent legal arrangement, whether contractual or concessionary...Law applied to the *Genossenschaft*, as it did to the individual. But it did not create the *Genossenschaft*, any more than it created the individual man (Gierke, [1868] 1990:51-52).

Runciman too elaborates on the distinction between Savigny’s and Gierke’s position as follows:

By the first conception, groups are seen to have what Gierke would call a ‘unity-in-plurality’: that is, a unity which is consequent upon some arrangement between a group’s individual members, such that the parts come before the whole. By the other, groups have a ‘plurality-in-unity’: that is, a unity, which is prior to, and in some senses determinant of, the individuality of a group’s members; the whole comes before the parts. ‘Unity-in-plurality’ is the ‘antique-modern’ conception, typical preference of both Roman and natural law theorists, exemplified by the model of the *societas* and usually couched in the mechanistic language of contract. ‘Plurality-in-unity’ is the ‘medieval’ conception, typically Germanic, exemplified by the *Genossenschaft*, and associated with the language of organicism....groups possessed of the former could only have an artificial or fictitious personality; but groups possessed of the latter might be understood as persons in their own right, in the manner of natural man (Runciman, 1997:37).

Gierke's belief in the plurality-in-unity view of society also had consequences for his ordering of public and private law. He writes: "...the idea of the modern state did not by any means arise solely from regional independence and the idea of sovereignty, but from these in conjunction with the territorial estates, which developed truly magnificently under the influence of the idea of union. The German concept of the state could scarcely have been formed by territorial sovereignty alone, which for its part was not hindered but hastened in its development by the estates. This is a concept which differs fundamentally from the notion of the state held by the ancients, above all in its recognition of public law as law – the valuable outcome of the long ascendancy of private law" (Gierke, [1868] 1990:95). Thus, instead of viewing private law as dependent on public law through state concessionary grants and authorship, Gierke argues that public law, in reality, emerged from what was now being regarded as private law, from the social fact of associational life and the desire by differentiated groups to particularize the relationships both within and between each other.

### 3.3.2 Fellowship and Legal Positivism

Gierke so far has made a legal argument about the real personality of fellowships, their civic status, and the significance of the public/private distinction as it applies in law. The legal argument of course, as typical of the time, was made with a broader political argument in mind. For Gierke, this was his interest in a unified German nation and his dispute with the Romanist historian Savigny who, as Dreyer states, "spoke for the Romanists when he said that their own century was unfit to draw up laws" (Dreyer, 1993:11). However, Gierke's argument also operates on a second level. Alongside the legal argument about politics, Gierke also makes what could be described as a political argument about law. This latter argument is expressed via Gierke's attack on what he perceived to be the political and moral vacuousness of a particular branch of legal theorizing labeled legal positivism. Dreyer provides context:

...legal thought was in the process of changing, and this contributed to the separation of social thought from the Hegelian philosophy of law. Legal positivism took over in the second half of the 19<sup>th</sup> century and put Germanic romantic organicism aside...Legal positivism took into account the existing text of the document, and nothing else. The inherent tendency of this doctrine, to accept whatever the state chose to express in the form of a law and to disregard all moral considerations as being outside the realm of a jurist, was either not understood or willingly ignored (Dreyer, 1993:13).

Legal positivism, in its omission of moral considerations, was in many respects the antithesis of Gierke's thought. A romanticist and Hegelian influenced, Gierke believed in an integrated and organic philosophy of law, which took into account not only the legal text but, more importantly, social practice and custom. Runciman acknowledges: "Gierke's insistence on the interdependence of political theory and jurisprudence means that he understood all conceptions of order to have a juristic basis – including all conceptions derived from the moral life of the 'Teutonic peoples', for which Gierke found juristic expression in what he calls 'folk-law'" (Runciman, 1997:36). The existence of folk law, becomes on this level of his argument, evidence for a broader political argument about the undesirability of a theory of legal order that separated the juristic elements of order from the corresponding political or moral elements. Runciman notes that in respect of the distinction between 'juristic' and 'moral' conceptions of order: "Gierke was always on the side of the latter, which he believed to be characteristic of, though not exhausted by, Germanic life and thought, and against the narrower, more legalistic notions which were typically derived from Roman law" (Runciman, 1997:36). The best case scenario, however, for Gierke was an order that could embrace both aspects, technical and moral, and his notion of the legal fellowship was intended to be a synthesis of both ideas. It was, in effect, an attempt to legally constitutionalize the realm of practice that MacIntyre had identified as the constitutive element of a moral organization of the person in order to protect it from the doctrine of state sovereignty that a legally positivistic order subscribed to.

Insofar as positivism would limit from the outset the form of arguments that could be made about what law is and, perhaps more importantly, for Gierke, what law should be, it was then deeply adverse to Gierke's theory. Gierke explicitly argued that fellowship was simultaneously a legal and moral imperative and refused priority to one argument over the other. Black notes that Gierke assigned to commonality a moral value, arguing that membership in fellowships engendered unselfishness and encouraged social responsibility. Fellowship in this sense was a juridical imperative because it expressed a moral idea. He also, however, viewed fellowship as a 'right' and in this sense it was a moral imperative expressing a legal stipulation. Black summarizes Gierke's position as follows:

...fellowship would resolve the problems of individual and society, and of autonomy and authority, by generating truly willed and therefore truly free forms of association...In the groups which people form of their own free will and with which

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they identify themselves for part of their lives, there is no clash between individual and society...

...Such associations realize human potentiality in ways the state alone cannot, because they emerge from the immense variety of actual human concerns and because their members form them spontaneously. In modern individualist society, moreover, no one group can subsume the whole personality of an individual; people normally belong to several different associations...it follows from both the real personality of groups and their role in human affairs that groups as well as individuals possess the capacity for rights and duties. There are corporate as well as individual human rights (Black, 1990:9).

Gierke further expands on his moral and political vision of the legal fellowship in the context of what he viewed as an urgent social development that a positivist view of law jeopardized. Writing in the context of what he refers to as the ‘modern association movement’ in Germany, he was anxious that while there appeared to be a resurgence in fellowship like organizations from below (primarily trade-unions and co-operatives), legal theory in Germany was moving in the opposite direction. The theory of legal positivism he perceived was far more likely to embrace the Roman concessionary view of associations and limit the public law relevance of these emergent groups before they had really had a chance to develop to full capacity. In this respect, Dreyer notes: “He was worried that on the wrong track as by mid 19<sup>th</sup> century the fellowships were beginning to confidently reappear and these had been largely dormant or meek under the absolutist days of the Roman empire” (Dreyer, 1993:20). Gierke’s mission then was to give the movement a chance to be fully realized, which required not only articulating a coherent juridical theory of fellowship as a public good but also defending it from being stifled by a more narrow conception, which made legal relations the hand-maiden of state command. Black notes, it was Gierke’s view that with “...states being so large, it is only in lesser associations that most individuals can develop as political beings, only there can the public virtues of citizenship be acquired...Gierke saw participation in public affairs as essential to moral and intellectual development, and multiple associations make this far more widely available. Associations...lift people out of themselves on to a plane where they welcome the mutual responsibilities of social life...we realize ourselves as moral beings concerned with a good other than our own, through a number of ‘lesser’ associations” (Black, 1990:9-10).

So, in Gierke’s view something like ‘fellowship’ rights would need to be asserted against authoritarianism just as personal rights had been asserted against rights derived from property in the medieval period. However, for this to remain possible the legal positivist

theory of law would need to be maligned. To do this, Gierke makes a political argument attacking legal positivism on the grounds that it represented a view of law, which did not reflect the reality of social life or a popular understanding of order. Black notes in this respect that Gierke can be credited with significantly developing the distinction (initially developed by his mentor Georg Beseler) between learned and popular consciousness. Black argues:

It forms the basis of his argument that a true understanding of fellowship and of the accompanying notion of group (or joint) personality was latently grasped by ordinary people in the Middle Ages but betrayed by jurists and philosophers...Gierke contrasted the idea of organic community existing in popular Germanic thought (*Körperschaftsbegriff*)...with the doctrine about human groups enunciated by jurisprudents in a technical manner with a view to legal application...His point here was that technical jurisprudence...never gave satisfactory legal formulation to the German *Körperschaftsbegriff*, as this was unreflectingly held in everyday life. This was due to the split between people (*Volk*) and learning (*Wissenschaft*), and to the domination of the latter by late Roman, and hence authoritarian, ideas (Black, 1990:xxvii).

Legal positivism was to Gierke then what the division of labor had been to Ferguson. In fact, it can to some extent be seen as a continuation of the consequences of the division of labor in the realm of law, setting up the duality of individual and state and leaving no room for intermediary associations of people combining for public purposes. Insofar as legal positivism threatened (again) the emergence of the fellowship by invalidating the legitimacy of popular or customary law in favor of a strictly technical jurisprudence, Gierke saw it as his task to debunk its legitimacy by questioning, much as Ferguson did with the division of labor, its social and political consequences. Black comments: “Philosophy and history are intimately connected in Gierke’s understanding of the world and of law, in his analysis of both the phenomena and the concepts of *Recht*...the idea of justice (*Recht*) is inherent, not in the cosmos as natural law theory held, but in humanity; and humanity is not a mere universal, but evolves through specific, historically developing communities with their changing and progressing social forms and ethical ideas. Positive legislation ought to conform to and reflect this evolution, and is invalid if it departs fundamentally from the moral insights thus built up” (Black, 1990:iv).

Gierke’s rejection of positivism did not mean that he rejected a theory of sovereignty altogether, but his was a much more qualified endorsement. Sovereignty was acceptable if and only if one could make the political and moral case for it. In a constitutional state, Gierke believed, subjects will the existence of the state so, in this regard; the state, as an

association, is on the same level with other fellowship-based associations. As such, the state, in Gierke's view, was not morally superior to other groups and its sovereignty, as a result, was not absolute but shared and always contingent on the purposes for which it existed. Black argues that Gierke viewed the states role to be the "guardian of laws and representative of common public interests" (Black, 1990:xx) and, as such, Black continues: "The state *must*, therefore, recognize, respect, and promote associations in their respective spheres" (emphasis in original) (Black, 1990:xx). Runciman further articulates that this precept conditioned Gierke's view of the state as *Rechtsstaat*, translated roughly as law-based-state. Runciman recounts: "It postulated a state which was a subject of rights...but whose right-subjectivity could only rest in the totality of the legal relations within it. No part of the state – neither ruler, nor people, individuals nor assemblies – could 'represent' or in any other way stand apart from the whole. The whole rather was bound up with each of its parts, individual and associated, because every part was an aspect of the whole" (Runciman, 1997:53). Fellowship rights then were a way of expressing the irreducibly social character of human relations and, as Black notes, were tied to Gierke's positing of a broader philosophical expression of the relationship between institution and intentionality. Black states: "He [Gierke] insists that the relation between ideas and actual 'forms of life' is of 'two-sided causality' or 'reciprocal action.' He speaks of institutions as embodying ideas" (Black, 1990:xxvi). Black continues: "What Gierke did was to highlight shifts in ideological and philosophical patterns and to claim previously unsuspected connections between sets of ideas. His achievements in this field make him one of the first major students of mentalities" (Black, 1990:xxvii).

Ideas in Gierke's theory then play an enabling role in historical change. They can be used "as legitimizers or facilitators of a process, or again by blocking off an otherwise possible alternative" (Black, 1990:xxvii). This, in turn, will impact the institutions that develop, which will then feedback into the ideas that are created, and so on. In legal positivism, Gierke saw an idea that was gaining dominance amongst various branches of legal scholarship, including Germanist scholarship, and an idea that he feared was not only a hindrance to his own moral theory of law but detrimental generally to the future possibility of any project taking a more integrated view of social order. Although I have attempted to separate out the two strains of Gierke's view, the legal arguments about moral personality and the moral arguments about legal personality, they are largely, and deliberately, inextricable in the text itself. In some respects this was characteristic of continental legal theory, Dreyer states "No debate among jurists in 19<sup>th</sup> Century Germany lacked political

implications, and no political debate was concluded without a fair amount of legal analysis. Political philosophy and political science were mainly conducted by jurists" (Dreyer, 1993:11). But, Gierke's text is a truly magnificent example, embedding in its composition his normative view that the legal/technical and the moral/historical could not and should not be thought of separately as they are part of the same ethos. Gierke confirms:

It is true that eminent Germanists have made a significant start in reconstructing the German law of fellowship from first principles. However, there is still lacking a more comprehensive survey, which on the one hand would follow the moral and legal idea of the German fellowship and its transformation through history, and on the other give equal consideration to public and private law – two areas equally caught up in and transformed by this concept. Alongside the legal and moral aspects of fellowship, its cultural-historical, economic, social and ethical aspects should of course not be neglected but these will only be considered either in so far as they are necessary for understanding the formation of law, or in order to demonstrate the insoluble link which exists between matters of Right and cultural life as a whole (Gierke, [1868] 1990:5-6).

To the extent some find such a comprehensive approach unsettling today perhaps this reflects the limitations of our own understanding of the relationship between law and politics – or, in other words, our legal-positivist heritage - rather than any fault of Gierke's. For instance a recent text by Christian List and Philip Pettit entitled "*Group Agency*" (2011) is quick to dismiss what they suggest is the metaphysical vitalism of early thinking on groups, which they primarily attribute to Gierke's influence. According to List and Pettit, Gierke's theory of the fellowship is a romantic 'animation theory' requiring "the pulsation of a common purpose which surges, as it were, from above, into the mind and behavior of members" (List & Pettit, 2011:7). List and Pettit reject the real personality approach because, they argue: "the view implicit in these metaphors suggest that it is possible, in a philosophical thought experiment, to replicate all the properties and relations we find among the individual members of a group agent without replicating the group agent itself. For the group agent to exist, so it is suggested, there must be something extra present" (List & Pettit, 2011:7). Thus, while they acknowledge that Gierke's thinking on groups inspired progressive political movements (guild socialism, associational democracy, and political pluralism) it was also, they argue, an equally useful rhetoric for fascism as "it also became associated with a totalitarian image of society" (List & Pettit, 2011:8). As such, they conclude, while "the animation theory offers a much thicker realism under which group-agency talk is as non-redundant as such talk could be" (List and Pettit, 2011:8) insofar as it "invokes a mysterious, non-individualistic force" (List and Pettit, 2011:8) it is

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“independently of its political associations...objectionable on metaphysical grounds” (List & Petit, 2011:8).

List and Petit express a common criticism of Gierke that is often made to reject his approach, but the suggestion that Gierke endorsed a metaphysical vitalism in his discussion of fellowship reflects a lack of understanding of Gierke’s edifice. Gierke does not posit that some mysterious force is required to be present animating the group with a common purpose. In fact, Gierke would certainly agree that if all the properties (individuals) *and relations* (social) in a society were to be replicated the group agent would be replicated; it is precisely this point that Gierke goes into excruciating historical detail to suggest. He argues that when social relations changed, the properties of German fellowships changed as well, even if a kernel of the original idea of fellowship did not entirely disappear. Black too affirms that Gierke, by positing the ‘real personality’ of fellowships, was not in fact suggesting that groups were something distinct from their members. Rather, Black argues, Gierke was simply committed to the idea “that the way people are connected makes a difference to the kind of person they are as well as to the kind of society they live in. Nor are these connections the results of mere choice; they stem also from the ineradicable circumstances of human existence...and from the intrinsic desires of human beings...” (Black 1990:xvii). In other words, the more salient idea in Gierke’s thought is one that emphasized the relation between form and content as a codetermination. Groups, in Gierke’s view, could not really be equated with natural individuals but they equally could not be conceived as a mere aggregation of individual views prior to joining the group – they required their own distinct form/concept. The philosophical point then was about “the existential reality and moral value of groups as persons...that the state and law ought to recognize” (Black, 1990:xvi) not that groups were actually or materially a person with a mystical pulse. Group consciousness, Black argues, in Gierke’s view is not a mere sum of individuals’ consciousness: “Gierke meant that individuals really feel themselves to be parts of a group, identify themselves with it, becoming ‘inwardly’ and ‘outwardly’ – subjectively and objectively – part of it...” (Black, 1990:xvi). Gierke makes liberal use of metaphor here and there is a certain organic sociology to his history of fellowships, but it does not merit dismissal on metaphysical grounds.

It is also unnecessary, as List and Petit suggest, to view Gierke’s work “independently of its political associations” (List and Petit, 2011:8). Gierke’s work is designed to be political. He was not merely making a psychosocial argument about the phenomenon of

group agency but he was also politicizing this phenomenal reality in response to a mode of legal argumentation capable of compromising a given group's right to exist. Black argues that for Gierke a refutation of the fiction theory of fellowships was essential: "If associations have no real being then they are the mere creatures of the state and the state is then justified in deciding according to its own rights when and to which groups associational freedom and corporate status should be permitted and in revoking such status at will. He...thought that, for freedom of association and corporate status to be acquired and lost by due process of law one must ascribe real personality to the groups in question. Only then could they enjoy genuine autonomy" (Black, 1990:xvii). Gierke's argument about the real personality of associations then cannot really be divorced from its political significance. Further, it is not clear why it would need to be as it is hard to see how this argument would readily lend itself to a fascist interpretation. Black notes: "He firmly believed that the recognition of real group personality, as well as of individual personality, is essential to human liberty, and that the arbitrary treatment of associations is the hallmark of tyranny" (Black, 1990:xvii). To the extent that criticisms of Gierke like List and Petit's refer to the overall unity of Gierke's edifice, Runciman also defends Gierke on this point: "It is important to emphasize...that the Gierkeian concept of plurality-in-unity, though it gives conceptual priority to unity, does not grant to the group unit the capacity ever to do without plurality. The group unit, or group person, must contain other units, or persons, including the persons of other groups" (Runciman, 1997:41). There may be other reasons to legitimately criticize Gierke but to dismiss his work on metaphysical grounds or suggest that it lacked a clear political foundation (and so could as easily embrace fascism as political pluralism) are not valid injunctions.

### **3.3.3 The Fellowship-Lordship Dialectic**

Critics of Gierke, however, are not the only theorists to approach Gierke's work and attempt to parse out what they perceive to be the relevant parts while leaving out critical elements of his framework. As noted above, the EPP school of political theory also subjected Gierke to a creative interpretation in their adoption of his work, even if a slightly more considered one. One of the elements of Gierke's thought the EPP school largely neglected was the dialectical structure of his concepts. For Gierke, history consisted of the progressive dialectical development of institutions and ideas and the primary antithesis that he was concerned to articulate in this respect was the conflict between fellowship and lordship. In Gierke's scheme, the idea and institution of fellowship could not be properly

understood without an understanding of the idea and institution of lordship. Indeed, his entire edifice is constructed around the antithesis of these two principles. So, before exploring the pluralists embrace and use of his notion of fellowship in chapter 7 it is necessary to understand first how fellowship related to lordship in Gierke's thought. To the extent the EPP school either glossed over this element of Gierke's theory or ignored this aspect in its entirety in their texts, the coherence of their theoretical project suffered. For instance, one of the most damaging critiques of the EPP's radical brand of pluralism is that there is no way to distinguish on their own criteria between the various associations they argue should be elevated to autonomous political status through the recognition of their legal personality. This particular criticism was not a problem for Gierke as associations could be distinguished through the dialectical principle they were conceived to support.

To develop his contention that the principles of fellowship and lordship could be seen to compete for dominance throughout history, Gierke distinguished five historical epochs, which he argued were "...characterized by the dialectical interaction, and conflict between, fellowship (*Genossenschaft*) and lordship (*Herrschaft*)" (Black, 1990:xxiv) unique to each period. Out of the five epochs he identifies it is in the third and the fourth periods where the conflict is most visible. During the first period, which he identifies as "up to AD 800" (Gierke, [1868] 1990:13), fellowship was defined in the folk friendships between free-men and, he asserts, was the dominant modality in this period. Gierke, however, is quick to qualify that to some extent the internal relations of folk groups were based on patriarchal structures and, as such, the principle of lordship too was pronounced. In this first period, he argues, the principles were difficult to separate but in the second period, which he posits as being from 800 – 1200 this ceases to be the case. In the second period, he offers, there was a "definitive victory of lordship over fellowship and material over personal conceptions. The patrimonial and feudal principle of organization dominates the life of the nation" (Gierke, [1868] 1990:10). Gierke is here addressing the feudal system of estates, which he identifies as property based communities dominated by a Lord in his personal capacity and which he identifies as patriarchy in its personal form and the relationship between Lord and Servant that develops patrimonial. Fellowship as an idea in this period was largely repressed. Still, Gierke notes, that at the end of this epoch, the subtle hints of a future transformation begin to emerge. He states:

Yet, the corporate idea is so deeply seated in the German spirit that it penetrates the lordship groups themselves, first restructuring them and then dissolving them. And

so a new form of association arises, which is characteristic of the second period: the dependent or lordship-based fellowship. This develops its own collective Right around and beneath the lords, who represent the original unity of the group. But towards the end of the period a newer and more powerful principle is already emerging, the principle which finally reduces the feudal state to ruins. This is the principle of free association – union. In place of the old fellowships which were based on purely natural association, it produces voluntary fellowships, but in the towns it combines the freely chosen union with the natural base and so simultaneously produces the first local community and the first state on German soil (emphasis and trans. omitted) (Gierke, [1868] 1990:10).

This for Gierke marks the end of the second epoch and sets the stage for the collapse of feudalism in the third epoch, which he dates until “the close of the middle ages” (Gierke, [1868] 1990:10). In this period Gierke argues that a new principle, one identified with fellowship, begins to contend for dominance, which he identifies as a confederative principle of union or free association and which, Gierke suggests, is responsible for the growth of “the most magnificent organisations from below by means of freely chosen fellowships” (Gierke, 1990 [1868]:10). Gierke contends that these fellowships then prepared the way for “the emancipation of personality from its base in the land” (Gierke, [1868] 1990:11) and further, he argues, led to “the separation of public and private law, give birth to the ideal personality of the group as state, local community and corporation: and, by means of free association from below, they almost succeed in creating a German state. But not quite! For the system of fellowship in this period does not have the strength to complete its task” (Gierke, [1868] 1990:11).

The reason that the principle of fellowship does not fully succeed in becoming the dominant idea of the epoch, Gierke posits, is because the property system continued to be bound up in the language of estates and as the fellowships had based their unity around these estates, the fellowships that emerged were not in a position to topple the principle that had provided the organizing impetus for their existence. Further, because the fellowships were organized along the lines of the estates (i.e. the town) even if independent from them, they were as a result unable to bring the peasantry (i.e. the country) into the movement. In other words, the property system of estates leftover from the feudal epoch created a juridical obstacle, which successfully held the transformation from lordship to fellowship in inertia. Because of this, Gierke argues, the organisations were not able to resist subordination to the lordship principle of territorial independence, which was more successfully “working towards the leveling of the estates, the fusing of town and country, and a greater more focused unity within the state” (Gierke, [1868] 1990:11). The principle of territorial independence then “succeeds in transforming lordship over land into the

territorial state and in making itself sole representative of the modern concept of state” (Gierke, [1868] 1990:11). Lordship, in the guise of the principle of sovereignty then, would come to dominate the fourth period that he dates until 1806 but it was, he asserts, a narrower victory.

Further, Gierke suggests, the domination of lordship in the fourth period, through the principle of state sovereignty, was not entirely regrettable. Because the contest with fellowship had escalated to such an extent in the third period, to succeed over fellowship the lordship principle had been forced to transition to an idea that was palatable to the whole population. The label of ‘lordship’ and ‘fellowship’ is not necessarily in Gierke’s scheme a pejorative or a stamp of approval, but a mode of describing the nature of the principle that dominates. Gierke argues that to some extent the lordship principle of state sovereignty in the fourth epoch did bring about progressive changes, he contends: “...with the dissolution of all the old associations, territorial independence also destroys the privileges and inequalities of public Rights and brings the idea of equality of all before the law and – for the first time in history – the idea of individual freedom for all within the grasp of its subjects. Although it has little at first to do with civic freedom, although a German’s rights to political freedom were mercilessly destroyed, the transitional period is indispensable in order to prepare the ground for the civic freedom of all men, which in our century replaces the freedom of the estates” (Gierke, [1868] 1990:12).

Still, he stipulates, there was also a consequence. As a result of the lordship principle of state sovereignty, Gierke states:

The fellowship structure is toppled and replaced by a system of privileged corporations which establish themselves exclusively on a basis of private law and thereby give up on any further participation in public Right. In the face of these corporations, which no longer perceive themselves as part of the generality but as privileged exceptions, yet are unwilling to undertake the duties corresponding to their privileges, the power of a unified state which can bend or break them is a necessity. To begin with, this naturally meant the destruction of the earlier freedom and autonomy. The state moves away from and above the people; whatever wishes to be recognized in public law can only continue to exist as a function of the state, while the dependent corporations based on private law – the characteristic type of association in this period – cannot revive their extinguished public significance. Absolute state and absolute individuality become the emblems of the age (Gierke, [1868] 1990: 11).

Thus, he argues, the 19<sup>th</sup> century is the history of the victory of the state and principle of territorial independence (sovereignty) over the principle of union or free association. With

the development of the idea of the sovereign state comes the notion of the “supervisory and tutelary state” (Gierke, [1868] 1990:11) and, as a result, the fellowships that had developed in the third period either disappeared or transformed beyond recognition to accommodate their new, inferior, position. But, Gierke conjectures, signs that Germany was entering a fifth stage were emerging, and with the principle of individual freedom firmly in place it was set in the 19<sup>th</sup> century to finally embrace the “real creative principle...[of] free association in its modern form” (Gierke, [1868] 1990:12). Under contemporary German conditions, Gierke argued, the fellowship was free to be: “No longer bound by the chains of the estates, not limited by exclusiveness, infinitely flexible and divisible in its form, equally suitable for the noblest and humblest of ends, for the most comprehensive and most isolated purposes, enriched by many of the merits of the Roman concepts of Right, but long since ridiculing the narrow Roman mould itself...into which theory and practice still attempt to force it...” (Gierke, [1868] 1990:12).<sup>9</sup> These fellowships Gierke saw emergent in the principles of the modern association movement, which his edifice attempts to support.

The dialectical structure is fundamental to the history Gierke unfolds and the concepts that he develops to explain it. Runciman argues: “The history provided by *Das Deutsche Gennossenschaftrecht* is dialectical, and its primary concern is with the ways in which ideas change. In it, models of political thought are seen to react upon each other, and these models not only shape but are shaped by the language in which they are expressed” (Runciman, 1997:35). It was, Runciman suggests, an “ongoing, all-encompassing struggle between two different, and irreconcilable, conceptions of order” (Runciman, 1997:36) and further, he advances: “The struggle between the two different conceptions of order which dominates his [Gierke’s] work also permeates all parts of it: it can be discovered both within Roman thought...and within German thought...as well as in the clash between

<sup>9</sup> Reading what follows in Gierke’s text here is historically painful. He states with respect to the ascendancy of the principle of fellowship: “It is taking part in the transformation of the German community and state, which have only achieved progress in the past and will only advance in the future by means of a return to the root of fellowship. This alone is creator of a free form of association, becoming involved in and transforming all areas of public and private life; and, although it has already achieved great things, it will achieve even more in the near and distant future” (Gierke, [1868] 1990:12). Of course, we know in retrospect, that this is not what happened and Germany became the site of totalitarianism and the scene of systematic oppression on a grand scale. The actions of The National Socialists are of course the fascism that List and Petit are obliquely referring to. But Gierke himself was not a member and while, as Black states: “It is true that Gierke’s works were more widely read after 1933, and one may find parallels between Gierke’s belief in a distinctive German culture...and elements in National-Socialist ideology...it would be naïve to suppose that such an ideology was implicit in Gierke’s way of thinking or indeed...in the national political culture and social philosophy upon which Gierke drew. The National Socialists, rather, hi-jacked such notions and used them in a deeply perverted form. Gierke’s teaching on the self-substantive nature of associations could hardly have been at more variance with National Socialist thought or practice” (Black, 1990:xxiii).

them" (Runciman, 1997:36). Gierke's scheme was comprehensive. Each part related to another and the concepts he invokes cannot really be understood in isolation. Runciman stipulates: "...[he] had to accommodate within a single juristic scheme all associations – guilds and cities, churches and the universal Church, natural families and the Family of Man – and so required a conception of personality which could contain the whole world of men, not just that area mapped out by the laws men happened to have made" (Runciman, 1997:49). This did not, however, mean that all non-state groups or organizations were considered to embody principles consistent with fellowship as opposed to lordship. Runciman elaborates:

It does not follow from this that the distinction between the public and the private breaks down altogether – the external relations of persons within the state, whether individual or groups, must remain private so long as such persons are capable of acting in their own right, as will be the case, for example, whenever they contract with one another. But it does not follow that no distinction can be drawn between persons on the basis of the sphere – public or private – to which they belong. All persons in the *Rechtsstaat* are public parts as well as private wholes, and so no person can either be denied a public function (i.e. reduced to the level of a subject), nor claim the whole of public right as their own (i.e. raised to the level of a sovereign). Moreover the distinction between the public and private must break down altogether in the case of the state itself. As a whole the state has an external aspect, but because juristically, it is the ultimate whole, it has no legal relations outside itself. The external aspect of the *Rechtsstaat* can only be revealed in the legal relations of its parts. Thus the personality of the *Rechtsstaat* resides in the totality of its laws, public and private (Runciman, 1997:53).

Thus the state that Gierke envisioned emerging from the development of the modern association movement would be a synthesis of public and private, which represented the synthesis of the two concepts of lordship and fellowship in the legal relations governing the whole. This was Gierke's interpretation of the *Rechtsstaat*, which he argued was "the idea of a State which existed only in the law and for the law, and whose whole life was bound by a legal order that regulated alike all public and all private relationships" (Gierke, [1868] 1990:73). The character of the *Rechtsstaat* as synthesis then, in Gierke's view, could only be determined by its internal laws of association or, stated differently, through the way in which the status of groups as fellowships (public) or lordships (private) was able to register.

Gierke gives a modern example of the antithetical principles of fellowship and lordship in two groups that Gierke saw as beginning to contend for a larger role in modern German life in the 19<sup>th</sup> century: these were joint stock companies (particularly big business) and

producers cooperatives (particularly trade unions). Although Gierke recognized the possibility that joint stock companies in their organization could be perceived as having some qualities of fellowship, to the extent they had been casually identified as such was a mistake. He states: "...all these theories took into consideration one aspect of the joint stock company – the association of persons; they made the relationship between unity and plurality basic to the juristic model. The specific difference between this form of association and other fellowships – the special relationship between the persons' unity and the united capital – was either not considered or even expressly deemed important" (Gierke, [1868] 1990:197). Gierke undertakes to examine this relationship and, while he agrees that certain early principles of joint stock company organization imitated fellowship-like principles, to the extent they became organized around and dominated by the principle of profit they had come to represent a principle better identified with lordship. For Gierke, the purpose and composition of the organization matters when it comes to determining whether or not a given entity can be considered a fellowship and in respect of joint stock companies he argues: "...it is the commercial purpose which brought the association into being: while it only furthers the common good by indirect means" (Gierke, [1868] 1990:203). As such, he characterizes the joint stock company as follows:

If the economic nature of the joint-stock company is that of an 'impersonal economic body existing for itself' which comes into being through the grouping-together of capitalists 'plus the annulment of the individualistic determination of the will of society'; if in the whole structure of the fellowship of persons appears to be merely the consequence and extension of the organism of capital; if directing intelligence and creative labor alike are both paid servants, and capital alone the master of the association – then the overall direction of this institution is bound to be speculative-capitalist. Beneficial and necessary as the form of the joint-stock company is as a link in the chain of economic organisms, if it alone ruled it would lead to the despotism of capital (Gierke, [1868] 1990:204).

And, Gierke continues:

In its inner nature, however, this unitary body is nothing but a *lordship group*, in which the representative of capital (the capital body as it were) is the absolute economic master. That same lordship group which, since time immemorial, has been struggling to gain victory over fellowship, is reproduced here; in a more limited form, on the one hand, because it does not extend beyond the sphere of economics and economic purposes; harsher and less restricted, on the other hand, because the lordship principle, which in former lordship groups was modified at an early stage by the emergence of dependent fellowships is here implemented unconditionally. For in the economic lordship associations of modern times, there are no links between the members themselves, no plurality with rights over against the unity, no constitution which could guarantee the collective will some influence, however modest, on the

life of the whole. In it labor is without rights. Unconfined by Right, lordship becomes here in fact more steely and immutable than that of the manorial lord ever was. For, with the predominant importance of capital, the human, personal relationship between master and worker becomes even smaller, the impersonal might of capital comes between them in an ever more divisive way, and finally the owner himself is ever more powerless, dragged into the service of his own capital (Gierke, [1868] 1990:212).

Thus, Gierke contends, the predominance of profit based organizations was a threat to the ability of now free individuals to unite in fellowship and contend with the principle of lordship to force a dialectical synthesis, he states: “The development of capitalist big business robs all of these classes of their economic personality, or threatens to deprive them of it...capital is the basis and master, labor only a dependent tool...” (Gierke, [1868] 1990:212). And further, he argues:

Hence economic personality no more belongs to the worker in capitalist enterprises than ecclesiastical personality does to a layman in the church hierarchy, or private law personality to a serf in the legal fellowship of the nation. Of course, the worker lacks economic personality in the first instance only in a specific group, which he enters as a matter of free choice... But the choice concerns only the ‘where’ of subordination not the ‘whether’;...and, since his whole economic existence is utterly determined and conditioned by an alien power, in whose life he is not granted the slightest active participation, he is devoid of economic rights of citizenship not only within the single group, but in the entire economy of the nation (Gierke, [1868] 1990:212-213).

There is a distinct resemblance to Ferguson here as Gierke too notes that the lack of economic independence or, indeed, economic equality, impacts the character of the society as a totality not simply the individual. The joint-stock company for Gierke was emphatically not a fellowship but identified with the opposite principle of lordship. Black comments: “Economic groups in which property (capital) rather than personality (labor) dominates are really lordship groups...Gierke savagely attacked the tendency to deny ‘labor’ – labouring people – their rights” (Black, 1990:xxvi). So, as capital pushes to enlarge its sphere, Gierke suggested, the principle best capable of restraining it is inherent to the people impacted, organized around the conflicting fellowship principle of economic equality. But, Gierke argues, when people are deprived of economic independence their resistance will be less able to contain capital’s dominance as these same people will be reduced in their aims. He stipulates: “In the end, it is only life itself which is being fought for. Since the wrestle for existence absorbs the totality of all resources, the free human personality becomes more and more stunted till only its name and abstract Right remain” (Gierke, [1868] 1990:213). To the extent that people may not have the wherewithal to

resist then, Gierke argues that the entire unity of the nation is undermined as economic inequality becomes increasingly pronounced. He states:

The disappearance of intermediaries further demonstrates the full extent of the danger: that the gulf between owners and the unpropertied will expand until it is immense. If no other elements were to intervene, it would necessarily come to a point where the nation became divided into two opposing camps: the economic rulers and the economic ruled. Transition from one to the other would be harder than to move from one caste to another in India. That would be the eve of the much prophesied social revolution, the beginning of the end for the life of the people (Gierke, [1868] 1990:214).

Thus, on Gierke's scheme, it was not merely any organized association of people that qualified to be called a fellowship. The purpose of the organization plays a role as does the relationship between the members of the association and the relationship between the members and impacted constituency. To demonstrate this Gierke suggests that another group beginning to emerge in modern German society was the true bearer of the fellowship principle in modern life; this group he suggests is the producers cooperative or trade unions. He saw the association of labor as having a dual task: "defence and creativity" (Gierke, [1868] 1990:215), defense in the sense of defending the principle of economic equality and creativity in the pursuit of economic freedom. Further, the benefits of membership in producers cooperatives, he argues, unlike joint-stock companies, were not only material but also had a public good element and as such embodied the fellowship principle, he states:

The material advantages which flow from collectivity back to the members often create the primary basis for full human development. But even greater than this is the growth human beings achieve as human beings through the fellowship...

...the individual retains his individuality. But, even in economic affairs, this individuality is not limitless and wholly self-determining; rather, it donates part of its being to the whole, as a member of which it can overcome the dangers in the existence of the isolated atom. The consciousness of gratitude for the elevation of one's own powers – through association with the equal powers of one's fellows – produces that sense of citizenship, at once proud and self-denying, which since time immemorial has been held to be the model of public virtue. A school for the whole of public and private life, the fellowship is before all else a school of morals.

In saying this, we also express the importance which fellowships have, beyond their immediate fellows, for state, economy and society. They introduce worthy citizens into the state. In the economy, in the face of the lordship of dead property, they conquer the right of citizenship for labor – the right due to its manifestation of its living personality. They preserve society from the dangers threatening it in the social embitterment of the numerical majority of its members. Only fools are capable of

believing that the association movement will ever banish from the world all economic dependence, or eradicate all social miseries. But it does not seem to bold to hope that it will bring to an end, or prevent, a situation in which economic dependence is the rule, and social misery the fate of the majority (Gierke, [1868] 1990:220).

Gierke notes that in contradistinction to the business association, in the labor association it is the workers personality not capital that is the “economic, legal, and moral representative” (Gierke, [1868] 1990:222) and further “the rights of fellows are equal in content and above all give them equality in representing the life of the association – that is, equal franchise and equal eligibility” (Gierke, [1868] 1990:222). He continues, noting that “in direct contrast to the capitalist commercial company the more definitively the labouring personality as such is the embodiment of the economic organisms, the more it seeks to use the organism to create a spiritual and moral fellowship” (Gierke, [1868] 1990:223-224). Gierke notes in this respect that producers cooperatives, amongst other things, provided relief for illness, made provision for education, created libraries, provided space for festivities, promoted moral conduct for both its own members as well as acting as a source of values to outsiders (see: Gierke, [1868] 1990:224). However, in order for the emergent associations to be able to accomplish their tasks and expand, he also acknowledged that they must find support externally - from the state and from other associations in society in the form of contributory aid as a means of “complementing self-help, and partly of enabling it to develop more fully” (Gierke, [1868] 1990:218).

Thus, there was, he argued, a positive duty on the part of the state to enhance economic freedom, which it ought to fulfill directly through subsidiary relief or indirectly through other mechanisms (education, cultural, public insurance etc.) This did not mean, in his view, that the state had any role to play in the administration of the fellowship or that the fellowships existence was dependent on state approval. To the contrary: “A completely free fellowship...is the product of civic autonomy. It has, therefore, no need of state approval. It is given existence by a constitutive act...” (Gierke, [1868] 1990:226). But, in the contest of dominance between capital and labor, Gierke was of the view that the state had undertaken of its own accord, in the quest for territorial independence, a responsibility to support civic freedom within the territory. This, in Gierke’s view, included economic freedom and as such the state continued to have a responsibility to support labor associations when a competing lordship group in the form of the for-profit corporation threatened this freedom. He states: “A claims on state aid, indeed is not the working classes’ privilege but their right, given this particular form by their circumstances, a right

which is available to all sections of the people over against the supreme universality. If the state is a moral being...it is its inalienable right and inescapable duty to intercede, in the last resort, for all its members, when individual resources, even when united with others, are not sufficient to achieve the purposes of human personality" (Gierke, [1868] 1990:216). He further argues in this respect, that better economically positioned individuals and classes also had a duty to assist such a social movement from below to develop more fully.

But, and importantly, what Gierke does not suggest is that the working class have a right to participate in the election of the state they had a right to request aid from. The vehicle through which labourers were to assert their personality against a competing group was the fellowship association. Dreyer argues that Gierke here can only be seen to have made a theoretical mistake as his failure to advocate universal suffrage and individual human rights does not make sense given the rest of his observations. He states:

At the same time his idea of fellowship almost inevitably led to democracy. All fellows were supposed to have the same weight in decision-making...democratic conclusions seemed to be the logical consequence...although he did not stress democratic processes...the very essence of his fellowship was a democratic process of decision making within the individual fellowships, and especially within the Reich as the largest and most important fellowship. Gierke, however, did not recognize the implications of his premises and historical findings nor carry them to their logical conclusion. Throughout his life he remained an ardent admirer of the Prussian state, and at the end of his long life, after the revolution and the birth of the Weimar Republic, he even joined an anti-democratic right wing party (Dreyer, 1993: 21).

However, viewed from an understanding that Gierke privileged a moral understanding of the person and his theoretical edifice is constructed to give coherence to this idea on the basis of externalizing materialist and individualist accounts; not only of persons, but of associations and the state also, this anti-democratic stance is in line with his edifice. Like Ferguson, Gierke was of the view that a moral organization of the person, and the corresponding concept of the public good, required a conflict with the rise of commerce and capital and that the best way to achieve this was through the rise of fellowship in civil society. There is a tendency in work revisiting theorists like Ferguson and Gierke to dismiss their failure to subscribe to democratic ideas as peculiar and capable of rehabilitation by simply tacking them on. And, certainly, some of their later followers

would modify their frameworks in the service of suffrage as an ideal.<sup>10</sup> But to suggest that Ferguson and Gierke could accept suffrage or individual rights *without more* does a disservice to an understanding of their frameworks. It also undermines one of the most important contributions to democratic theory the moral organization of the person makes. Gierke and Ferguson rejected democracy because they thought it would be immoral in circumstances of deep and persistent economic inequality. In so doing they radically questioned the premise that the substance of democracy could be reduced to a procedure.

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<sup>10</sup> Hugo Preuss, a prominent left wing legal theorist and democratic reformer in Germany instrumental to the drafting of the Weimar constitution following World War I had been Gierke's student and claimed Gierke as a mentor and major influence (see: Dreyer, 1993:23-24).

#### 4. The Great Transformation

In the previous chapter Ferguson and Gierke's attempts to defend the moral organization of the person were examined, but even at the time they were writing their views were already starting to be usurped by the growing power of the state, assisted along by economic theories such as Smith's that called on the state to provide the infrastructure for the growth of commerce and legal theories of sovereignty that suggested an unlimited state power over territorial subjects. By the close of the 19<sup>th</sup> century and into the 20<sup>th</sup> century, with the advent of the Industrial Revolution in England, the state began to actively intervene to reset the parameters of the organization of the person by taking on a more constitutive role and attempting to re-position the discourse on the public good towards the materialist pole the moral organization of the person had defined the idea of the public good against. The result is that the old and new ideas of value enter into a period of intense conflict, which will ultimately lead to a reconsideration of the extremes of both the moral and materialist positions. To gain a better understanding of the schismogenic<sup>11</sup> tension that erupted with the Industrial Revolution and leading into the Two World Wars, Karl Polanyi's "*The Great Transformation: the Political and Economic Origins of Our Time*" ([1944] 2001) will be examined in some detail.

##### 4.1 Karl Polanyi: On Economic Liberalism

Karl Polanyi has been variously referred to as an 'institutional economist' (Stanfield, 1980), a 'social historian' (Humphreys, 1969), an 'anthropologist' (Cook, 1966), and an 'economic sociologist and political economist' (Block, 2003). All of these labels fit his work to some extent but perhaps the monikers that best capture his broad interdisciplinary methodology would be 'critical' and 'institutionalist' in keeping with the mode of institutional critique and radical questioning described by Cotterrell (1987) in the introduction. An economist by training but immersed in global politics through personal circumstance,<sup>12</sup> Polanyi became interested in the development and workings of global

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<sup>11</sup> The concept of 'shismogenesis' being deployed here is loosely derived from Gregory Bateson's "Naven" where it is defined as "processes of differentiation tending towards increase of the ethological contrast" (Bateson, [1936] 1958:175) with ethos being defined as the "expression of a culturally standardized system of organization of the instincts and emotions of the individuals" (Bateson, [1936] 1958:118) in the society where the particular ethos is operative.

<sup>12</sup> Polanyi was born in Hungary but later moved to Vienna where he was editor of a financial weekly *Der Österreichische Volkswirt* and an outspoken socialist. With the rise of Hitler, Polanyi was forced to resign from his position due to his political views and relocated to England where he worked for the Workers Educational Association. Following this he relocated to take academic positions in the UK, the United States, and later to Canada. Fred Block in his introduction to Polanyi's work notes that his "...focus on the

institutions: their historical, economic, and political context, and, in particular, how differentially constituted institutions interacted with and on one another and with and on human beings. He was particularly interested in the institutions emerging from 19<sup>th</sup> century market liberalism and his most well known work “*The Great Transformation: The Political and Economic Origins of Our Time*” ([1944] 2001) (hereinafter referred to as “*TGT*”) sought to examine, from a critical institutional perspective, the breakdown of liberal society in the early 20<sup>th</sup> century. Gareth Dale, in his recent intellectual biography of Polanyi, “*Polanyi: The Limits of the Market*” (2010), summarizes: “The puzzle that Polanyi introduces is why those same institutions that had underwritten the ‘Hundred Years Peace’ of 1815 to 1914 were thereafter to preside over social breakdown and war [1914-1939]. The answer, he suggests, can be found by analyzing the nature and history of the self-regulating market system, for it was the common matrix that shaped all the institutions under discussion, including the balance of power system, the gold standard and the liberal state” (Dale 2010:48). *TGT* then is Polanyi’s attempt to chart the “deep seated institutional strain” (Polanyi [1944] 2001:140) that entered into the liberal institutional order, primarily through the attempt by the British state to create a self-regulating market system and the reaction of society at large when it became clear that the propositions on which a self-regulating market system rest are not sustainable in a humane society. To understand how, and by means of what institutions, liberal society operated and impugned upon the previously recognized motives for human action, forms of human association, and raison d’être of the state, Polanyi’s analysis of the schismatic polarization of 19<sup>th</sup> century economic liberalism in *TGT* will be explored in some depth. Before diving into the detail of the text on these matters, however, it is useful to provide from the outset a general overview of the central arguments of Polanyi’s work in order to have a better understanding of the overarching framework in which his more specific interventions are articulated.

Polanyi’s key contention in *TGT* is that the historical conditions underlying the establishment of 19<sup>th</sup> century liberal society in England (and Polanyi [1944] 2001:32 is firm that this was “England’s century”) was on the one hand the pressure created by the industrial revolution, which held out the possibility of production on a mass scale and a corresponding class of traders who wished to harness this capacity, and, on the other,

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institutions that regulate the global economy – was directly linked to Polanyi’s multiple exiles. His moves from Budapest to Vienna to England and then the United States, combined with a deep sense of moral responsibility, made Polanyi a kind of world citizen.”(Block 2001:xxi). For more on Polanyi’s background see: Polanyi-Levitt & Mendell (1987).

increasing pressure from the social classes corresponding to the factors of production (namely the laboring and landed classes) to regain control over the social conditions in which this production was to take place. The result, he suggests, was the development of various institutional mechanisms vis a vis the state that attempted to satisfy both interests and that were, in what they were seeking to do, in direct polar conflict. So, he sets out, the demand for a market system by the trading classes was facilitated by the state through the deliberate crafting of three requisite institutions: a free internal labor market, a system of free trade, and an international monetary standard (the gold standard). These institutions, Polanyi is keen to emphasize, are all required for a market system to operate: it was “everything or nothing” (Polanyi [1944] 2001:144). For a self-regulating market economy to conceivably be able to self regulate required the factors of industrial production, namely: labor, land, and capital, to each be made responsive to the regulatory mechanisms of supply, demand, and price. At the same time, the institution of markets in labor, land, and money were bound to, and did inevitably cause, mass social dislocation in a society that prior to the 19<sup>th</sup> Century had largely been organized by traditional ties of parish/village life, aristocratic privilege, and subsistence agriculture. As such, the political demands of the classes impacted by the imposition of the primary institutions affiliated to the market system also required satiating by the state to prevent social unrest. This in turn led to the state, Polanyi asserts, eventually accepting the necessity of intervention to mitigate at least some of the social consequences of unrestricted market development: including the passage of various pieces of protective social legislation, the pursuit of protective trade policies, and the development of central banking to regulate the domestic money supply. Further, as a final concession, and after a deliberate period of sustained reluctance,<sup>13</sup> the state capitulated to the growing demand to grant broader rights of suffrage to the laboring classes.

As Polanyi points out, however, these protective measures, while entirely necessary and indeed minimal for human survival, were also entirely incommensurable with the idea of a

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<sup>13</sup> The *Parliamentary Reform Act* (1832) denied the vote too much of the working classes. The Chartist Movement (1838-1848) attempted to challenge this legislation and institute popular suffrage, however it was held back by the English middle classes and reform of the laws governing suffrage did not begin to change in England until the *Reform Act* of 1867, and even then only partially. Polanyi notes in this respect: “The uncompromising rigidity with which such an extension of the vote was rejected by the Reformed Parliament for a third of a century, the use of force in view of the mass support that was manifest for the Charter, the abhorrence in which the liberals of the 1840s held the idea of popular government all prove that the concept of democracy was foreign to the English middle classes. Only when the working class had accepted the principles of a capitalist economy and the trade unions had made the smooth running of industry their chief concern did the middle class concede the vote to the better situated workers; that is, long after the Chartist Movement had subsided and it had become certain that the workers would not try to use the franchise in the service of any ideas of their own” (Polanyi [1944] 2001:180).

self-regulating market. They directly, and by design, interfered with the price mechanism in respect of every element of production and the introduction of broader based suffrage destabilized the very idea of the economy as an autonomous sphere that could be insulated as far as possible from political action. A society premised on economic self-regulation could not coexist with a society committed to the protection of the factors of production without institutional collapse of the order built on this precarious compromise. The relationship between these rival normative ideas was intransitive and any reflexivity between them vulnerable to the hazards of a strange loop taking hold. And this is, in effect, what Polanyi argues occurred.

The nation state then of 19<sup>th</sup> century liberal Britain (dominated by England), Polanyi argues, became deadlocked attempting to uphold two ideological approaches to governance, *laissez faire* and protectionist, which were theoretically incompatible. As a result, by trying to combine both philosophies, the state ended up by institutional decree establishing a situation that was inherently unstable. Still, Polanyi should not be misread to suggest that the state should not have intervened in the market as if not intervening in the market was an option. It was not the interventions by the state to protect the population that were the source of the disorder. Instead, Polanyi submits, it was the state's dogged attachment to the ideology of the self-regulating market in spite of the evidence that it could not be made to work that was at the root of the catastrophe. Had the state not intervened at all in the market, unregulated markets in labor, land, and money would ultimately have destroyed society; compromising human life, food production, and the money supply – the very elements of production required for industrial enterprise. Yet, instead of recognizing that the idea of a self-regulating market or *laissez faire* simply would not materialize,<sup>14</sup> the British state throughout the 19<sup>th</sup> Century continued to hold on to the myth that it might, failing to reject the core institutions of market liberalism while systematically undermining their core propositions.

Further, while the state recognized the need to intervene in Britain, it simultaneously began to turn its attention to market experimentation outwards, allowing the unrestricted exploitation of colonies abroad. In doing so, the internal instability the state was seeking to contain domestically started to take shape internationally. Britain's colonies began rebelling against British rule (quite literally represented, in some instances, by profit-based

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<sup>14</sup> Economist Joseph Stiglitz, for instance, in a foreword to Polanyi's *TGT* text notes that: "Today, there is no respectable intellectual support for the proposition that markets, by themselves, lead to efficient, let alone equitable outcomes" (Stiglitz, 2001:viii).

corporations such as the British East India Company) and outside of the British colonies, a regional race by the other European powers to catch-up to Britain despite uneven conditions of industrial development began to unfold, jeopardizing the precarious balance of power system. What was truly remarkable about this period in history then, Polanyi muses, is not that the state of Britain engaged in some limited forms of social protection of the domestic population. What is remarkable, he argues, is that the state of Britain did not renounce the idea of the market society entirely and continued to deliberately pursue a free-market economic strategy, both internally and externally, despite the surge of widespread disruption.<sup>15</sup>

It is the antithetical character of the modern liberal nation state as represented by Britain (with England at the helm) then that is at the heart of Polanyi's analysis, even if it is sometimes a silent partner to his institutional critique of the market. The social dislocation incumbent in the transition to a market society had required a strong centralizing authority to achieve and the institution responsible for orchestrating and maintaining this shift was the state of Britain. The unprecedented exertion of state authority, the disruption to the traditions of English society, and the social dislocation of huge swathes of the population, formed an eventually implacable demand for the authority of the state to be legitimated through the extension of suffrage and recognition of the need to take on a welfare function in tandem with market expansion. Further, as the British state began to grow in power and expand its territories abroad, largely in search of new markets that could be more easily exploited with less internal repercussions, it also created regional tensions in the precarious balance of power in Europe and, ultimately, an aggressive form of nationalism by the threatened European powers. This unstable regional situation was held together, Polanyi asserts, for a surprisingly long period due almost entirely to the intervention of an international capitalist class (and the corresponding institution of *haute finance*)<sup>16</sup> who

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<sup>15</sup> Silver and Arrighi have interjected here that this was perhaps less inexplicable than Polanyi allows, noting: "The main reason the British parliament and the British public at large were converted to the principles of free trade, and doggedly stuck to them, is that Britain was better positioned than any other country to "internalize" the benefits and "externalize" the costs of a self-regulating market on a world scale. This positional advantage rested on British primacy in three interconnected spheres: industry, finance, and empire building. Although Polanyi does refer occasionally to these three kinds of primacy, he misses their joint action in ensuring that Britain would gain rather than lose from practicing the liberal creed" (Silver & Arrighi 2003:335).

<sup>16</sup> Polanyi describes *haute finance* as an institution *sui generis* to the market liberal period of history that "...functioned as a permanent agency of the most elastic kind. Independent of single governments, even of the most powerful, it was in touch with all; independent of the central banks, even of the Bank of England, it was closely connected with them" (Polanyi [1944] 2001:10). Made up of a class of international financiers, Polanyi cites the Rothschilds as an example, who despite being "...anything but pacifists; they had made their fortune in the financing of wars; they were impervious to moral consideration; they had no objection to any number of minor, short, or localized wars. But their business would be impaired if a general war

were invested in continued market expansion without the disruption of a major conflict. But, eventually, the struggle against the power of the British state to impose her will, both internally and externally, would prove the maintenance of England's liberal vision of the global market society unsustainable. In the end, Polanyi argues: "Power had precedence over profit" (Polanyi [1944] 2001:12).

What the British state failed to readily understand at the time, Polanyi maintains, is that there is a significant difference between the operation of markets that are subordinated to the needs of society and a 'market system', which aims to position the market as society's dominant organizational principle. The latter, he argues, is intrinsically impossible. The idea that the economy could ever be self-regulating on a national and international scale and operate unencumbered by national and international politics when a market system by definition involved a threat to human populations, territorial organization, and financial stability, was a politically dangerous, utopian, and ultimately ruinous liberal fantasy. Polanyi asserts: "Since the working of such markets threatens to destroy society, the self-preserving action of the community...[will] prevent their establishment or to interfere with their free functioning, once established" (Polanyi [1944] 2001:210). It was always then, in Polanyi's view, a question of when the liberal strategy of the free market would reach the point of rupture, not if the breakdown could be prevented (without abandoning the strategy).

The tendency of more contemporary academic work examining Polanyi's contentions in *TGT* is to focus on his latter claim of the inevitability of liberalism's collapse and specifically the key concepts he utilizes to advance it: the transformation of labor, land, and money into 'fictional commodities', the 'embedded' nature of institutions, and the resistance or 'double movement' inevitably generated by any attempt to disembed the economic sphere from the social-political sphere. While these will all be touched upon in the elaboration of Polanyi's text below, as I am primarily interested in Polanyi's work for the historical context he provides to the breakdown in the normative organization of society, I will be focusing instead on what I will suggest are three core shifts he outlines as incidental to the attempted expansion from market to market system: firstly a shift in the motive for human economic action from subsistence to gain, secondly a shift in the forms of political solidarity from fellowship to material interest, and lastly a shift in the modality

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between the Great Powers should interfere with the monetary foundations of the system. By the logic of facts it fell to them to maintain the requisites of general peace in the midst of the revolutionary transformation to which the peoples of the planet were subject" (Polanyi [1944] 2001:11).

of governance from pluralism to centralization. The first two of these shifts, the idea of the person and the basis of social action, I will suggest, represent an intensification or further polarization of the controversies that engaged the Scottish Enlightenment thinkers and the German legal historical school. The latter shift, however, in repositioning the state as a constitutive as opposed to a facilitative normative authority marks the beginning of a change that would progressively reduce legitimate political authority in Western society to ultimate identification with the notion of sovereignty.

#### **4.1.1 Persons: Morality and the Machine**

A too rarely discussed element of Polanyi's account of the great transformation of English society is his emphasis on the way the core liberal economic institutions when taken together assumed a motive for human action that was entirely unique to the organization of society by the market. To institute a market economy centered on the idea of self-regulation by price as opposed to broader social welfare, he argues, required the construction of human beings as motivated by one motive and one motive alone: monetary gain. Polanyi asserts: "Nineteenth century civilization alone was economic in a different and distinctive sense, for it chose to base itself on a motive only rarely acknowledged as valid in the history of human societies, and certainly never before raised to the level of a justification of action and behavior in everyday life, namely gain. The self-regulating market system was uniquely derived from this principle" (Polanyi [1944] 2001:31). Polanyi observes that this was not gain conceived of as an attempt to gain in social stature or social position through the pursuit of material resources; instead he suggests the gain motive incumbent in market organization was the individual pursuit of material resources to gain in order to have gained, without more. He argues that this is explicitly contemplated when one attempts to generalize the abstract ideal individual of market or economic logic as the model human being by which an entire society ought to be organized in the service of. He explains: "A market economy is an economic system controlled, regulated, and directed by market prices; order in the production and distribution of goods is entrusted to this self-regulating mechanism. An economy of this kind derives from the expectation that human beings behave in such a way as to achieve maximum money gains" (Polanyi [1944] 2001:71). The abstract *homo economicus* of economic models then would have to be made flesh if the market society's self-regulating mechanisms of supply, demand, and price, were to function in the way the proponents of market liberalism asserted.

This then was not gain as a mode of self-interest in the same way, for instance, as Adam Smith had conceived of the motives of ‘economic man’ in the 18<sup>th</sup> century. Polanyi, like Ferguson before him, is intensely critical of Smith’s theory of the logic of the ‘invisible hand’ for its abstraction of exchange as in and of itself the key motive behind human social behavior. Instead, Polanyi argues, the propensity to exchange is an incidental motivation subordinate to the demands of intermediating social relationships, which condition its practice. It was, he argues, an empirical mistake on Smith’s part to have equated the wide spread presence of a division of labor in society with the assumption of a totalizing intrinsic human desire to engage in bartering and exchange. Although Polanyi agrees with Smith that some division of labor in society was to be expected insofar as it springs from “inherent differences” (Polanyi [1944] 2001:46) between people, Polanyi notes that the division of labor is common to a number of human societies that did not exhibit bargaining behavior and, as such, for Smith to assert that it derived from an inherent human motivation to bargain, was “apocryphal” (Polanyi [1944] 2001:46). Here Polanyi supports his assertions by drawing on the anthropological work of Marcel Mauss and Bronislaw Malinowski (amongst others) on the indigenous societies of the Trobriand Islands<sup>17</sup> where they observed a pronounced division of labor operated alongside strong social prohibitions against bargaining. Drawing on the anthropological research available to him, Polanyi argues: “The outstanding discovery of recent historical and anthropological research is that man’s economy, as a rule, is submerged in his social relationships. He does not act so as to safeguard his individual interest in the possession of material goods; he acts so as to safeguard his social standing, his social claims, his social assets. He values material goods only insofar as they serve this end...the economic system will be run on non-economic motives” (Polanyi [1944] 2001:48).

Still Polanyi viewed Smith as a transitory figure, not the high priest of 19<sup>th</sup> century liberalism as is sometimes asserted. He capitulates that it was Smith’s economic model of man focused on the exchange motive that may to some extent have made the belief in *homo economicus* as an abstraction (and indeed the market society) possible, stating in this regard:

The market pattern, on the other hand, being related to a peculiar motive of its own, the motive of truck or barter, is capable of creating a specific institution, namely the

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<sup>17</sup> See: Marcel Mauss “*The Gift*” ([1950] 2002) and Bronislaw Malinowski “*Argonauts of the Western Pacific*” ([1922] 2007).

market. Ultimately, that is why the control of the economic system by the market is of overwhelming consequence to the whole organization of society: it means no less than the running of society as an adjunct to the market. Instead of economy being embedded in social relations, social relations are embedded in the economic system. The vital importance of the economic factor to the existence of society precludes any other result. For once the economic system is organized in separate institutions, based on specific motives and conferring a special status, society must be shaped in such a manner as to allow that system to function according to its own laws. This is the meaning of the familiar assertion that a market economy can only function in a market society (Polanyi [1944] 2001:60).

However, Polanyi also recognizes that gain for the sake of gain was not in Smith's contemplation when he was proposing his theory of society as premised on the human propensity to exchange. Recall that while Smith was certainly of the view that the primary motive of human action was (and should be) self-interested exchange, Smith had always contextualized this as an interest in exchange that emanated from the division of labor in society and the desire for social recognition within a society constituted by this principle (however ill-founded). Further, while Smith perceived exchange as the primary motive of human behavior he did not suggest that human beings were not driven by other motives as well, specifically acknowledging that economic motives unfolded in tandem with what he referred to as 'moral sentiments' (Smith [1759] 1982). In fact, as discussed previously, Smith was careful to suggest that not every aspect of society would be suited to market organization and, as such, he explicitly accepted that certain areas of life were too important to be left to market provision.<sup>18</sup> Polanyi comments: "wealth was to him merely an aspect of the life of the community, to the purposes of which it remained subordinate; it was an appurtenance of the nations struggling for survival in history and it could not be disassociated with them...hence it was only within a given political framework that he deemed it possible to formulate the question of wealth, by which he for one meant the material welfare of 'the great body of the people'" (Polanyi [1944] 2001:116).

Smith, Polanyi acknowledges, still came from a scholastic tradition that had understood human action as being directed towards primarily social objects even if the objects Smith proposed were suspect. Dale, discussing Polanyi's conflicted view of Smith in this regard, surmises: "Rather, in the spirit of the Scottish Historical School, he conceives of man as a social and moral being, a member of the civic order of family, state and society. But if in this sense he reflected the ideational fabric of the mercantilist age, Smith also sharpened the knife that was shortly to slice it to shreds. In discovering the market's role as the pivot

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<sup>18</sup> See discussion on Smith's view on public education as discussed in Chapter 4.

of economic life and as the spur to competition, and in originating the myth of man's innate propensity to barter, truck and exchange, he gave a decisive impetus to a conceptualization of society as atomistic and driven by self-interested 'Economic Man'" (Dale 2010:53). So Smith, in Polanyi's view, may not have *intended* the view of man motivated by gain assumed in the transformation to market society that emerged with 19<sup>th</sup> century market-liberalism; there was, he writes: "no intimation in his work that the economic interests of the capitalists laid down the law to society; no intimation that they were the secular spokesman of the divine providence which governed the economic world as a separate entity" (Polanyi [1944] 2001:117); his theory had, however, as an unintended consequence, given to the capitalist proponents of market society a specious moral vernacular of self-interest as best-interest divorced from the more anthropologically nuanced views articulated by (his sometimes rival) Ferguson.

On its own, Smith's theory of 'economic man' may not have been enough to spur the collective effort on the part of the state required to establish the institutions of the market society but for the contingency of a subsequent development: the invention of the machine. Polanyi remarks: "The step which makes isolated markets into a market economy, regulated markets into a self regulating market...was not the result of any inherent tendency of markets towards excrescence, but rather the effect of highly artificial stimulants administered to the body social in order to meet a situation which was created by the no less artificial phenomenon of the machine" (Polanyi [1944] 2001:60). Dale recounts that Richard Tawney, commenting on a draft of *TGT*, suggested that Polanyi here placed too much emphasis on the invention of the machine, with the corresponding criticism that his text was in danger of being read as technologically determinist (Dale 2010:84). But, this is not really what Polanyi was suggesting. The invention and widespread use of the machine was, in Polanyi's view, simply a social fact of 19<sup>th</sup> century life and as might be expected the owners of said machines desired to harness their full productive capacity. He does not suggest, however, that this fact alone determined the development of a market or materialist form of organization at the rate and through the institutions, which it would ultimately come to be developed. In Polanyi's view, the strategy of a market form of social organization was deliberately adopted, over other alternatives, emphatically not as a spontaneous outcome of the machine but rather as the result of the highly contingent circumstance of the machine coming of age at the same time as the discipline of neo-classical economics (inspired by but significantly departing from Smith) was also gathering momentum.

Substituting an abstract ideal individual version of economic man for Smith's more socially situated and complex one; in the neo-classical economic view, all forms of human behavior could be analyzed: "through a formal choice-theoretic framework built upon the postulate of rational calculating individuals – where 'rational' is understood as acting to deploy resources so as to maximize desired outcomes in a given situation. The transhistorical scope of this proposition and the conceptual tools derived from it together imply that economic theory applies universally ergo no general economic history is necessary" (Dale 2010:90). If Polanyi was conflicted by Smith he was clear that he deplored the neo-classical perspective for what he viewed as its conscious dismissal of the evidence of economic variation collected by sociologists and anthropologists.<sup>19</sup> In fact, he went so far as to express his view through a poem "*Model of a Classical Economist*" unearthed by Dale in Polanyi's archives:

I am the very model of a classical economist;  
 I've information on the subject making me an optimist  
 I know the pricing system, so I ignore the historical  
 From Paleolithic to Neolithic in order categorical.  
 I'm very well acquainted though with matters mathematical;  
 For fuller understanding I'll just supply the quadratical.  
 Any problem is answered by my marginal analysis  
 When you grant my assumption of a 'ceteris paribus'!  
 (Dale: 2010:111).

And it is this final assumption, 'ceteris paribus' translating to 'all else being the same', that Polanyi questions most aggressively in *TGT* through the analysis of what are generally referred to as the 'Old Poor Laws', or as Polanyi tends to refers to them as: Speenhamland. The Old Poor Laws were essentially a form of legislated relief in England dating from 1795 until their reform through the passage of the *Poor Law Reform Act* in 1834 (generally referred to as the 'New Poor Laws'). The Old Poor Laws had originally been passed as a means to alleviate the dislocation effected by the English enclosures movement<sup>20</sup> that saw large sections of the population forced to seek out new places to live and subsist. As a result, the state guaranteed to the poor, under the administration of the parish, a form of support that in operation effectively protected the newly displaced population against

<sup>19</sup> Polanyi is methodologically in this respect considered a 'substantivist', a view he develops in more detail in the essay "*Anthropology and Economic Theory*" (1959). See also S.C. Humphreys (1969) for a summary of some of Polanyi's contributions to economic anthropology in this area.

<sup>20</sup> The English enclosures movement was a move to restrict the common use of land for arable farming as had been practiced by the open field system by fencing off segments of the land and declaring legal ownership in the invented title holder as opposed to subject to common rights. For a more extensive discussion of the enclosures movement see: EP Thompson "*The Making of the English Working Class*" (1963).

hunger by ensuring that no matter what a person was able to earn through securing a wage (or not) that they would be provided with at least enough to be able to eat, the rate provided being customarily tied to the price of bread (referred to as the Speenhamland scale, after the district in England where the measure was adopted). Polanyi asserts that what the Old Poor Laws effectively represented then was the implementation of a “nascent right to live” (Polanyi [1944] 2001:82) by the state through a redistribution of material resources to protect the welfare of a population in transition. The result, however, of the Old Poor Laws was, Polanyi observes, also in effect to prevent the very development of the labor market that the enclosures were meant to incentivize as employers were not inclined to pay much in wages when wages were effectively being subsidized by the state. Laborers then, in turn, saw little point to working for a wage and, although they continued to do so, they did not do so with much urgency.

With hindsight, Polanyi notes, it is not surprising that this situation developed as it must be recalled that at the same time the Old Poor Laws were in effect, laborers were prevented from organizing into trade unions and asserting their bargaining power collectively over wages by the Anti-Combination Laws passed as a response to labor unrest following the land enclosures. In conjunction with the Old Poor Law, however, the Anti-Combination Laws were effectively serving instead to protect employers (or capital) from having to bargain for the labor they employed, counterproductively preventing the establishment of the market they were designed to assist. Polanyi notes: “If laborers had been free to combine for the furtherance of their interests, the allowance system might, of course, have had a contrary effect on standard wages: for trade union action would have been greatly helped by the relief of the unemployed implied in so liberal an administration of the Poor Law” (Polanyi [1944] 2010:85). However, Polanyi continues: “In conjunction with the Anti-Combination Laws, which were not revoked for another quarter century, Speenhamland led to the ironic result that the financially implemented ‘right to live’ eventually ruined the people whom it was ostensibly designed to succor” (Polanyi [1944] 2010:85).

In response, the state, as opposed to repealing the Anti-Combination Laws to allow trade unions to form (they were not finally repealed until 1871 with the passage of the *Trade Union Act*), opted instead to introduce radical changes to the system of poor relief through the *Poor Law Reform Act* (1834). The New Poor Laws represented the persuasion of the state by the arguments of neoclassical economists that the only way to alleviate the

situation was to introduce scarcity into the equation as, ‘all else being the same’, if the laboring population was afraid of going hungry they would be more willing to work and employers in need of a work force would be more willing to pay to ensure the workforce was fed. In effect then, under the New Poor Laws relief from hunger would no longer be guaranteed by the state. Administration of the Poor Law was removed from local parishes and placed under the jurisdiction of centralized Poor Law authorities. Aid in wages and outdoor relief was discontinued, making the only way to obtain relief contingent on voluntarily submitting to a workhouse that, Polanyi offers, “was deliberately made into a place of horror. The workhouse was invested with a stigma; to stay in it was made into a psychological and moral torture...”(Polanyi [1944] 2001:106). In popular parlance at the time, he adds, they were simply referred to as “jails without guilt” (Polanyi [1944] 2001:121). In one radical measure then the state, Polanyi argues, moved from a position of institutionally securing a right to live to adopting a policy that was the equivalent of the persecution of the innocent. He describes the impact of the legislation as follows: “Never perhaps in all modern history has a more ruthless act of social reform been perpetrated; it crushed multitudes of lives while merely pretending to provide a criterion of genuine destitution in the workhouse test” (Polanyi [1944] 2001:86).

But, Polanyi capitulates, it worked to some extent. Once state relief of hunger was withdrawn from a sizeable portion of the impoverished population, a competitive labor market did begin to develop on the back of the New Poor Law grounded in the artificial scarcity created through the deliberate withholding of food and other forms of welfare. But the problem, Polanyi suggests, is that liberal neoclassical economists then held up this result as proof that their models and the market logic derived from them worked; as if the scarcity the New Poor Law had introduced was the natural order and the gradual improvement in wages evidence that the state should not intervene in market redistribution. But, Polanyi interjects, this interpretation entirely ignored the history of the Speenhamland measures (or Old Poor Laws), which had only been introduced because of the dislocation created by the enclosures movement that in the process of trying to create a market for labor had removed the poor from the land they had been previously been able to subsist upon. The relief provided under the Old Poor Laws was the positive side of the Anti-Combination Laws, introduced as a way to prevent the working class from revolting. Scarcity then, Polanyi argues, was not necessarily the natural order of things had the state not intervened. In fact, he argues, it was through the intervention of the state to establish a market - not through the interference of the state in the market – that the scarcity of land

for the poor to subsist off of had been induced in the first place. Thus, for economists to say ‘all else being the same’, is in effect to ignore everything that had proceeded the Speenhamland situation and fail to recognize that it was the artificial imposition of scarcity to establish the market, and not the natural order of scarcity the market remedied, which had led to the twin conditions of mass destitution and high levels of state funded relief. The assumption could not hold. The temporal and social stasis of the neoclassical economic model, assuming an unchanging environment and a socially abstracted individual motivated by gain, left far too much out of the equation that would otherwise, in Polanyi’s view, provide a better understanding of the historical context of human motivation and corresponding socio-economic behavior.

Polanyi’s positing of the Speenhamland scale and its revocation as the impetus for the development of labor markets on a national scale is one of the more criticized points of historical detail in the text. Critics charge that Polanyi’s analysis overlooked rural agricultural labor, which had largely already formed into labor markets prior to the implementation of Speenhamland and, as such, was not impacted by the scale of relief and its revocation. On this point, Dale points to a letter that Polanyi received from his friend (and one of the pluralists associated with the EPP school to be discussed in Chapter 7) G.D.H. Cole who wrote: “I still think you immensely over-stress the importance of Speenhamland, with the result that you spoil...part of a really excellent book by giving the impression of having a bee in your bonnet” (Dale 2010:85). Cole, as quoted by Dale, will also later remark in a note that Polanyi’s assertion that the labor market developed out of Speenhamland was a “monstrous exaggeration” (Dale 2010:85). Further, Dale notes that other critics charge that Polanyi underestimates the extent of market based policy measures and market mentality generally that had already existed under mercantilism. As such, they argue, the transformation to a market society, while an intensification of mercantilist policies, was not as abrupt as Polanyi tends to suggest (see: Dale, 2010:80-83 for a discussion of Richard Tawney and Joyce Appleby’s work in this area).

However, even if the rate of relief encapsulated by the specific measure of the Speenhamland scale was not as significant across England as Polanyi originally contended and the transition from mercantilism to the liberal-market society of the 19<sup>th</sup> Century somewhat less abrupt, what remains largely uncontested in the literature is that the change in the administration of relief implemented by the *Poor Law Reform Act* of 1834 (abolishing not only the Speenhamland scale but also significantly restricting various other

forms of assistance) was indeed a radical shift in state policy. Polanyi notes here that with the implementation of the New Poor Law a form of political economy started to emerge in England that explicitly started to approach “human community from the animal side” (Polanyi [1944] 2001:119). What prior to this point, Polanyi argues, had largely remained confined within the discipline of economics: “...economic society was founded on the grim realities of Nature; if man disobeyed the laws which ruled that society, the fell executioner would strangle the offspring of the improvident. The laws of a competitive society were not human laws” (Polanyi [1944] 2001:131) began to become public policy. With the transition to the New Poor Law and the direct application of this economic vernacular into the formulation of laws passed by the state, he contends “human society was now in danger of being shifted to foundations utterly foreign to the moral world of which the body politic hitherto had formed a part” (Polanyi [1944] 2001:121). In a sense then Polanyi modifies Ferguson’s thesis that political man could not be separated from economic man to some degree. Political man and economic man could attempt to be separated, but only through the sustained and deliberate use of state enforced starvation. Even then, this totalizing cognitive separation of economics from society could not in practice be applied to the body politic for very long without generating resistance.

#### **4.1.2 Associations: Human Fellowship and Material Interest**

To establish the liberal ideology of the ‘free’ market society, at minimum, Polanyi asserts, it required the establishment of markets in the inputs necessary for the market’s self-regulation mechanism to function. These inputs, as discussed previously, were land, labor, and money, or, in other words, the factors of production. Polanyi elaborates: “Production is the interaction of man and nature; if this process is to be organized through a self-regulating mechanism of barter and exchange, then man and nature must be brought into its orbit; they must be subject to supply and demand, that is, be dealt with as commodities, as goods produced for sale” (Polanyi [1944] 2010:136). However, Polanyi argues, to include labor and land or, in other words, human beings and natural surroundings, in the market mechanism “means to subordinate the substance of society itself to the laws of the markets” (Polanyi [1944] 2010:137). As such, he asserts, the “self regulating market demands nothing less than the institutional separation of society into an economic and political sphere” (Polanyi [1944] 2001:74). But, Polanyi notes, there is one overwhelming and intractable problem with the postulate on which this institutional separation relies: land, labor and money were not actually objects “produced for sale” (Polanyi [1944]

2001:76). So, he reckons, human beings, the natural environment, and purchasing power, are not actually manufactured products and thus for the ideology of market liberalism to describe and indeed treat them as such was to engage in an ontological fiction; but a fiction absolutely required in order for the market mechanism to function. He summarizes: "...labor, land and money had to be transformed into commodities in order to keep production going. They could, of course, not be really transformed into commodities, as actually they were not produced for sale on the market. But the fiction of their being so produced became the organizing principle of society" (Polanyi [1944] 2001:79).

Polanyi wagers that as soon as you are dealing in ontological fictions, the construction of which impact not only on people's means of survival but people's entire way of life and being, you are immediately by the very exercise dealing in a form of politics. As such, large sections of society, Polanyi suggests, resisted viewing themselves, or their environment, or their professions, or, indeed, their purchasing power or capital, in the way a market orientated society would require. Impacted classes; primarily the landed aristocracy, urban laborers (in a variety of occupations), farmers, and domestic small business were particularly vulnerable to being either in their persons (in the case of labor) and their way of life (in the case of territorial organizations and small business capital) being thought of politically and economically as a commodity. Polanyi states: "Almost invariably professional status, safety and security, the form of a man's life, the breadth of his existence, the stability of his environment were in question" (Polanyi [1944] 2001:161). The vehicle then by which various social interests attempted to confront their fictional characterization as interchangeable objects of exchange was by lobbying the state to put in place social regulation, which generally took the form of protective legislation (land laws, factory laws, social welfare laws, etc.) and protectionist measures in economic policy (agricultural trade tariffs, public monopolies, central banking, etc.). This push and pull on the state – or the pressure to move towards market expansion on the one hand and social protection on the other - is what Polanyi refers to as the 'double movement' or, in other words, the schismogenic dynamic that characterized 19<sup>th</sup> century market-liberalism, which inevitably became unstable and unsustainable. Polanyi in an oft-quoted passage summarizes as follows:

Social history in the nineteenth century was thus the result of a double movement: the extension of the market organization in respect to genuine commodities was accompanied by its restriction in respect to fictitious ones. While on the one hand markets spread all over the face of the globe and the amount of goods involved grew to unbelievable dimensions, on the other hand a network of measures and policies

was integrated into powerful institutions designed to check the action of the market relative to labor, land, and money. While the organization of world commodity markets, world capital markets, and world currency markets under the aegis of the gold standard gave an unparalleled momentum to the mechanism of the markets, a deep-seated movement sprang into being to resist the pernicious effects of a market-controlled economy. Society protected itself against the perils inherent in a self-regulating market system – this was the one comprehensive feature in the history of the age (Polanyi [1944] 2001:79-80).

The aim of market expansion and the aim of social protection, Polanyi asserts, are incommensurable. As long as the class interests favoring one or the other are significantly stronger, as he argues was the case for most of the 19<sup>th</sup> Century in respect of the capture of the state by the material interests of the industrial trading class, then he acquiesces that some minor concessions to prevent the unrest of the politically unrepresented can be a supportive measure. Dale too notes in this respect that some forms of protection can actually serve to provide “necessary supports of the market system” (Dale 2010:75) as it checks the markets destructive tendencies. But, when both movements begin to gain a measure of political and economic strength, as Polanyi asserts began to occur through the extension of broader suffrage to the working class and the development of more aggressive forms of associationalism in the labor movement and territorial organizations, then a situation of political deadlock begins to emerge.

The groups conceived of as commodities under market logic then, he argues, not only began to resist and actively seek protection from the state to safeguard their own corporate interests, but, he notes, they also started to some extent to join forces if only in a debate over their general right to exist as social and, indeed, moral entities. So, while Polanyi observes that the debate they introduced and the concessions they demanded had an economic stake: “The monetary importance of some typical interventions, such as customs, tariffs, or workmen’s compensation should in no way be minimized” (Polanyi [1944] 2001:161), he conjectures, “But even where money values were involved, they were secondary to other interests...in these cases non-monetary interests were inseparable from monetary ones” (Polanyi [1944] 2001:161). The overriding interests of the groups that began to act against the logic of the market were, Polanyi argues, social and cultural. It is an often misunderstood part of the text, but Polanyi, perhaps anticipating criticism, suggests that if there is difficulty understanding the basic proposition that people are invested socially and culturally in the society they live in and will, if pushed, act to protect the interests of (and in) society, this is itself the result of a “warped vision of social and political history” (Polanyi [1944] 2001:162) that he contends emerges as much from Marx

as from Ricardo. People do not, he argues, only act to protect their own material position. Once, he argues, “we are rid of the obsession that only sectional interests, never general interests can become effective, as well as of the twin prejudice of restricting the interests of human groups to their monetary income, the breadth and comprehensiveness of the protectionist movement lose their mystery” (Polanyi [1944] 2001:161). He surmises: “Precisely because not the economic but the social interests of different cross sections of the population were threatened by the market, persons belonging to various economic strata unconsciously joined forces to meet the danger” (Polanyi [1944] 2001:162).

Polanyi asserts that what was typical of the associational demands that started to emerge is that they started to couch their appeal in the language of a public or general interest, whether they were expressed to protect: “health and homesteads, public amenities and libraries, factory conditions and social insurance...public utilities, education, transportation, and numberless other matters” (Polanyi [1944] 2001:161). Undertaken in order to counter the demand for market expansion guided by the purely monetary interests of the trading classes, it was, he argues, a politically powerful move. Polanyi states: “Monetary interests are necessarily voiced solely by the persons to whom they pertain – other interests have a wider constituency” (Polanyi [1944] 2001:161). Further, the non-monetary interests voiced by the forces in society seeking preservation were, he contends: “Capable of representation by any type of territorial or functional association such as churches, townships, fraternal lodges, clubs, trade unions, or, most commonly political parties based on broad principles of adherence” (Polanyi [1944] 2001:161). The broad appeals they made were, however, largely directed at the state as: “no purely monetary definition of interests can leave room for that vital need for social protection, the representation of which commonly falls to the general interests of the community – government” (Polanyi [1944] 2001:161).

Polanyi’s arguments here are interesting as he suggests that implicit to the emergence of the countermovement contesting market-liberalism in the English politics of the 19th century was a broad associational presence in England of what Gierke had explicitly identified as typical *Genossenschaft* or fellowship institutions. Further, in his positing of a distinction between the narrow monetary interests represented by the trading class and the more general or social interests represented by the classes impacted by this exclusive pursuit there are also strong echoes with Gierke’s notion of the unified co-operative interests represented by the corporate groups he identifies as fellowship institutions and the

singular monological interests of corporate groups he identifies with lordship institutions. On this point, both Polanyi and Gierke can be seen to reject a purely materialist history or class based theory of political struggle in favor of a more contingent and organic social view of class. Polanyi states the matter thusly:

...class interests offer only a limited explanation of long run movements in society. The fate of classes is more frequently determined by the needs of society than the fate of society is determined by the needs of classes. Given a definite structure of society, the class theory works; but what if that structure itself undergoes a change? A class that has become functionless may disintegrate and be supplanted overnight by a new class or classes. Also, the chances of classes in a struggle will depend upon their ability to win support from outside their own membership, which again will depend upon their fulfillment of tasks set by interests wider than their own. Thus neither the birth nor death of classes, neither their aims nor the degree to which they attain them; neither their co-operations nor their antagonisms can be understood apart from the interests of society, given its situation as a whole (Polanyi [1944] 2001:159).

Up to this point Polanyi and Gierke could be said to agree. However, despite their facial similarity they actually differ on what they then propose drives the change in society that conditions how political struggle unfolds. For Polanyi, changes to the structure of society emanate from external events and the reaction of society to these events. He states: "Now, this situation is created, as a rule, by external causes, such as a change in climate, or the yield of crops, a new foe, a new weapon used by an old foe, the emergence of new communal ends, or, for that matter, the discovery of new methods of achieving traditional ends. To such a total situation must sectional interests be ultimately related if their function in social development is to become clear" (Polanyi [1944] 2001:159). Polanyi's view then is that the form of political struggle in a given social constellation will always be contingent on an external antagonism. In 19<sup>th</sup> century society he contends that external antagonism was the attempt to establish a free-market (itself induced by the contingent circumstance of neo-classical economics and the invention of the machine) and as such the form of struggle took the form of monetary interests in contest with general interests rooted in the associations of people threatened by market institutions.

Gierke here has a somewhat different perspective. Like Polanyi, he agrees that the form of struggle in the 19<sup>th</sup> century presents as a contest between narrow and general interests. However, for Gierke, the form of this struggle is not contingent on an external antagonism but internal to the society at issue, the dominance of one principle or another depending on what constitutional principle dominates the organization of the forms of associations and

institutions therein. This constitutional structure does not necessarily materialize from an external event (although it might) but from the differential positions of the people of the society at issue and the political balance of force between them. The actors or classes on either side of the struggle over the constitutional structure may change but the internal dialectic between organizing principles favoring lordship (freedom) and fellowship (unity) is constant, the constitutional form of society (and the struggle to change it) at any given moment defined by the dominance of one or the other principle or a synthesis achieved between them.

Resolving this theoretical difference between Polanyi and Gierke is unnecessary at this juncture, but it does help to keep Polanyi's view in mind in the evaluation of some of the criticisms made of his work on this score. For instance, there is a tendency to want to superimpose Polanyi's discussion of the double movement as it appeared in the 19<sup>th</sup> Century onto the contemporary conditions of the 20<sup>th</sup> century and that Polanyi is somehow "wrong" (Hann & Hart 2009:4) if this does not work. But, on Polanyi's own admission external circumstances will change the structure of society and he in no way posits this would be possible. His analysis was always meant to be situated and historically specific to the conditions of the 19<sup>th</sup> century. Similarly, attempts to extend Polanyi's conceptual framework by modifying it beyond recognition to apply to 20<sup>th</sup> century conditions are also misguided for the same reason.<sup>21</sup> This does not necessarily mean, however, that we cannot think about Polanyi's observations and analysis of 19<sup>th</sup> century market-liberal society in Britain as a way to think about contemporary conditions as long as these caveats are kept in mind. It is valid, for instance, to ask whether or not the double movement he identifies as constitutive of 19<sup>th</sup> century dynamics is more generalizable than Polanyi claims (and as Gierke might contend), so long as it is recognized that Polanyi did not build this assumption into his frame of reference.

One recent attempt to do something like this for example has been the work of Beverly Silver and Giovanni Arrighi (2003). While they appreciate Polanyi on his own terms, they observe that the public interest Polanyi posits as being mobilized and represented by territorial associations of varying economic strata against the market order of the 19<sup>th</sup> century were, in his own terms, primarily a reactionary force. As such, they question

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<sup>21</sup> For a recent example see Nancy Fraser (2013) and her positing of a 'triple movement' with the third movement representing a move towards emancipation. This does an injustice to the specific historical constellation Polanyi was describing. Part of the power of the text is that the double movement as it transpired over the course of the 19th Century did not result in a move towards emancipation but political deadlock.

whether or not under the specific conditions of the late 20<sup>th</sup> century a similar reactionary force comprised of varying classes would be able or willing to form to contest the market-order of late 20<sup>th</sup> century neo-liberalism. They set out the issue (quoting from Polanyi) as follows:

...with relation to the implications of Polanyi's analysis for understanding countermovements of workers, Polanyi's framework tends to deemphasize power relations among classes. The extension of the self regulating market is likely to provoke active resistance from the bearers of the fictitious commodity labor, in part because it necessarily implies the overturning of established social compacts on the right to livelihood. Nevertheless, in Polanyi's analysis, an unregulated market would eventually be restrained from action from above even if those below lacked sufficient bargaining power to protect themselves. This is because the project of a self-regulating market is simply "utopian" and unsustainable on its own terms – one that is bound to wreck the "fabric of society" and call forth "agencies" that will move to protect "society" from the ravages of the satanic mill, regardless of the existence (or effectiveness) of protest from below. Thus, for example, Polanyi argues that it was "enlightened reactionaries" among the landlord class who played the "vital function" of fighting for protections for the emergent (still voiceless) British working class in the early nineteenth century (Silver & Arrighi, 2003:326-327).

Silver and Arrighi are skeptical then that the same organic view of society, potentially plausible in the circumstances of 19<sup>th</sup> century liberal Britain, continues to be applicable in the contemporary circumstances of US global hegemony in the 20<sup>th</sup>. Who, they ask, are the enlightened reactionaries that will take on the global order of US global capital? They argue that although the US, at least since the 1970s, has firmly adopted elements of 'the liberal creed', which would make Polanyi's analysis appear to be superficially applicable; US dominance they suggest is based on very different principles and practices than Britain's. For one, they argue, the US is a much larger and self-sufficient economy than Britain and, as such, has tended to approach trade aggressively engaging in trade negotiation coupled with blatant domestic protectionism rather than pursuing free trade as such. Not an Empire in the same way Britain was, they argue that the US favored foreign direct investment and investment through transnational corporations formed in the US to conquer foreign markets and expand US influence outwards. The order of global capital that has emerged from this, they suggest, is less impacted by territorial political problems as capital can move. Further, they contend, the US has depended far less on a stable regional balance of power generally between other world powers to avoid war on US territory, able to rely instead on US military dominance. So, they assert, any Polanyian like counter-movement today would have to come through a rejection of the terms of global capital by other powerfully situated states. But, in their view, they submit:

“unprecedented centralization of global military power in the hands of the United States, the equally unprecedented integration of the capitalist powers in dense transnational networks of production and accumulation, and the increasing dependence of the capitalist powers, old and new, on one another’s resources for the reproduction of their privileged status in the global political economy” (Silver & Arrighi, 2003:348) means this is unlikely to happen. They stipulate: “We are not saying that there are no quarrels among capitalist powers over the pace and direction of the process of the world market formation. We simply do not see these quarrels becoming the driving force in the reversal of that process as it did in the late nineteenth and early twentieth centuries” (Silver & Arrighi, 2003:348).

Thus, Silver and Arrighi argue, Polanyi’s analysis of 19<sup>th</sup> Century liberalism cannot be generalized to late 20th century neo-liberalism as they argue that his premise that “...under normal circumstances the powerless and disenfranchised are likely to be the beneficiaries of ‘protection’ promoted by more favorably located agents/actors” (Silver & Arrighi, 2003:327) does not continue to apply. Their observation here is that the plight of people in the late 20<sup>th</sup> century has more in common with what Polanyi identifies as two exceptions to the normal situation in *TGT*: the first being the “plunge into utter destruction” (Silver & Arrighi, 2003:327) that he identifies with the inter-war period of the early 20<sup>th</sup> century and the second being the situation of non-sovereign colonies. In the first instance, they argue that ‘plunges into utter destruction’ are not as rare today as *TGT* would suggest and “we might want to treat it as a more ‘normal’ phenomenon than Polanyi’s concept of the double movement seems to allow” (Silver & Arrighi, 2003:327). This is not a particularly well-developed idea as no examples of what they mean by this are given. The second exception that they assert as the new normal situation, however, is a more interesting claim, which is related to the situation Polanyi had described as the exceptional position of non-sovereign colonies in *TGT*. They state:

...this exception implicitly brings us to the question of the geographical scale at which the self-protection of society takes place (and also takes us implicitly back to the question of the relative balance of force and consent.) For Polanyi, while the agents of the movement toward the market economy ranged from the local and national to the global (haute finance), the agents of the countermovement (“groups, sections, classes”) were largely local and national...Moreover, these agents of the countermovement aimed at protecting local or national interests (interests broadly defined). For Polanyi, the “society” that is protecting itself in the nineteenth and first half of the twentieth century is largely a national society (Silver & Arrighi, 2003:328).

Silver and Arrighi then suggest that in a highly globalized society, Polanyi's jettisoning of a class-based or materialist framework is less applicable as, they argue, he cannot be taken to provide an understanding of how a primarily reactionary public interest of an amalgam of impacted classes would emerge in the specific conditions of intensified global capital where nation states are deeply implicated. They argue that this follows from Polanyi's own analysis of the situation of the British colonies in *TGT*, noting: "...the common 'human' interests being protected by the British 'laboring people' were largely those of British humans. No organ among either the landed aristocracy or the 'laboring people' of Britain existed to sense the dangers to humans and nature involved in the extension of the market economy to the colonial and semi colonial world. Indeed, in many ways, as Polanyi was well aware, the self-protection of industrial societies was the other side of the coin of the disruption of lives and livelihoods elsewhere" (Silver & Arrighi, 2003:329). Their argument then is that the colonial situation is no longer an exception to the normal situation as the power of states generally in contemporary conditions of global capital has changed. Insofar as, they argue, the Polanyian double movement "explicitly recognizes the importance of sovereign state power as the basis for the effective self protection of society" (Silver & Arrighi, 2003:327) then they suggest that Polanyi's analysis is not generalizable to late 20<sup>th</sup> century conditions when a change in the external situation, the intensification of global capitalism through transnational corporations, has made sovereign state power a tenuous proposition. We are all, they suggest, even to some extent the US, colonized by global capital now.

There are elements of Silver and Arrighi's analysis that are compelling, perhaps because they convincingly describe what we have at least ideologically come to accept as the normal situation of late 20<sup>th</sup> Century neo-liberal global capital. At the same time, they often conflate very different claims of *able* and *willing* when they discuss the power of nation states in both the 19<sup>th</sup> Century and the 20<sup>th</sup> Century. So, for instance, in the 20<sup>th</sup> century conditions of global capital they at one point suggest that powerfully situated nation states in the global order could intervene but likely won't do so as they are too invested in the status quo. But, this is actually not very far removed from what Polanyi asserts was the position of Britain in the 19<sup>th</sup> century. As Dale notes: "temporal change is inscribed within the DNA of Polanyi's book" (Dale 2011:75). The state of Britain had to be made to be willing to make concessions through the threat of civil unrest and the transformation of democratic institutions internally, which in turn politically strengthened the power of impacted classes to demand further concessions. The unwillingness of

powerfully situated nation states to intervene in the global order then would not be a reason to abandon Polanyi's observations of 19<sup>th</sup> Century Britain but to learn from it. However, in the latter part of the analysis they then appear to suggest that nation states are not able to intervene in global capital, asserting that they are effectively powerless to resist the global order of capital; colonized by their own creation. This is a very different claim and one that I would suggest demands greater scrutiny. Is it that all states are effectively powerless to the order of global capital, an order that Silver and Arrighi contend hinges more on the accumulated power of transnational corporations than on any particular state, or is this only what we have come to believe because powerfully situated states tied to the institutions of global capital are invested in perpetuating this mythology? I will take this up further in the discussion of the interaction between state sovereignty and the legal formation of profit based transnational corporations in later chapters, but first Polanyi's somewhat ambiguous view of the state, on which much hinges, requires explication.

#### **4.1.3 Body Politic: Plurality and Centralization**

As suggested from the outset, the role of the state in *TGT* is a formative part of Polanyi's text. Each of the shifts implied in the transformation from market to market society; the shift from a conception of morality as premised on internal goods and situated sociality to a morality premised on external goods and individuals as abstractions; the shift from a conception of social action based on human community to social action based instead on market position, all required the apparatus of a complicit state in order to achieve. So, Polanyi here argues that while movement for self-protection was largely spontaneous in nature; a reaction to the institution of market liberalism, the market liberal institutions of labor markets, trade, and monetary standards were not. They were deliberate state initiatives. He argues:

The utopian springs of the dogma of laissez-faire are but incompletely understood as long as they are viewed separately. The three tenets – competitive labor market, automatic gold standard, and international free trade – formed one whole. The sacrifices involved in achieving any one of them were useless, if not worse, unless the other two were equally secured. It was everything or nothing (Polanyi [1944] 2001:144).

The great myth then, Polanyi argues, of the laissez faire ideology the state purported to subscribe to was that, in the absence of the state, markets in the factors of production would naturally occur. In reality, Polanyi notes, a market society required significant

involvement on the part of the state: "...laissez-faire was not a method to achieve a thing, it was the thing to be achieved" (Polanyi [1944] 2001:145). Thus, in order to institute market liberalism's three economic tenets, he observes: "The thirties and forties saw not only an outburst of legislation repealing restrictive regulations but also an enormous increase in the administrative functions of the state" (Polanyi [1944] 2001:145). Beyond the institution of markets, Polanyi also contends that state involvement continued to be necessary for Britain's economic success in these markets once instituted. So, he suggests, there are three necessities for economic success, these being: "inclination, knowledge and power" (Polanyi [1944] 2001:145) and a private person, he argues, "possesses only inclination" (Polanyi [1944] 2001:145). As such, knowledge and power need to be collectively organized and here the state plays a critical role: "it was the task of the executive to collect stats and information, to foster science and experiment, and to supply the innumerable instruments of final realization..." (Polanyi [1944] 2001:145-146). Polanyi observes: "The road to the free market was kept open by an enormous increase in continuous, centrally organized and controlled interventionism" (Polanyi [1944] 2001:146). Dale comments that Polanyi thus: "...construes the transition to free market capitalism as coincident with and facilitated by a far reaching transformation in state capacity and strategy: the rise of consolidated and centralized states that sought to reengineer the norms and behavior of working people and the poor, fashioning them into subjects responsive to the needs of capital" (Dale 2011:59). Not only then did government intervene to institute laissez faire, Polanyi argues, it intervened in a particular way, through a shift from "parliamentary action by action through administrative organs" (Polanyi [1944] 2001:146). Laws like the New Poor Laws for instance were representative of this more sustained disciplinary approach, representing a "shift in thinking about state policy away from largely negative state prohibitions and towards attempts at deliberate social engineering. Which, paradoxically or not, characterized the period of "laissez faire" (Dale 2011:59).

Despite proclaiming to adopt a policy of free markets and non-intervention, in reality the state continued to be an immensely powerful economic actor. This was particularly true of Britain during the period, as the state took on an expanded role in economic life through the creation of markets the state was then required to supervise. What was incredible then, in Polanyi's view, is how politically successful the economic liberals were for a time at making it seem like the opposite; as if laissez faire was based on fostering free conditions for the spontaneous development of society and politicized appeals to restrain markets a

form of “collectivist conspiracy” (Polanyi [1944] 2001:147). At least initially, Polanyi asserts, attempts by various situated agencies to restrict the impact of laissez faire policies were, as Silver and Arrighi also (2003) emphasize, spontaneous and reactionary. He observes (drawing on Dicey): “There was no collectivist trend save the acts of legislation themselves” (Polanyi [1944] 2001:147). To the extent that collectivist sentiment or appeals to a ‘public interest’ started to emerge, he agrees with Dicey that the source of the trend may have been the legislation as it demonstrated that appeals to the public interest were the best way to convince the state of an obligation to act. Thus, Polanyi argues, the collectivist trend of the countermovement developed, at least at the outset, from a “purely pragmatic spirit” (Polanyi [1944] 2001:147).

Dale notes that Polanyi here is to some extent insidiously attempting to take on *laissez faire* economics. The philosophy of *laissez faire* suggested that the spontaneity of market order was more efficient than economic planning as it could respond faster to changing conditions and democratically superior because it allowed individual agents to freely pursue a variety of ends of their own design rather than representing sectional purposive goals. Polanyi wanted to contend instead that it was the idea of the free market the state subscribed to that introduced a fixed and artificial institutional assemblage in the service of highly specialized and rigid sectional goals of the trading classes, and that it was society’s spontaneous reaction that operated efficiently and democratically to secure social platforms for asserting more variegated social ends. It remains, however, these temporal coordinates that Silver and Arrighi (2003) are responding to when they posit that Polanyi overemphasizes the possibility of “reactionary” forms of resistance that rely heavily on recognition by the state to be effective. Dale too contends that this is one of the weaker parts of Polanyi’s analysis in *TGT*, noting that the dichotomy of ‘artificial liberalism’ and ‘natural protectionism’ is problematic as it leads Polanyi into a trap of arguing that that the market was based on voluntarism whereas the movement towards protection was based on a latent functionalism derived from an essentialized proposition “that societies have needs, and that identifying the ways in which they meet these needs constitutes an explanation of why given social processes are what they are” (Dale 2011:79). Dale continues that his adoption of this position relates to Polanyi’s lack of theoretical specificity pertaining to the state:

State power is viewed from two quite distinct angles in *TGT*. In one tranche we learn about the indispensable role of the nineteenth century British state in creating and maintaining the market economy and constructing forms of social policy tailored

to managing the population in the interests of capital accumulation. In another, we learn of its attempts to protect society against the market's unpleasant effects...but what criteria determine whether a particular state policy should be placed on the 'market' or on the 'protective' side of the ledger? The answer is not clear" (Dale 2011:75).

So, Dale contends then that what Polanyi did not really address in detail is how the idea of the state and the idea of market institutions intersected. He advances: "The central problem, ironically, is that his concept of the market is disembodied: it abstracts from questions of property and control" (Dale 2011:75). There is merit to this criticism if not how I would express it. Polanyi's concept of the market was deeply embedded in questions of power and control but, in line with what I think was meant by Dale (2011) and as Silver and Arrighi (2003) claim, Polanyi's discussion of the politics of resistance is lacking in detail. For instance, Polanyi asserts that the countermovement was initially reactionary but stipulates in the case of the labor movement that it became more deliberate and offensive over time whereas other territorial associations were ultimately subdued. Why was this the case? As mentioned previously he also suggests that the public interest came to be represented in a variety of associations comprising various economic strata that drew support from each other 'unconsciously.' Why does he propose this was unconscious? While there is a lot of detail in *TGT* on how the idea of a self-regulating market came to dominate a particular political-economic constellation, we are not told much about how the state-centralization required to achieve it in turn conditioned the political forms the resistance of territorial associations to this paradigm were willing and/or able to take. In the case of the working class, at least, Polanyi does indicate that until the latter part of the 19<sup>th</sup> century they were legally prohibited from taking any collective form, destitute, and without rights of suffrage so that provides a partial explanation. But, presumably other impacted constituencies were better positioned legally, economically and politically? If their demands for social protection were not about economic interest, or at least if their economic interests were subordinate to the wider social claims they were making, why were they not able to mobilize state support? Polanyi provides a forensic analysis of how economic ideology structured the politics of the period but there is less detail in his analysis of how the political ideology of the period, in turn, structured the state's understanding of its relationship and obligations to the society so governed. In other words, Polanyi gives us a comprehensive account of the economic side of economic liberalism but there is less detail on what this meant politically.

Polanyi perhaps does not provide this answer as his analysis of the great transformation was meant instead to pose exactly this question. What, he argues, becomes clear from the radical polarization of materialist and moralist organizations of the person during the period and their ultimate outcome in war and destruction is that some form of authority is needed. He states: "No society is possible in which power and compulsion are absent, nor a world in which force has no function. It was an illusion to assume a society shaped by man's will and wish alone" (Polanyi, [1944] 2001:266). This was the illusion that governed in England as the power of the state was not accountable in the market society since it was presumed "...the less its power, the smoother the market mechanism would function" (Polanyi, [1944] 2001:266). The fascism that erupted elsewhere on the continent, however, Polanyi contends, was the opposite side of the same coin. It was only about society and had no respect for human freedom: "The fascist solution of the impasse reached by liberal capitalism can be described as a reform of market economy achieved at the price of the extirpation of all democratic institutions, both in the industrial and political realm" (Polanyi, [1944] 2001:245). He compares: "Freedom's utter frustration in fascism is, indeed, the inevitable result of the liberal philosophy, which claims that power and compulsion are evil, that freedom demands their absence from a human community. No such thing is possible; in a complex society this becomes apparent. This leaves no alternative but either to remain faithful to an illusory idea of freedom and deny the reality of society, or to accept that reality and reject the idea of freedom. The first is the liberal's conclusion; the latter the fascist's" (Polanyi, [1944] 2001:266). The challenge of the reinstitution of normative order then following the breakdown of society by the polarized extremes of liberalism and fascism was to conceive of another possibility. To concede that power is necessary but at the same time power could not be absolute. He states: "In an established society the right to non-conformity must be institutionally protected. The individual must be free to follow his conscience without fear of the powers that happen to be entrusted...Compulsion should never be absolute..." (Polanyi, [1944] 2001:263-264). What was required then was an institution of the person and society by power but also institutional accountability of power to the person and society. This is the compromise, or median position, that the legal organization of the person following the Second World War will attempt to achieve and the relative success or not of this solution will hereinafter be discussed.

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## SECTION 2

### The Legal Person

#### 5. The Legal Person: A Median Position

Following the polarization and breakdown of society brought about through a clash of organizing ideas, the post-war period was focused on rebuilding the normative foundations of society and resolving the tensions that had led to the extreme polarizations characteristic of the Industrial Revolution in England and later the rise of fascism in Germany. The resolution was a middle position between the moral organization of the person and the materialist organization of the person, which recognized the value of maintaining elements of both but subjecting them both to scrutiny. This shift was effected through the repositioning of value by a regulatory concept of the legal person that would guarantee a civil status to individuals and protect their common projects while simultaneously ensuring that no citizen could be excluded from any common project on the basis of physical characteristics or symbolic beliefs. It was also a normative recognition that a balance needed to be maintained between competing social and economic interests by ensuring that choices in the political sphere were restricted by the requirement for power to be exercised legitimately in the public interest. Alain Supiot provides an outline of the ideas, positions, and institutions that make up the legal organization of the person as a normative order, which will be set out herein. However, as Supiot's text is also a lament for the legal organization of the person to be restored in confrontation with contemporary regimes of value instituted by global economic forces, this chapter and the chapters that follow will also question if the external pressure of global economic forces is the only reason for the displacement of the organization of the legal person or if the internal composition of the legal order too has played a role in its own decline.

##### 5.1 Alain Supiot: *Homo Juridicus*

In “*Homo Juridicus: On the Anthropological Function of the Law*” (2007), French legal scholar Alain Supiot explicitly considers the nature and function of law and, more specifically, the rise to dominance of the legal organization of the person following the Second World War. Like MacIntyre, Supiot acknowledges the role enlightenment moral philosophers played in the “rewriting of the human being’s origins” (Supiot, 2007:12). However, unlike MacIntyre, Supiot acknowledges that this was to some extent a positive

development insofar as Enlightenment prescriptions of the universal value of human beings laid the groundwork for a more fundamental social transformation. The major innovation Enlightenment philosophies facilitated then, Supiot outlines, is the transformational significance of the construct of ‘legal personality’ or the recognition in law that each individual counted as a legal person through the assignment of a civil status, which in turn entitled every individual to participate equally with others in any and all social practices. Supiot reminds us that this specifically legal conception of the person was not always the case: “Our Western conception of the human being as an abstract universal, born free, endowed with reason, and equal among equals, won out only at the end of a long historical process which stretched from the development of Roman law to modern declarations of rights” (Supiot, 2007:11). As such, he argues, the re-invention of the person through a legal vernacular was a necessary rejoinder to the classical moralist conception, which could not recognize this dictate. The legal person is thus a response to the moral tradition of thought, which was limited by a dogmatic belief that virtue was only a quality of mind of certain select people and therefore failed to recognize the essential equality of all people. It was the triumph of legal personality then to account for this shortcoming of the classical moral framework that Supiot suggests was and remains responsible for the change in position of law and morality as evaluative practices. To understand the organization of the legal person as an alternative normative organization, Supiot’s description of the discursive ideas, order, and position of institutions that comprise *homo juridicus* will be examined.

### **5.1.1 Legal Personality as Regulatory Construct**

Returning to MacIntyre for a moment, one of the issues MacIntyre neglects to give due weight to in his account of the classical development of a moral organization of the person is the fact that the idea of the moral person and the notion of virtue to which it was attached developed out of a deliberately homogenous community. So, for instance, his model community (and the model community of classical moral philosophy developed by Aristotle) is the Greek *polis*; a *polis* that he acknowledges was comprised by “...writing off of non-Greeks, barbarians and slaves, as not merely not possessing political relationships, but as incapable of them. With this we may couple his [Aristotle’s] view that only the affluent and those of high status can achieve certain key virtues, those of munificence and magnanimity; craftsmen and tradesmen constitute an inferior class, even if they are not slaves. Hence the peculiar excellences of the exercise of craft skill and

manual labor are invisible from the standpoint of Aristotle's catalogue of the virtues" (MacIntyre, [1981] 2007:159). Supiot adds to this account, quoting from Aristotle's "Nicomachean Ethics": "For Aristotle, however, 'there can be no friendship, nor justice, towards inanimate things; indeed not even towards a horse or an ox, nor yet towards a slave as a slave. For master and slave have nothing in common'" (Supiot, 2007:45). Women too, as Sharon Welch (1991) has rightly criticized MacIntyre for omitting, were excluded from the Aristotelian *polis*. Thus, while the classical moral order theoretically adopted a collective and socially situated idea of the person, it must be remembered that as a result not all persons in the classical moral framework were perceived to be equally relevant to the definition of virtue in practice.

Further, MacIntyre also recognizes that in Aristotle's characterization of the practice of the *polis* there was no contemplation at all in his scheme of how the exclusionary nature of the composition of the *polis* might change. He notes: "Aristotle did not understand the transience of the *polis* because he had little or no understanding of historicity in general. Thus a whole range of questions cannot arise for him including those that concern the ways in which men might pass from being slaves or barbarians to being citizens of a *polis*. Some men just are slaves 'by nature', on Aristotle's view" (MacIntyre, [1981] 2007:160). Although MacIntyre, of course, does not accept this part of Aristotle's posturing, he is, however, dismissive that this particular criticism inherently discredits the virtue framework as a comprehensive organization of value. MacIntyre suggests: "these limitations in Aristotle's account of the virtues do not necessarily injure his general scheme for understanding the place of the virtues in human life" (MacIntyre, [1981] 2007:160). And yet, certainly these 'limitations' do. If the narrative account of a human life – be it the life of a slave, a barbarian, a woman, an un-wealthy man, etcetera - is a narrative unified by the exclusion from the social practices that define associations, define personal virtues, and define the terms of belonging to the community, then it is clearly going to generate a conflict in the account of virtue: between the narratives of the people excluded and the narratives generated by the order of which they are both a part and not a part of in light of the exclusion. Further, this conflict will not be internal to the determination of the value or good of a practice itself (how could it be if one is barred from participating) but a question of the very possibility of the 'good' of a practice that would exclude certain categories of people from participating (particularly when not participating in the Athenian view would have been the equivalent of a certain kind of death). It is a conflict then, which on MacIntyre's own outline of the moral organization of the person, ought by necessity to

register in the evaluative context of law as opposed to virtue; as an evaluation of what was, in effect, a murderous act.

Once this conflict registers, however, or once this vital question of status is asked, the entire scheme (as, indeed, Supiot will indirectly argue) is then open to challenge and reorganization by the law, as the historical injustice cannot be remedied by prohibition of the specific and singular act of exclusion. The institution of legal personality then is how, according to Supiot, conflicts concerning discriminatory access to the practices of social existence were eventually resolved and the change, he argues, had far reaching consequences for the organization of social life and indeed the organization of value therein. He states: "Human beings are not born rational, they become so by gaining access to meaning shared with others" (Supiot, 2007:viii). Thus, the exclusion of some people from participating in certain symbolic practices or conversations because of race or ethnicity or sex or wealth is effectively the exclusion of these people from participation in the creation of social meaning and, as such, an exclusion from the very language on which the case for their inclusion could be made. The institution of a civil legal status applicable to every human being from birth to death then cannot be avoided in any society that comes to value the human being as both an abstract universal *and* materially embodied. He states: "the legal person is just that, a construct, but in the symbolic universe that is ours, everything is a construct. Legal personality is certainly not a fact of nature, but rather a certain representation of the human being that posits the unity of body and mind at the same time as it formulates a prohibition: that the human being should never be reduced one-sidedly to either" (Supiot, 2007:x).

Through this re-positioning of the representation of the person then and the concomitant rights and duties the re-positioning entailed, the idea of the legal person, once introduced, changes the very definition of morality as a purely abstract quality of mind (or character) arising from interactions in the course of a discriminatory practice. The legal person, as a middle position between morality (symbolic value) and materialism (embodied value) cannot tolerate this view. Once the idea of the legal person is instituted: "We are each bound by our civil status as determined by law before being bound by any commitment we may make...it is by transforming each of us into a *homo juridicus* that, in the West, the biological and symbolic dimension that make up our being have been linked together. The law connects our infinite mental universe with our finite physical existence and in so doing

instituting us as rational beings" (Supiot, 2007:ix). Supiot describes the process as a sort-of 'double birth', opining that the concept of the legal person is the recognition of:

The need for the human being to be born twice, once to the life of the senses and once to the life of sense. As is the case in other domains, the legal fictions subtending issues of lineage are never simple literary fictions that some omnipotent author of a 'parental project' may manipulate at will. These technical resources situate human beings both in their biological dimension and in the dimension of representation, in order to enable them to become rational beings. It is the particular property of legal technique to perform just such an anthropological function, that of instituting the human being (Supiot, 2007:145).

The institution of legal status then, on Supiot's description, is a re-birth; it is a new position and it opens up a very different organization of value that fundamentally rejects the idea that human worth can be solely circumscribed to a quality of mind. This is not to suggest that the relevance of moral ideas disappear entirely; they are still a part of the legal conversation and, in fact, Supiot is clear that many legal concepts depend on ideas inherited from classical moral philosophy. But, new co-ordinates are introduced and the ideas carried over are subject to the pre-requisites the legal person implies. The idea of the legal person is thus a simultaneous articulation of a fundamental prohibition and the institution of a right. He states:

Our identity is fundamentally the same as that of any other person, and any difference based on sex, race, religion, nationality, age, et cetera, may be disqualified as a prohibited discrimination...Hence the seminal role of the principle of equality in our legal and political traditions. We all have the same rights and duties, and we are all identical, which implies that any one person can always be replaced by another. Consequently, a person may occupy all positions within society, while not being absolutely identified with any of them (Supiot, 2007:14).

In terms of what came before then, Supiot argues, the assignment of civil status generates new political narratives that were not previously available. It is not law as an extension and supplement to virtue but law as a confrontation and overhaul of virtue. The practices of virtue do not simply emerge unscathed with the minor exception of an opening to previously excluded agents, but instead the opening to previously excluded agents by specifically legal means elicits an exhaustive and penetrative recasting of all that developed in the absence of this status as open to question and of dubious pedigree. With legal personality then comes an imperative for the past practices of virtue (and therefore the narratives and traditions derived from these practices) to be reviewed and reformulated in light of the law's vital presupposition. Any alliance between the legal person and the

moral person is only ever partial and the associational practices giving rise to virtue become subject to the law's all-encompassing oversight.

But the moral person is not the only normative configuration interrupted by the dominance of the legal person. Supiot, to some extent, acknowledges that the institution of legal status as the prescription that 'everyone must count' does leave the concept of the legal person vulnerable to the charge that it is a mere extension of the ideas implicit in the materialist conception as developed by classical economics and embraced by political supporters of *laissez faire*. He states: "Insofar as each person is replaceable, each is also quantifiable and can be apprehended as an accounting unit. This quantifying tendency is evident in the history of our political institutions, in which the law of numbers has come to override any qualitative considerations, resulting in a purely arithmetical conception of the majority principle. It is also at work in the increase in economic and social statistics..." (Supiot, 2007:15). However, Supiot argues, this is crucially not what the legal person implies by suggesting that every embodied individual must count as a legal person. He stipulates that this crude materialism is a different norm than that implied by the legal person, and the legal person as a normative institution is positioned against biological reductionism. The legal person, as a partial positioning, does not simply succumb to a materialist quantitative account of the person although this will be relevant. But, insofar as moral beliefs also remain relevant, the legal person must also be "based on a qualitative appreciation of people and things" (Supiot, 2007:15). It is critically not a mere "technical norm" (Supiot, 2007:15) that assumes that "the individual is...a stable entity, which remains essentially unchanged from birth to death" (Supiot, 2007:15).

A mere accounting then is not what the concept of the legal person implies by suggesting that every human being must be represented. The legal person is defined by the imperative of not reducing our conception of the human being's representation to either the purely symbolic dimension of capacity or to the purely physical dimension of embodiment. Supiot states: "To reject the biological or the symbolic dimension leads to the insanity of treating humans as mere animals or as pure mind, subject to no limits that are not self-imposed" (Supiot, 2007:ix). As such, the legal person as a regulatory idea, while prohibiting the reduction of the human being to a purely symbolic construction, is also an enacted proposition that the qualitative aspects of human existence do matter and as such a rejection of the idea that only materialist propositions are rational. He continues: "Calculation is not thinking, and the arithmetical rationalization on which capitalism is

built degenerates into madness when it leads people to believe that what cannot be calculated for that very reason has no significance" (Supiot, 2007:xi). For Supiot, then, the dominant adoption of the idea of the legal person following the atrocities of the Second World War was the adoption of the idea that "to view the human being as pure object or pure mind are two sides of the same lunacy" (Supiot, 2007:ix). It is, in this sense, almost a perfect example of what Ugazio (2013) had identified as a middle position; a position that is defined in relation to both extremes but discursively independent of both.

By way of practical illustration, Supiot in "*The Dogmatic Foundations of the Market*" (2000) demonstrates how this dualism operates via the legal institution of contract, which is at its core constructed through an oscillation and partial alliance with ideas derived from both moralist and materialist conceptions, arriving at a legal position that depends to some extent on both. Firstly, he suggests, the contract (and as such the market) is not possible without the legal person: "As far as operators are concerned, the market would not be conceivable without the concept of the person, that great fiction invented by Western legal culture...[that] postulates the existence of 'contracting entities' capable of deciding and acting and being held liable for the decisions and actions imputed to them" (Supiot, 2000:322-333). In other words, there needs to be a material entity that is accountable for contract to function and contract as an idea accepts this materialist constraint. At the same time, the idea that promises should be upheld is historically derived from the notion that: "The acts of a Christian must always be founded on Truth. A believer must always be true to his word; anyone who makes a promise and does not keep it is acting contrary to the Truth, is deceiving his neighbor and committing a mortal sin. Respect for the spoken word was therefore initially presented as a moral rule..." (Supiot, 2000:333). The legal institution of the contract thus combines ideas derived from both the moral and the material organizations of the person, oscillating between them. This tacit positioning he suggests is given its clearest expression in the employment contract where, Supiot stipulates, the status of employment is combined with contract and in combination with the regime of labor law and social security "protects the employee against the risks of impairment of his earning capacity" (Supiot, 2000:337). In this way, Supiot states: "The dual reconciliation...between on the one hand the individual and collective...and on the other the time of exchange and lifetime...plucks work from its condition of being a commodity, the object of contract, and turns it into an element of the identity of persons" (Supiot, 2000:337).

Ngaire Nafine (2003) in her review of the jurisprudence on legal personality also agrees that a concept of the legal person that links biological and metaphysical elements is at present the dominant approach. On this view then legal status is ascribed to all human beings from birth to death and is by definition interdisciplinary as the concept invites the contributions of other disciplines in debating both the biological and metaphysical elements in the exercise of legal jurisdiction. She notes, however, that this notion of the legal person can be distinguished from alternative conceptions, which although not as dominant do occasionally find jurisprudential expression. One of these she labels, for instance, the “Cheshire Cat” (Nafine, 2003:350) conception of legal personality. On this view, the presumption is that legal status is an empty slot into which any entity could fit, animate or inanimate, as the construct does not imply any biological or moral qualities. Legal personality on this view is a technical legal construct; the mere vehicle for rights and duties to attach to any person or thing the law comes into contact with and must make a determination upon. Nafine suggests, however, that this particular conceit of the legal person is a potentially dangerous obfuscation, as it tends to suggest that the law can be divorced from ideological content simply by adopting a technically neutral construction. To the contrary, she argues, when it comes to the content of personhood this is unlikely to be the case. For example, she suggests, the ideology inherent to the technical norm becomes clear when the Cheshire Cat conception of personhood becomes attached to debates about the status of the fetus. If the legal person is a just an empty slot for the discussion of rights and duties then it is argued, following the Cheshire Cat conception, that there is no reason in law why a fetus cannot be a legal person. Whatever one’s view on the matter may be, simply stating that the assignment of legal personality is not a biological or moral argument does not in practice immunize the discourse from deep associations with biological and moral argument. Representations of personhood will always be political – the law cannot escape this through a technicality.<sup>22</sup>

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<sup>22</sup> This is also at stake in the growing debate over animal protection and whether pets should be granted legal personality. David Grimm in “*Citizen Canine: Our Evolving Relationship with Cats and Dogs*” (2014) provides an overview of the complexity of the subject matter. At present animals are still treated as property in most legal systems but he suggests this is out of step with popular conceptions of animals as part of the family and recent animal custody cases explicitly considering their ‘best interests’. The grant of legal personality to animals however is a source of intense controversy specifically because the adoption of a technical construction has significant biological and metaphysical consequences. For instance, he notes, the American Veterinary Medical Association (AVMA) is fighting the conception of animals as legal persons as it raises the specter of medical malpractice lawsuits. Similarly, a number of legal commentators have suggested that while there is a need to protect animals the law must find a way to do so without granting legal personality as to recognize animals as persons would compromise the uniqueness of human beings at the core of the legal system.

Thus, Nafine argues that the construct of the legal person is ideological and that the conception of the legal person as being a question of biology and morality is an unavoidable element of any jurisprudential discourse on the person. Nafine admits, however, that she has purposely avoided the subject of corporate personality as the debate becomes even more complex when legal personality becomes applied to groups of persons. She asserts: "...the literature on the legal person is to a large extent preoccupied with the meaning of corporate personality" (Nafine, 2003:348). However, she argues, if we want to understand legal personality it is necessary to understand individual legal personality also as they are, in law, variations of a kind. Supiot too digresses: "The invention of legal personality enabled this individualistic notion to invade every human community or society. Legal personality allows every form of association of individuals, whether based on having things or having ideas in common, to constitute itself in turn as an individual. That is how *homo juridicus* comes to treat a plural like a singular, an 'us' like an 'I' capable of interacting with all other individuals on equal footing" (Supiot, 2007:17).

Yet, as I will be suggesting in this and later chapters, herein lies the source of the legal organization of the person's implosive potential. Under the regulatory construct of the legal person *both* individuals and associations share the category of legal persons, biological and moral, which is a major change from the moral and material organizations of the person that had previously kept these two institutional imaginaries distinct if not autonomous. The thinking behind this, as Jan Klabbers offers in his analysis of legal personality in international law, is to recognize the importance of associational or group life. He states:

...the more general purpose of personality...is to recognize the human group as being worthy of recognition (in the broadest possible sense of the word) in itself. Human beings tend to live and act in groups. They worship their Gods in churches or sects; they play sports together in football clubs or tennis clubs or Little League; they aim to organize their professional interests in trade unions, employer associations, or associations of independent professionals; they acquire knowledge and insight together in universities or other institutions of higher learning; they may wish to give a voice to their sexual preferences in gay or lesbian associations; they may wish to organize along ethnic lines for various reasons; they engage in charity together by organizing themselves as foundations or otherwise; and they might wish to organize themselves in specific corporate forms in order to attract investors or raise money. Either way, much of what people do, they do in groups, and those groups will more likely than not strive for some form of recognition (Klabbers, 1990:21).

Klabbers argues that the grant of legal personality to groups then has a dual role. The first is to establish a political claim for the recognition of the group's legitimacy to contend for limited resources with other groups and individuals and it is also a claim for autonomy not to be interfered with by 'other' groups or individuals, which may seek to intervene in the group's activities. In this way, Klabbers suggests, "...it may well be that the main importance of legal personality is not 'legal' in any ordinary sense of the term, but instead is fundamentally political: by allowing groups to band together for what purpose and under whatever banner, the law facilitates the conduct of politics (as well as commerce) in a stylized form" (Klabbers, 1990:24).

But this stylized form is to reduce every group or association in society to an individual and to treat every group or association as in law the same as every other group or association and the same as every other individual. In this respect, Jane Collier et. al. argue that the practice of equality before the law in fact serves to generate difference but does so in a very specifically legal and sometimes contradictory way. She sets out: "First...law declares everyone equal before the law, but by doing so constructs a realm outside of law where inequality flourishes. Second...law simultaneously demands and disclaims difference, requiring people to have unique identities and individual wills while compelling them to stress their similarities with other abstract bearers of legal rights if they wish to be treated as equals" (Collier, Maurer & Suarez Navaz, 1996:21). I will be suggesting in later chapters that the idea of the legal person becomes in this way extremely strained, particularly in the attempt to fashion equal persons from groups of persons assembled for very different purposes and in very different ways from both other groups and from other individuals. Similarly, once a particular status becomes 'naturalized' by legal recognition, it is extremely difficult to change, to the point of crystallizing absurdities that compromise any normative merit the notion of legal personality attempts to substantiate.

### **5.1.2 State as Constitutional Guarantor**

As civil status must not only be instituted but vigilantly maintained this, Supiot claims, is only possible through another necessary invention contingent to the adoption of legal personality as a regulatory norm: a third party guarantor. The recognition that an overarching authority constitutes the legal person is a remedy to the problem apparent from the organization of the person during the Industrial Revolution, where, in Britain for

instance, the state was in fact acting as a centralizing authority while simultaneously denying that it was doing anything of the sort. He remarks: “The cornerstone of this human order composed exclusively of individuals is a supreme individual posited, again on the model of *imago Dei*, as one and indivisible...an immortal Being which transcends the individual interests of its members” (Supiot, 2007:17). This is a necessary figure because, he argues: “A totality is unthinkable if the concepts of reference, hierarchy, and common rule are rejected, if one refuses to accept that...there is a kind of domination of form over matter, a subjection of parts to the command of the whole” (Supiot, 2007:34). For Supiot, the typical configuration of this supreme being is posited in the West as the legal or constitutional state and as such, in the West at least, a scheme is developed where individuals and associations of individuals (treated as equivalent to individuals) are subordinate to the state for the very reason that it is the state that guarantees their status or legal personality. For this to hold, however, the state must be normatively recognized as constituting the totality: “The State is a transcendent person bearing prerogatives to which the ordinary law does not apply and is also the ultimate guarantor of the legal personality of the real or fictive beings that are referred to it. Without this pinnacle to the system, our anthropological configuration would simply come apart” (Supiot, 2007:28).

For the ideal of the legal person to regulate social behavior and the practice of law to facilitate the continuity of the legal person in changing circumstances, it will require, in Supiot’s view, something like a set of rules and their coercive institution. Supiot digresses: “Personality is therefore not a biological given like genetic makeup or blood group, it is a dogmatic construction which would collapse if people could treat it simply as they pleased. The principle of the inalienability of civil status is the expression of the prohibition that surrounds personality, and it also posits the existence of a third party which guarantees this status” (Supiot, 2007:27). The Western model of the constitutional state, however, is not the only way. So, Supiot notes that the form of the state is not necessarily the important feature, but what matters is that there is an external form of rule to hold the system together so that a range of deliberative practices can take place by reference to the legitimacy of the authority that guarantees them. He suggests that this may not be the modern legal state as we imagine it in the West: “Western legal constructions are not the sole means of ensuring this anthropological function: it has been the Western way, and there are others, notably the Chinese tradition which is based not on laws but on relations, not on rules but on rites.” (Supiot, 2007:59) In essence, however, what Supiot argues will always need to be present is a more or less parental authority of some form. He continues:

“In the West, as for other cultures, there is no ‘I’ possible without an authority that guarantees this ‘I’, or, to put it in legal terms, without an authority that guarantees personal status. No one can make the sovereign gesture of altering their lineage, sex or age” (Supiot, 2007:21).

In some respects this particular constitutive element of his account of the legal organization of the person, namely the notion of a third party, is not that distinct from the order that MacIntyre had presented. The difference between them however is that instead of associations or social groupings providing the reference for virtue and the public good, in a legal order it is the state that provides the reference for civil legal status and the public interest. The practice of law, Supiot argues, requires a third party to provide: “a common reference point to guarantee a meaning and a place for each of us” (Supiot, 2007:27) and prevents us from becoming “caught up in self-reference...[that] can only end in solitude or violence” (Supiot, 2007:27). Supiot also then, like MacIntyre, suggests that a legal organization of the person will require a subordinate level of evaluative practice; with the constitution of legitimate authority by the state providing a reason for the facilitative practice of law and the facilitative practice of law, in turn, making the constitution of legitimate authority possible. Both Supiot and MacIntyre in this respect deny the ‘total state’ of either centrality or plurality. A legal order however, unlike a moral or materialist order, rejects the idea of a multiplicity of value-creating practices as the constitutive foundation, not because decisions on value must be divorced from the practice of law, but because the development of plural values through practice should be kept firmly distinct from the declaratory aspect of law, which must have the power to decide on the most representative ones among them in the public interest. The exercise of authority in a legal organization of the person must be legitimate but a legal organization of the person contends that this still requires a singular legitimate authority. Supiot submits: “For on the one hand, even among legal scholars, the anthropological function of positive law is denied. Yet on the other hand, people keep calling for ethics...whereby they are unknowingly obeying the instructions given by Hitler to the German legal profession in 1933: ‘The total state must not know any difference between law and ethics’” (Supiot, 2007:59).

While Supiot suggests the form of state does not matter for the purposes of normative organization, he does have a particular form of state in mind in seeking to restore the dominance of the legal order he is describing. The post-war state that Supiot is referring to

as providing a political justification for the rise to dominance of a legal organization of normativity is specifically the welfare state model. Thus, in an earlier text written prior to *Homo Juridicus* he suggests:

The contract can then be regarded as an abstract relationship, independent of the diversity of persons and things, giving legal force to the calculation of interest. But it can be so only in so far as its validity is guaranteed by a State, which is also a guarantor of a qualitative definition of persons (civil and occupational status), of things (transactions which it can prohibit or limit), of time (which it regulates) and of space (which it divides into territories). As the development of the market economy proceeded, this taking over by States of the qualitative dimension of trade grew ceaselessly. Thus, the State as Policeman (*Herrschafft*) was succeeded by the Welfare State, which took charge of everything that, in industrial society, eluded the calculation of interest at work on markets (Supiot, 2000:336).

He emphasizes this welfare state model again in *Homo Juridicus*, recognizing that while it cannot be denied the state became a controversial institution in the 19<sup>th</sup> century in both its liberal *laissez faire* and in its totalitarian guises, the state that emerged from this crisis in the 20<sup>th</sup> century is not the state in the same form: “The Welfare State’s great strength was that it did not impose on people a previously determined vision of their happiness but harnessed the energy of their collective action and conflicts to produce new rules. Its superiority...resided...in these rights to collective action, by which those ruled were authorized to confront the rulers with their own conceptions of just order” (Supiot, 2007:154). The welfare state then, he suggests, developed out of and as a remedy to previous ideas of the state and would not have developed had the state as institution not been challenged to legitimate its constitutive place following the Industrial Revolution and following two World Wars. The welfare state was the resolution to the conflict that Polanyi had suggested; both the institution of a recognized authority but also the preservation of a discursive space for authority to be challenged by non-conformity through the guarantee of legal personality and rights to collective action.

We should then, Supiot cautions, not take the achievement of the welfare state lightly. The welfare state was an attempt at “restoring the legitimacy of the State by entrusting it with new responsibilities and assigning a role to collective action in the pursuit of social justice. Instead of being simply in charge of governing people and embodying a power that dominates them, the State would ensure their well being” (Supiot, 2007:153). If the state starts to ignore this idea, then it may be that politically the state ought to be replaced: “The law came into being well before the state, and there are reasons to believe that it will outlive it” (Supiot, 2007:148). But, for this to happen, the fact that it is the state that is

ignoring this idea has to be legible, he argues: “For power to be sustainable it needs to be acknowledged” (Supiot, 2007:146). And, further, whatever institution came to replace it would still require a “singular founding institution of beliefs and a singular space for the debate of conflicts that arise in respect of their institution” (Supiot, 2007: 146). To ignore the need for something like the state, or for an *imago dei*, is to descend into totalitarianism under the guise of reaching a utopian ethical consensus, which is not, he argues, possible.

Supiot’s concern then is that in contemporary democratic discourse there is developing a view that the state should be cast as a “partner in the ‘social dialogue’” (Supiot, 2007:155) but be reigned in as a central authority by a dispersal of power to a multitude of centers of governance, based on the ideas of function and subsidiarity. Supiot disputes that this would be a more democratic version of power, or worse, emancipatory. To the contrary, Supiot argues, “...the decline in State sovereignty has not given rise to increased freedom but on the contrary to enslavement to the pursuit of goals that are all the more constraining for not being the result of anyone’s decision” (Supiot, 2007:149-150). He states:

...the figure of the Third, the guarantor of identity, and with it the dimension of the institution of the human being, have been lost along the way. Why on earth should this bother us? It should bother us because it is a breeding ground for what Pierre Legendre...has called a ‘butchers conception’ of humanity. Recent history has demonstrated just where the reduction of human being to a biological essence can lead...In a world in which science is the ultimate point of reference, belief in the dignity of man is relegated to the private sphere, along with religion, while the public sphere is concerned with the realism of the struggle for existence. This realism, which is in fact a scientism, replaces belief, and is the basis on which people seek to build the social and economic order (Supiot, 2007:31)

For the legal person to be capable of performing a regulatory role, the state cannot be conceived to be a “...mere instrument in the hands of forces superior to it” (Supiot, 2007:155). And yet, in Supiot’s view, this is exactly what is happening to the state due to the external forces of globalization, which, he suggests, threaten the dominance of the legal organization of the person and generate false democratic narratives to legitimate doing so in the process. In reality, he contests, all the decentralization of power from the state has done is remove whole areas of social life from the reach of the central regulatory ideal of the legal person and so the legal jurisdiction to intervene and converse with the state to conserve them. To the extent that we are enlisted to support what he refers to as a combination of neo-liberalism and neo-corporatism under the ruse of greater democracy then we are operating under a delusion. When power is decentralized in this fashion, it separates, he argues, power from authority and makes an authority of power. He argues:

The instrumentalization or withdrawal of the State cannot but have a drastic effect on how society functions. The ‘laws of the economy’ suppose that a world exists where each has a stable identity. This Western myth of a society reduced to a cloud of rational individuals each maximizing their private interests fails to recognize some basic facts of anthropology: human reason is never an unmediated fact of individual consciousness. Human reason is the product of the institutions that allow every person to give meaning to their existence, that grant them a place in society and enable them to express their particular talent within it. Once this process is no longer guaranteed by the State, people attempt to ground their identity in other things... (Supiot, 2007:155).

Peter Goodrich (2009) in a review of Supiot’s text: “*Law’s Labour’s Lost*” notes that Supiot’s concern is the rise of other authorities that are moving to replace the state but that are not democratically accountable or constituted by law in the same way the welfare state at least is (was). One of the entities that Supiot singles out, for instance, is the large for-profit corporation. Goodrich summarizes (quoting from Supiot):

Alongside the dissipation of the rule of law into the self-regulation of transnational corporations we also find a tendency towards erasure of the conflicts that law historically was there to express and channel. The new corporations become their own State and law, and are obliged to regulate their own multiple environments and all inputs into profitability, including not only their own employees but also ‘investors, consumers, political figures in the host country, and so forth.’ To achieve these ends the corporate world has taken over the channels and experimented with new techniques of power: ‘Privatization and extension of the free market have allowed these companies to get their hands on all the major media...and thus to control the world of ideas and images, either directly (through financial control) or indirectly (through financing of advertising.) They can therefore have a much more secure hold over minds than ever the Church could’ (Goodrich, 2009:309).

If a legal organization of the person is to be restored then, Supiot argues, one of the entities that the state must be able to resume control over is large transnational corporate capital. But, Goodrich (and others: see Knox, 2009 and Del Mar, 2009) note that Supiot’s endorsement of an omnipotent all-powerful third party also raises immediate alarm. Goodrich poses the question: “Can one defend dogmatics without also supporting the paternal solution and the *nom du pere?*” (Goodrich, 2009:311). The answer, he suggests, that Supiot does (and must) put forth “is one which distinguishes the traditional content of dogma from the hermeneutic and deliberative role of the critical jurist as one who seeks to keep open the space within which arguments as to justice, as to the ethics and value of collective actions and social forms are raised and elaborated” (Goodrich, 2009:311). Both state and law are necessary; the second order evaluative context of law is equally necessary to prevent a justification of unrestricted state power. But is this convincing? Goodrich

recounts that what Supiot cannot suggest is a reinstitution of law as a paternal dogma: “Such a function assumed a transcendental image of the social in which God, the State, the Working Class, or indeed the family and the Name of the Father could establish a clear reference point and a settled role. That is no longer the case.... Along with the demise of the paternal dogma comes its correlate, the demise of the Father of the laws, of the sovereign as a founding reference, and of the law as necessary truth... There is no single source of law, no one interpreter, no unitary Text nor any comprehensive lexicon of meanings” (Goodrich, 2009:307). Instead, to retain credibility, the authority of law must be conceived along democratic lines, with the state still occupying the pinnacle of the system, but state power reconceived as a vehicle for a multiplicity of legal discourses in practice.

Even if one accepts, however, that Supiot’s advocacy to restore the power of the state is a plea in favor of a slightly less paternal, democratic, rule of law based, welfare state; Supiot’s desire to restore the power of the state still ignores contemporary realities of the close relationship between the state and corporate capital, and more specifically ignores that this relationship has at least intensified in part as a result of the legal organization of the person and not merely as a result of the external forces of globalization that have acted upon it. What Supiot does not and cannot acknowledge is that the very idea of equating individual persons with associations of persons and subordinating both equally to rule by the state was always a precarious democratic narrative that depended on the state’s continuing benevolence and on the capacity of the second order of evaluative practice, namely legal jurisdiction, to uphold the legal person as a biological and moral category. A state bound to upholding the category of the legal person in the public interest cannot draw a firm distinction between individuals based on their pursuit of moral and/or material ends. When this is translated to mean that all associations of people too cannot be discriminated against on the basis of the purpose of their association; the combination of the legal person and the institution of one super-association to the detriment of all others, means the distinction between associations pursuing internal goods and associations pursuing external goods is collapsed and all associations pursuing any form of goods protected so that the dominance of the state can be justified. But, as will be set out, this equivalence of individuals with associations of individuals; and all associations of individuals with every other association of individuals; will, in a capitalist system, privilege some associations (and as such some individuals) over others and compromise the organization of the legal person as a whole.

The restoration of an organization of the legal person with the state as the supreme association then can only be validated if, as Supiot suggests, the second order of evaluative practice, legal jurisdiction, can register the inevitable conflict of interest that has the potential to develop if the state becomes too close to a particular organized interest subordinate to it. It also must be acknowledged that this conflict of interest is particularly likely in a welfare state capitalist model where the state is highly dependent on taxing private capital to support public welfare initiatives (see: Offe, 1984). The legal practice of jurisdiction then must be able to call into question the authority of the state via the notion of the sanctity of the legal person that the state is instituted to protect if the legal person as a regulatory idea starts to be jeopardized by the state's relationship with one particular legal person or group of legal persons above all others. And yet, the very interrogatory logic of legal practice necessary to accomplish this requires a collective association of practitioners committed to upholding the inviolability of the legal person as the good or the end of legal practice while, at the same time, it is this idea of a definable good of legal practice that is perhaps inadvertently compromised by the very institution of the legal personality of individuals as equivalent in law to the legal personality of associations; with no identity or end of any subordinate group or person being legally more important than any other.

### 5.1.3 Jurisdiction as Facilitative Practice

In accordance then with the organization of the legal person, for the third party guarantor to be recognized as a legitimate authority in contemporary democratic polities, the rules declared by the state, Supiot argues, must be conceived of as heteronymous, which opens up the rules to interpretation and as such institutes a second order of evaluative practice. This, he suggests, is the practice of law, which through the assertion of jurisdiction is also critical to upholding legal personality as a normative organization. This is not however, the idea of law as prohibition, as was the case in moral organizations of the person, or law as the assertion of individual rights, as in a materialist conception. Instead, with the institution of the legal organization of the person, the temporality of the relation of legal practice to normative organization is re-structured. Supiot argues that law conceptualized as the practice of jurisdiction does not arrive after the fact, he states: "The cliché that is served up time and again, that law arrives after the fact, overlooks the temporality of legal systems. As is the case for any system based on dogma, the legal system cannot be

situated in a continuum of chronological time but takes place in a sequential time frame in which any new law both repeats a founding discourse and generates new cognitive categories” (Supiot, 2007:xvii).

It is this dual quality of the legal person under legal jurisdiction, life as being and ought to be, which allows the practice of law to infiltrate state declarations and open up space for new legal interpretations. As such, the legal organization of the person intervenes in the tendency to emphasize either the idea of law as a prohibition of certain immoral acts or law as a recognition of certain individual rights and insists that the value of law to normative organization inheres instead in the law as a particular practice that subjects the good of either to the overarching public interest in upholding the ideal of legal personality. When law is conceived of as a practice then, argues Supiot, the evaluative context of law can take on its role to “transmit a shared heritage” (Supiot, 2007:xxi), which glosses all value choices in the political arena with certain dogmatic dictates that “does not just make rights enforceable it makes rights possible” (Supiot, 2007:xxii). Thus, Supiot stipulates: “The Universe of laws is infinitely larger than the body of legal norms” (Supiot, 2007:41) as it is not only a set of rules to be applied or even a regulatory norm of legal personality alone that is encompassed, but it is also, he asserts, a humanizing technology, or a practice *sui generis*, which inhabits and exposes all aspects of the organization of normativity within the society at issue so they can be debated and challenged in a public forum free from censure.

Goodrich argues that Supiot’s discussion of the practice aspect of law is in essence then an account of the rise and fall of the practice of the jurist, who’s contemporary plight, Goodrich asserts, is diminishing in significance. He states: “Whether defined as scholar, critic, or second order professional, the legal academic is increasingly removed from the university and equally remote from practice. The historical virtues of juristic enquiry – its scholarly rigor, its interdisciplinary scope, its humanism, its interpretive vision – are now increasingly read as signs of irrelevance or despair” (Goodrich, 2009:296). Further, Goodrich differentiates the realm of the jurist from the set of rules the jurist applies as follows:

The jurist, whose name derives from *ius*, was at root a philologist, someone who was skilled in the language and interpretation of the antique and venerable signs of law. *Ius (non scriptum)* is distinct from *lex (scripta.)* Where *lex* refers to written law and legislation, to *imperium* and imposition, *ius* is embedded in a much broader art of invention and interpretation attached to what is technically an unwritten doctrine and

law. Jurisdiction and specifically that of the jurist here refers to a spoken law, a mnemonic of maxims, auditory recollections, a tradition of pronouncements, orally aired learned opinions latterly collected in treatises, scholarly texts, judicial decisions, collections of arguments as well as the conversations, opinions and other aural recollections that formed the common knowledge or *communis opinio* of the legally learned....the jurist, was in origin far from being what we would today mean by a lawyer (Goodrich, 2009:297).

In Supiot's account, the role of the jurist then is critical to a legal organization of normativity as it is the jurist that facilitates the development of the legal person as a regulatory construct. The constitutive or dogmatic ideas of a legal order are, in Supiot's description, to some extent imposed by the state (as in a moral order they were imposed through standards of associational practice). However, for the continuity of the legal organization of the person, state intervention needs to be integrated into a legal narrative, which is the jurist's role to undertake. If the jurist were not performing this role then the entire organization of the legal person would be without foundation as the state's power must be able to be called to account by a second order of evaluation. Otherwise, there would be little difference between the constitutional state and the totalitarian states associated with the fascist regimes that came to power in the 19<sup>th</sup> century.

The mode of action of the practicing jurist described by Supiot then, Goodrich argues, is best captured through the notion of genealogy with the jurist uniting people excluded from various communities of practice with a rectification of this injustice and a granting of place in the legal order through a filtration of would-be exclusionary norms by the historicity of legal doctrine. Drawing (as Supiot frequently does) on the work of Pierre Legendre, Goodrich sets out: "Genealogy, the study of familial inheritance and social places, founds the subject in the legally authorized hierarchy of sites of enunciation and institutional roles. We need, we are compelled, as human beings to attach to images of identity and community that will bind us to a place, a group, an order of being while exteriorizing our fears of emptiness and non-being onto the outside and alien, the different and other" (Goodrich, 2009:300). The jurist as genealogist then fills the social function of "instituting human beings as stable and fixed identities with pre-assigned, genealogically given places" (Goodrich, 2009:307) that is accomplished through a "rhetorical process of discovery, interpretation and promulgation" (Goodrich, 2009:301). "The figure of the jurist as critically understood..." (Goodrich, 2009:312), Goodrich writes, "is that of an in-between person..." (Goodrich, 2009:312) and through the utilization of techniques of jurisdiction and legal status ensures a space for all people and practices that respect the underlying norm of the right to participate equally in the legal order as articulated by the state. Put

another way, the state can only declare a rule that is then subject to interpretation. It is the jurist who, through the exercise of jurisdiction, inscribes value to the rule in the application of the rule to the individual case and in doing so both reaches back to the past of the rule's declaration and projects forward by application a future continuity and a future possibility of challenge.

The reason of and for legal systems then, Supiot submits, is "not the beliefs they contain but the resources of interpretation they harbor" (Supiot, 2007:xxiv). Supiot argues that the function of a legal framework and thus of the practice of a legal practitioner or jurist is primarily a mediating one or, in his terms, an "interdiction" (Supiot, 2007: xxiv) or "something said between" (Supiot, 2007:xxiv). The practice of law then is not only "a word imposed on all" (Supiot, 2007:xxiv) by the state, but it is also, critically, a practice "interposed between each person and his/her representations of the world...It is a technique because its meaning is not sealed within the letter of sacred immutable text but depends on the objectives that people have set for it....its essential quality is to temper power and technology with a measure of reason...[and its] role is to come as close as possible to an accurate and just representation of the world in the knowledge that this can never be achieved absolutely" (Supiot, 2007:xxiv). Thus, the dogmatics of practice, in the sense that Supiot suggests, is one that is divorced from the content of any particular law but instead posits as an idea of law as a heteronymous mode of interpretation, which reflects the public interest in questioning authority and the imposition of a balance of interests that ensures that the ideal of the legal person, born free and endowed with reason, is respected. The practice of law, through the assertion and practice incumbent on jurisdiction, effectively extends the interests the state protects by working out how these interests balance in a particular case. Goodrich clarifies: "Dogmatics should not be understood as a substantive set of beliefs or practices, prophecies or revelations, so much as it should be apprehended as a space for a certain species of deliberation, for an openness to the questioning of institutional claims to authority and the diverse exercises of social power. Where the market impacts lives, where conflicting interests potentially change the social structure, then there needs to be a safe or at least a rationally designated, structured social space within which to address the competing values, and the potential consequences of corporate or individual practice" (Goodrich, 2009:310-311).

Thus, quite unlike accounts of law that specify its sole or primary function as a way of reducing the complexity of social life to allow for decisions in particular instances, the law

in Supiot's terms also, in effect, adds to the complexity of social life. It does so because it is not only a set of rules prohibiting certain acts divorced from the context in which they arose but, when normativity is organized by a regulatory construct of the legal person, the practice of law is also itself a mode of intelligible action, a jurisdiction which insidiously constrains all social practices (and the values formed therein) through the recognition that in every instance there is a case (a real person) *and* a rule (an abstraction) and that both must be considered. Further, and in light of this institution, it will, to some extent at least, modify and reinterpret what came before to create, through reasoned multidimensional argument, the possibility of what might come after. Supiot argues: "In every civilization, the logic of interdiction responds to the need to place a third principle between humans and their representations, whether mental (language) or material (tools). This dogmatic function – of interposing and interdiction – gives law an exceptional place: that of a technique that humanizes technology" (Supiot, 2007:39). He stipulates: "The devices of the law must be held firmly in place if human beings and society are not to fall apart" (Supiot, 2007:40).

Through the idea that law is a practice, to some extent dependent on the state but also in crucial respects independent, Supiot wants tremendously to recognize that there is a difference between the internal good of the operation of law as a practice and the external goods achieved through the operation of the state as legal guarantor, and that both elements are necessary for a coherent framework of value organized by the regulatory notion of the legal person to operate. However, while much of Supiot's text is spent mourning the degeneracy of juristic practice today, the closest he comes to positing a reason for the decline is that jurisdiction has been delegated to a multitude of self-regulating bodies due to an externally imposed neo-corporatist demand created through the pressures of global economic forces. When this occurs, he suggests, legal practice cannot perform its role and the coherence of the organization of the legal person is compromised. Yet, he fails to register that the legal organization of the person requires as a condition of its institution the demolition of the very idea that associational interests are distinct from the individual interests of their practitioners, which arguably allowed the standards or resources of legal practice to develop in the first instance. Perhaps, it is not then particularly surprising that under the configuration of the legal person the standards of legal practice are eroded. It is naïve to think juristic practice, unrestrained by an ideal of the public good of law as an associational practice, would not operate to promote the external goods of practitioners in alliance with well resourced clientele. Worse than naïve, it is to ignore the fact that this is

exactly what has occurred with the rise to prominence of the corporate lawyer and law firm (Lipartito, 1990) and more recently the role of legal jurists in the construction of the very international economic institutions; for example, international commercial arbitration (Dezelay & Garth, 1996), which Supiot suggests are undermining the legal organization of the person.

In the following two chapters, what an examination of the interpretation of the legal person by jurists in fact demonstrates is that juristic practice itself played a significant role in reducing the legal person to a functional proposition rather than a normative regulatory claim. The legal person, like the moral person, is also a matter of position and if the moral person was ultimately undone by the externalization of materialist values, the legal person is ultimately undone by the very proposition of suggesting that moral and material propositions can be un-problematically combined in the determination of jurisdiction over associated persons; that a partial alliance in the realm of the corporate person is possible. By attempting to analogize individual legal personality to corporate legal personality, the very idea of the legal person over time implodes in practice and the incoherence reduces the legal person, not to the regulatory idea of a partial alliance between morality and materialism; but a proposition that the legal person is a functional device to recognize moral and/or material claims decided elsewhere: a form without content. This is not only something that happened to the organization of the legal person as a result of a change in external circumstances (although surely, as Supiot suggests, this is part of it) but it was also internally possible, derived from the constitutive element of a legal order, the guarantee of the relation by a third party guarantor, and the facilitation of the organization of the legal person by practicing jurists unrestrained by a concept of the public good. So Supiot frets: “in the political sphere, the State and the law are still in dissociable, still propping each other up; but their legs are a little shaky. The State seems to have given up on abstracting general and enduring laws from a world whose complexity eludes it, and has reverted to new forms of feudalism. The law has become a rule with limited validity, or else retreats in the face of markets and various forms of contractual agreement” (Supiot, 2007:53). And, indeed, it is a valid complaint. However, in his haste to recover the institution of legal status and the practice of jurisdiction as necessary to re-establish the legal organization of the person (or, to quote the title of Goodrich’s review: “*Law’s Labour’s Lost*”), what he does not consider is that perhaps the way the legal person has been instituted; the sine qua non of law’s particular labor, has, in fact, been the major factor contributing to its waning normative influence.

## 6. The Legal Person and the Public Interest

In the previous chapter, Supiot's outline of the legal organization of the person as a median position between moral and material conceptions was discussed, with Supiot claiming that legal personality as a normative proposition did not become dominant until the aftermath of the Second World War. However, he also suggests this was the culmination of a long historical process and the idea of the legal person was certainly in circulation prior to this point. Curiously, the main debates on corporate legal personality are almost entirely prior to this point and became especially intense in the early 20<sup>th</sup> century prior to the outbreak of war. As such, it is necessary to return to the period Polanyi discussed previously to get a better sense of the ideas that came to define the corporate legal person and that continue to exert influence over the construct of corporate legal personality today. However, to do so it is necessary to go outside Polanyi's text, as although Polanyi discusses law in *TGT* as one of the ways by which impacted constituencies were able to secure some measure of protection from the state and a significant amount of his text is spent discussing, by way of contrast, the impact of the Poor Laws; his analysis generally of the legal institutions of 19<sup>th</sup> century economic liberalism is on the whole very minimal. It is not clear from the text, for instance, if Polanyi views law as merely a forum where state initiatives were registered or if he views legal mechanisms as being to some extent independent of state control.<sup>23</sup> To grapple with the developing relationship between law and the state in the 19<sup>th</sup> and early 20<sup>th</sup> century, the legal scholarship of the period merits attention.

Fortuitously, it is during this period that F.W. Maitland (still today often recognized as England's 'greatest legal historian') was researching the institutions of English private law and had, as a result, become particularly interested in what he was increasingly coming to see as a problematic relationship between the legal practice of protecting corporate groups and the legal theory of sovereignty. Later, Harold Laski, inspired by Maitland, too will discuss the legal theory of personality and the relationship between the common law and the legal forms of persons in his critique of state sovereignty. Both of their respective theories of the legal person and their theorization of the relationship between law and politics will be discussed below as they are important precursors to the organization of the

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<sup>23</sup> It should be noted here that he does discuss the common law in *TGT* in passing and he appears to draw a distinction between the common law and legislated acts by the state, stipulating: "The scope of social defense against all-round dislocation was as broad as the front attack. Though common law and legislation speeded up change at times, at others they slowed it down. However, common law and statute law were not necessarily acting in the same direction" (Polanyi, [1944] 2001:190) but it is difficult to say given the brevity.

legal person Supiot describes (although very different from it, in that Laski, at least, would not have accepted an all powerful state as third party guarantor). The subsequent development of the jurisprudence on corporate legal personality will, in fact, adopt some of Maitland and Laski's ideas but in a way that they would not have imagined and may not have approved. This will be set out separately in chapter 8 to follow.

### **6.1 Frederic William Maitland and the Legal Fiction of Sovereignty**

Writing at the close of the 19<sup>th</sup> century and into the early 20<sup>th</sup> century, Maitland slowly begins to reassess the relationship between the real operation of law and the theory of legal sovereignty, the dominant view at the time being the command theory and identified with the work of John Austin.<sup>24</sup> He does so through a historically penetrating analysis of the status of corporate entities and it is through Maitland's work<sup>25</sup> then that we are able to trace the genealogy of two distinct narratives concerning the nature of the relationship between the state and non-state corporate entities. What Maitland comes to appreciate is that corporate entities in England appeared to be able to gain status in law by one of two distinct routes. Officially, under the concessionary theory of the legal person or *persona ficta*, they were to be accorded legal status by permission of the state alone through Royal Charter or formal registered incorporation. Unofficially, under the equitable doctrines of trust law, corporate groups could to some extent by-pass state incorporation and appear in law 'as if they were persons' by being designated as trust beneficiaries. Only the former, however, was ever explicitly acknowledged in theory despite the fact that it was the latter operation that was most often turned to in practice.

Thus, to get a better understanding of the implications of the *persona ficta* theory of corporate entities in England it was to the work of Otto von Gierke that Maitland turned. Publishing in 1900 an English translation of a portion of Volume 3 of Gierke's "*Das Deutsche Genossenschaftsrecht*" under the English title: "*Political Theories of the Middle Age*"(1900), it would be Maitland's venerated introduction to this text that would go on to

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<sup>24</sup> Austin's theory is set out in "*The Province of Jurisprudence Determined*" (1832). Dewey (1894) argues that on a reading of this text the notion that the command theory is Austin's theory is a myth and instead should be more readily identified with Hobbes. However, as this is not a thesis on the nuances of Austin's theory of sovereignty, I will simply be asserting here the general discursive understanding of the command theory that Maitland was reacting to and that tended to be attributed to Austin, without attempting to unpack whether or not this was in fact really representative of Austin's personal view.

<sup>25</sup> Maitland's various essays have been re-published in an edited collected by David Runciman & Magnus Ryan (2003) entitled "*State, Trust and Corporation.*" Unless otherwise indicated the summary of Maitland that I am providing here is drawing on Maitland's essays assembled in this collection.

inspire the EPP school of political thought in England.<sup>26</sup> The actual text of Gierke's selected for translation by Maitland, however, was somewhat of an odd choice, jumping into the middle of a highly systematic work that depended for its claims in volume three on the foundational work undertaken in the preceding two volumes.<sup>27</sup> To Maitland's credit, he was aware of this incursion, remarking: "...it would be untrue to say that this amputating process does not harm" (Maitland 1900:8) and he explicitly acknowledges that Gierke's theory of the *Genossenschaftsrecht* is "a highly organized system, and in that section are sentences and paragraphs which will not yield their full meaning except to those who know something of the residue of the book and something also of the controversial atmosphere in which a certain *Genossenschaftstheorie* has been unfolding itself" (Maitland 1900:9). But, Maitland, it must be understood, was primarily concerned with Gierke as a way to understand, by means of comparison, the application of the legal theory of the *persona ficta* that Gierke discusses in reference to *Genossenschaftstheorie* in Germany with the legal adoption of the *persona ficta* theory in English common law that operated in practice somewhat differently.

This is unfortunate as starting where Maitland did meant that some of Gierke's more progressive ideas about trade unions and producers cooperatives, subject matter that will be the primary concern of pluralists like G.D.H. Cole and Harold Laski, is absent from the translated material. As such, the later pluralists who would follow on Maitland tended to draw less on Gierke than they might have done and more on Maitland's interpretation of Gierke, which was ultimately directed at a different set of questions than the later pluralists were asking. Still, Maitland did attempt to use his introduction to the text to provide his English audience with at least some of the missing detail of Gierke's un-translated work as well as his own elaboration on why he thought that some of Gierke's ideas, in particular his suggestion that corporate entities were better legally conceived of as 'real' and not 'fictitious' or 'artificial', were relevant to an understanding of the English legal doctrine pertaining to the same. His engagement with Gierke will also lead Maitland to begin to articulate a highly original theory of the relationship between the law and the state, which will be teased out in the discussion below and which informs the subsequent dominance of the organization of the legal person and related concept of the public interest.

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<sup>26</sup> Maitland's introduction to this text and other works on the subject would also travel from England to America and arguably it was Maitland's work that also, at least initially, inspired American Political Pluralism ("APP"). While the uptake of Gierke in the US is sometimes credited to Ernst Freund, Harris (2006) argues that Maitland's work was already known in America by the time that Freund revisits Gierke's ideas in the American context.

<sup>27</sup> Outlined in Chapter 4 of this text.

### 6.1.1. Law and Statecraft in England and Germany

Key to Maitland's interpretation of Gierke in the English context is the difference Maitland identifies in respect of the relative impact of Roman law on Germany and the impact of Roman law on England. The reception of Roman canons in the legal field was of course not a distinctly German event but had spread throughout the continent touching down in each place with greater or lesser force. England was not an exception to this, however the influence of the Roman canon was of less significance in England than it had been in Germany. Maitland conjectures that the reason for this could be attributed to the presence in England of an established and organized indigenous legal profession. By the time Roman law had made its way across the channel, he argues, England had already started to develop its own domestic legal doctrines under the protective oversight of the Inns of Court (common law) and the Court of Chancery (equity). The domestic profession, Maitland observes, was highly organized and invested in their own ways of doing things and thereby strong enough to resist the wholesale adoption of Roman Law; staging instead a defense of English legal institutions. Maitland states: "Thus when the perilous time came, when the New Learning was in the air and the Modern State was emerging ... English law was and had long been lawyers' law, learned law, taught law, *Juristenrecht*" (Maitland 1900:8). As such, Maitland opines, England could withstand the pressure to adopt wholesale the Roman canons of civil law through the institutionalized barrier imposed by the presence of an organized domestic profession.

By way of contrast, Maitland notes, that at the time of the Roman reception in Germany, Germany's domestic legal profession was not at such an advanced stage of organization; the consequence being that "Italian doctrine swept like a deluge over Germany" (Maitland 1900:9). Customary institutions and associations in Germany that could not locate their right to exist in terms of the Roman concessionary theory of legal personality were, as a direct result, vulnerable and often extinguished. This included the *Genossenschaft* or fellowship institutions discussed by Gierke, where what Maitland suggests the "practical law" (Maitland 1900:7) of Germany was actually in the process of being articulated. Maitland notes, in reference to Germany's customary or practical legal development then: "...here lay the possibility of a catastrophe – it was not learned law, it was not taught law, it was far from being *Juristenrecht*...German law savoured of nothing of the kind, but rather of the open air, oral tradition and thoroughly unacademic doomsmen..." (Maitland 1900:7-8). Thus, as Roman law migrated to Germany through dissemination in German

law schools, Maitland observes: “It became always plainer that what was in the field was not merely a second set of rules but a second and disparate set of ideas” (Maitland 1900:17). So, when the German Princes sought to consolidate their power, the Roman theory of the state was at the ready to assist alongside German academic legal scholars and jurists who had trained in Roman canons and could articulate the Roman doctrines in a way that was favorable to the Princes’ position.

In Germany, unlike in England, there was no counter-jurisprudence or a domestic professional institution capable of competing with Roman law in the same register. Runciman elaborates: “In Germany they had no Inns of court, and no Court of Chancery, in which they might preserve and develop their own juristic conceptions of group life” (Runciman 1997:91). Maitland’s understanding of the catastrophe of German law here is important as it sets the stage for what he will present as an impending potential catastrophe in the English law pertaining to non-state corporations in the early 20<sup>th</sup> Century. For, although Roman ideas had not had the same influence in England as they had in Germany, some Roman concepts had taken root. For the most part, Maitland observes, they were confined to what he refers to as ‘Church law’ and were specific to the jurisprudence of the ecclesiastical courts. However, some of the doctrines articulated therein had crossed over into common law and entered into the service of what he refers to as the ‘English law of Persons’. It was the reception (and mutation) of Roman concepts in this latter area that interested Maitland; in particular, his attention was increasingly being drawn to the tenuous reception of the Roman or Italian<sup>28</sup> theory of the corporate entity as *persona-ficta* in common law jurisprudence. It was curious, he noted, that although many Roman ideas had not found a place in English law, the English common law jurists had in fact adopted the concept of the *persona-ficta* Gierke held responsible for the demise of fellowship institutions in Germany. And yet, Maitland observes, English associations or fellowships had not been impacted by the doctrine in quite the same way as their German counterparts.

The question of how and why associations in England then had not only survived but also multiplied in spite of the reception of the Roman theory of corporate personhood in English law would come to increasingly preoccupy Maitland’s work towards the end of his life. Beginning with an aside in an 1893 lecture addressing the role of local government

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<sup>28</sup> Maitland refers to it as the Italian theory rather than Roman theory as the theory of the corporation represented a particular interpretation of the Digest by Innocent IV and was considered more of an Innocentine doctrine than Roman. See Maitland (1900:19).

given to the Liverpool Board of Legal Studies<sup>29</sup>, he would go on to author a number of texts and lectures wrestling with both the legal and political meaning of the *persona-ficta* in the English context. It is a foray that is often filled with trepidation on Maitland's part due to what he perceived to be its political and metaphysical content. He repeatedly insists in various essays addressing the subject matter: "As to philosophy, that is no affair of mine" (Maitland [1904] 2003:71).<sup>30</sup> And yet, with increasing vigor, he does start to do some theoretical heavy-lifting, insofar as his exegesis of the fundamentally ambiguous existence of corporate entities in English law and legal history begins to question the merits of the then dominant theory of legal sovereignty and the dominant characterization of non-state corporate entities that followed from it. This theory is often shorthanded as 'the command theory' of law attributed to John Austin's work in "*The Province of Jurisprudence Determined*" (1832) and corresponding to a particular analytical model of jurisprudence that Julius Stone notes "monopolized the field of English jurisprudence for a half-century after Austin" (Stone 1944:97).

Before considering Maitland's work in more detail then, it is necessary to briefly summarize the basic components of Austin's command theory (in an admittedly highly perfunctory fashion) to at least have an idea of what Maitland was positioning his work against. Austin, inspired by the German jurisprudence that had followed on Savigny in Germany<sup>31</sup>, articulated a theory of law that postulates a complete identification of law with the command of the sovereign. As Hans Kelsen (1941) summarizes in an article for the *Harvard Law Review*, Austin articulated a theory of law in which laws were defined as "rule and rule as command" (Kelsen 1941:54) and commands were conceived of as the "will of the legislator or the state" (Kelsen 1941:55) and enforced by the state through the use of sanction. The state (or organ of the state) is then sovereign because the laws created by the state are obeyed. As Kelsen points out, strictly speaking, Austin's theory of law does not spell out that the sovereign is necessarily a state. In Austin's theory "law is the creature of the sovereign or state but state here...means not a political society, but rather the bearer of sovereignty within the society" (Kelsen 1941:63). Presuming this is the state, however, then law is the command of the state. There is no normative content to the law in Austin's view. Citizens are conceived to obey the law because they fear the sanction of the

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<sup>29</sup> See: Runciman & Ryan (2003:xxxvii) where they discuss this lecture as being Maitland's first foray into the subject matter.

<sup>30</sup> Maitland had however prepared a dissertation for a Fellowship in Moral and Mental Science at Cambridge (See: Runciman & Ryan, 2003:x).

<sup>31</sup> For a more detailed exegesis of the relationship between Austin and Savigny see Schwarz (1934) "*Austin and the German Jurisprudence of his Time*."

law as enforced by the sovereign. To the extent that rights exist in law they are identical with duty: “Such a right exists when an individual is accorded by the legal order the opportunity to make the duty of another effective by bringing a suit and thus setting in motion the sanction provided for violation” (Kelsen 1941:61). Kelsen argues then that the theory Austin proposes is a static theory of law insofar as it “regards law as a system of rules complete and ready for application, without regard to the process of their creation” (Kelsen 1941:61). And further, he notes, it is a theory that divorces law entirely from the field of politics: “As all law emanates from the sovereign, the sovereign himself is not subject to the law...sovereign power is incapable of legal limitation” (Kelsen 1941:64).

In the actual practice of law in England during the 19<sup>th</sup> and early 20<sup>th</sup> century however, Maitland observes, there was scant evidence to suggest the command theory accurately reflected what was in fact happening in and through legal institutions. Strictly speaking by the terms of the command theory, corporate entities unrecognized by the state should not have been able to exist at all in law or practice without the state’s command or, at the very least, consent through a general rule. And yet, Maitland observes, not only did unincorporate entities exist in practice and in legal contemplation, they were exceedingly well protected in law ‘as if they were persons’ through the relief of the rigid common law *persona-ficta* doctrine by the more flexible doctrine of trusts in equity. Further, he observes, this had been so for joint stock companies even when they were technically illegal under the *Bubble Act* (1720) and for brotherhoods or fraternities even when they were technically illegal under the Anti Combination Laws. Although these laws had since been repealed, replaced by the *Joint Stock Companies Act* (1856) and later *Companies Act* of 1862, and the *Trade Union Act* of 1871 allowing for voluntary incorporation or registration, Maitland notes that many corporate entities including joint-stock companies, trade unions, and non-chartered learned societies (professions) had opted to remain unincorporated. The legal profession itself, he notes, despite potentially having the option of incorporation, had steadfastly decided to forego seeking any official recognition of juridical personality. Maitland states: “...let us remember that the English judges who received and repeated a great deal of the canonistic learning about corporations, *Fiktionstheorie*, *Kozessionstheorie* [fiction theory, concession theory] and so forth, were to a man members of these *Körperschaften* [corporate entities] and had never found that want of juristic personality was a serious misfortune. Our lawyers were rich and influential people. They could easily have obtained incorporation had they desired it. They did not desire it” (Maitland, [1904] 2003:107).

In practice then corporate entities had a long historical pedigree in English law and society and could not be said to exist at the command or pleasure of the state or sovereign. At the same time, under the dominant legal and political theory of the period, they could not be understood to exist or be said to have a right to exist if they did not. Public law and private law were then, he observes, speaking to some extent the same language of ‘persons’ in their formal registers: the common law doctrine of the *persona ficta* formally supporting the command theory of sovereignty but, informally, what being a legal person (or not) meant for the purposes of the way the law actually worked in practice, when combined with equitable relief, was very different. Maura Nolan (2003), in her excellent review of Maitland’s organicism, discusses how implicit in Maitland’s work on a number of subjects there is a fascination on his part with what Siegfried Kracauer calls the ‘anteroom’, which she describes (quoting from Kracauer) as: “a space where the ‘last things before the last’ – the material and physical elements of daily life, its particulars (those things that precede philosophy) can be considered. If philosophy lays claim to the absolute, then the anteroom exists in the spaces between the named homogeneities of doctrine and theory, in the ‘nameless possibilities’ of such interstices” (Nolan 2003:569). One way to translate the argument that Maitland makes here is that he observed that un-incorporate corporate entities were existing in a sort-of legal anteroom not necessarily recognized as persons by the common law or able to be conceived as existing independently of the state in theory, but, as the subjects of equity and trust law, managing to exist somewhat comfortably and undefined, out of view of both the law of persons and the state, within the interstices of common law and equity.

### **6.1.2 Trusts: Property and Persons**

To understand how unincorporated corporate entities had historically managed to become protected in English law (and not German law) ‘as if they were persons’ when as a matter of strict law they could not be, it is necessary to understand something of the history of the English doctrine of trusts. Trusts, Maitland argues in “*The Unincorporate Body*” ([1911 2003]), would be difficult for anyone unfamiliar with the structure of English law to understand. He states:

Where lies the difficulty? In the terms of a so-called ‘general jurisprudence’ it seems here: - A right which in ultimate analysis appears to be *ius in personam* (the benefit of an obligation) has been so treated that for practical purposes it has become

equivalent to *ius in rem* and is habitually thought of as a kind of ownership, ‘equitable ownership.’ Or put it thus: - If we are to arrange English law as German law is arranged in the new code we must present our law of trust a dilemma: it must place itself under one of two rubrics; it must belong to the Law of Obligations or to the Law of Things. In sight of this dilemma it reluctance and recalcitrates. It was made by men who had no Roman law as explained by medieval commentators in the innermost fibers of their mind (Maitland, [1911] 2003:53).

In its earliest formulations, Maitland observes, the concept of the trust was largely restricted to land: “for a long time the only and for a longer time the typical subject-matter of a trust is a piece of land or some incorporeal thing, such as an advowson, which is likened to a piece of land” (Maitland [1911] 2003:53). It was a mechanism, he argues, for a wealthy landed class to keep their lands from falling into the hands of feudal lords through political demands of wardship or marriage or legal doctrines of relief or escheat by making an agreement with a group of friends that these friends would legally hold the title to the land in trust for the trustor’s use and on his death fulfill his testamentary wishes that as a matter of strict law he would otherwise not be able to make. Because the landed class would all do this for each other, the system rested on reciprocity between them: one would not betray the trust of the other, as they would not want the others to do the same to them. While, Maitland observes, in the early 20<sup>th</sup> century context the trust “has been extended to things of all sorts and kinds” (Maitland [1911] 2003:53), he argues: “were it not for trusts of land we should hardly have come by trusts of other things” (Maitland [1911] 2003:53).

Although the trust then hinged on the specific terms and conditions of the agreements made, Maitland notes that it would be difficult to really call this agreement a contract as if each agreement were viewed individually, what would be the consideration? Even if nominal consideration were contrived, the person responsible for creating the trust, who would sometimes and sometimes not be the beneficiary, would often have passed away by the point it may need to be enforced. Even if they were alive and the agreement was breached, how could they protest in contract when the right they consigned was technically not legally alienable? Further, Maitland asserts, it would be difficult to conceptualize the rights of beneficiaries not party to the agreement as against the trustees if the trustees alienated the land to a third party in the language of contract. Maitland elaborates: “Think steadily of that right as the benefit of a contract and you will find it hard to say why it should be enforced against one who was not a party” (Maitland [1911] 2003:54). The trust then did not, he argued, turn on the same principle of the benefit of an enforceable promise between two parties strange to each other. It was not, in other words, enforceable by common laws pertaining to personal obligation. Instead, he argues, the early trusts could

not really be understood apart from the system of social relations in which the device was embedded, the concept then turning on a collective notion of ‘good conscience’ that existed between the members of a similarly situated social group, the purpose of the legal device often being to evade the technical requirements of the common law.

And ‘good conscience’, Maitland argued, is also the basis upon which trust agreements came to be legally enforced, not through the common law of contract but through equitable administration; the rights of the beneficiary in trust being made to resemble property rights rather than personal rights. The reason this could transpire is unique to the English legal system, organized at the time into two distinct bodies of law: common law and equity, the latter conceived as an “extraordinary jurisdiction to relieve injustice caused by the common law” (Maitland, [1904] 2003:84) and as such superior in the event of conflict. Unlike the common law, equity was a more flexible forum with broad remedial discretion and through the recognition of trust agreements and the development of trust doctrine: “‘good conscience’ becomes the active principle; a conscience that can be opposed to strict law” (Maitland, [1911] 2003:55). However, trust beneficiaries (*cestui que trust*), Maitland notes, did not suffer for this lack of juridical principle:

Even when the Court of Equity could not give the *cestui que trust* the very thing that was the original subject matter of the trust it has struggled hard to prevent its darling from falling into the ruck of unsecured creditors of a defaulting trustee. It has allowed him to pursue a ‘reified’ trust-fund from investment to investment: in other words, to try to find some thing for which the original thing has been exchanged by means of a longer or shorter series of exchanges. That idea of the trust-fund which is dressed up (invested) now as land and now as current coin, now as shares and now as debentures seems to me one of the most remarkable ideas developed by modern English jurisprudence. How we have worked that metaphor! May not one have a vested interest in a fund that is vested in trustees who have invested it in railway shares. Even a Philosophy of Clothes stands aghast. However, the main point is that *cestui que trust* is magnificently protected (Maitland [1911] 2003:56).

As the laws of equity pertaining to trust arrangements started to be articulated with increasing regularity, it began to be recognized that the device could be put to a variety of uses: “A trust for persons shades off, we might say, into a trust for a *Zweck* [purpose]” (Maitland [1904] 2003:99). So, for instance, a trust could be fashioned really for any corporeal person or incorporeal thing that one wanted to protect and the Court of Chancery would enforce it. Runciman states: “It was the great merit of the concept of trusteeship that it focused not on someone or thing but on the terms and conditions under which the rights of someone or thing were held by others. These terms and conditions were determined by

the terms and conditions of each individual trust, and it was here that the lawyers could perform their tricks, fashioning legal entities out of the constraints which acted on the trustees themselves" (Runciman, 1997:104). It was not long then before corporate entities of all types began to realize that a lack of public recognition of their legal personality, whether it was because the state or sovereign explicitly denied it or because they simply did not care to find out, was not necessarily an insurmountable obstacle to taking on a corporate form. As trust beneficiaries, corporate entities could hold property and if they were socially recognizable entities these rights were particularly invulnerable. Trusts, Maitland notes, had been conceived to bind any third party with notice of the trust: "The trust is to be enforced against all whose conscience is to be 'affected' by it. Class after class of persons is brought within the range of this idea" (Maitland [1911] 2003:55). In the case of well known corporate entities this was an advantage: "No one will ever be heard to say that he has purchased without notice of a trust a building that was vested in trustees but was fitted up as a club-house, a Jewish synagogue, a Roman catholic cathedral" (Maitland, [1911] 2003:55).

So, through the application of equitable doctrines, groups with a broad range of interests and objects came to be protected in England without ever being granted formal recognition as legal persons. That these associations existed however and held property rights was something that was in effect broadly socially understood without the public ever necessarily needing to understand the peculiar operation of the law that made this possible and without any coherent juridical theory of corporate existence being developed. Maitland states:

And so we came by our English *Ansalt* or *Stiftung* without troubling the State to concede or deny the mysterious boon of personality. That was not an inconsiderable feat of jurisprudence. But a greater [feat] than that was performed. In truth and in deed we made corporations without troubling king or parliament though perhaps we said that we were doing nothing of the kind (Maitland, [1911] 2003:59).

In practice, Maitland argues, the law of trusts operated as "a most powerful instrument of social experimentation" (Maitland [1911] 2003:56), which often led to political change. He cites as a particularly progressive and successful example that: "It (in effect) enabled a married woman to have property that was all her own until at length the legislature had to give way (Maitland [1911] 2003:56). The most significant intervention of the trust however, Maitland stipulates, was that it had evaded the *persona-ficta* doctrine and allowed corporate institutions of all sorts to flourish (Maitland [1911] 2003:57). Equity, in

Maitland's view, through the exercise of reserve jurisdiction had here performed its most significant role; providing an "escape" (Maitland [1911] 2003:58) from the rigidity of the common law requirements of legal persons and allowing to the English people "a field of social experimentation such as could not possibly have been theirs, had not the trustee met the law's imperious demand for a definite owner" (Maitland [1911] 2003:59).

Chief among the merits of this latter operation then, in Maitland's view, had been to protect in England the equivalent of German *Genossenschaft* institutions by attenuating the state or sovereign's sole discretion over the personified institutions of corporate life. He states:

Our *Anstalt*, or our *Genossenschaft*, or whatever it may be, has to live in a wicked world...And apart from wickedness, there will be unfounded claims to be resisted: claims made by neighbours, claims made by the state. This sensitive being must have a hard, exterior shell. Now our Trust provides this hard, exterior shell for whatever lies within. If there is a theft, the thief will be accused of stealing the goods of Mr. A.B. and Mr. C.D., and not one word will be said of the trust...The judges, if I may so say, could only see the wall of trustees and could see nothing that lay behind it. Thus in a conflict with an external foe no question about personality could arise. A great deal of ingenuity had been spent in bringing about this result...Disputes there will be; but the disputants will be very unwilling to call in the policeman (Maitland, [1904] 2003:105).

Still, Maitland writing at the outset of the 20<sup>th</sup> century was not unaware that there were problems with this longstanding but fundamentally ad-hoc arrangement. Firstly, fellowship institutions were not the only institutions being protected through what Maitland refers to as law's 'back stair'. Runciman elaborates: "At no point did trusts require the sanction of the sovereign, and they could be formed wherever a desire existed to protect those things which endure beyond the life span of an individual man. Moreover, the beneficiary of a trust need not be construed in the conventional language of personality at all – it might...be a 'purpose' which has no personal equivalent...There are few things that were incapable of being protected by trust" (Runciman, 1997:67). He continues that as the trust then turned on the terms and conditions of each individual agreement: "it did not form part of a coherent juristic alternative to Romanism. The English legal system contained many Roman elements. What it also contained were elements, like the trust, which had no juristic basis at all" (Runciman, 1997:67).

As such, the active principle of 'good conscience' could not only be used to protect fellowship institutions but also large accumulations of stock or wealth. So, Maitland

observes: "...the mightiest trading corporations that the world has ever seen are known by the name of Trust" (Maitland, [1904] 2003:76). And while in some respects, Maitland acknowledges, this strengthened the protection afforded: "Our independent institution lives behind a wall that was erected in the interests of the richest and most powerful class of Englishmen: it is as safe as the duke and the millionaire" (Maitland, [1904] 2003:101). It also meant that corporate life in England rested on uncertain political and juristic foundations, the trust eclipsing all organized groups under one umbrella: charities and institutions alongside for profit corporations, professional associations, clubs, and unions etcetera. Similarly there were no distinctions made on how each individual trust was governed: "we are face to face with almost every conceivable type of organization from centralized and absolute monarchy to decentralized democracy and the autonomy of the independent congregation...all of them have found satisfaction for their various ideals of...polity under the shadow of our trusts" (Maitland, [1904] 2003:104). He continues: "as might be expected in a land where men have been very free to create such...'trusts' as they pleased...threads have been woven in every conceivable fashion. And this has been so from the very first. In dealing with...trusts one by one, our Courts have not been compelled to make any severe classification" (Maitland, [1904] 2003:103).

Maitland's concern about the lack of juridical principle involved in the formation of trusts then is not that he was particularly worried the state would suddenly decide to interfere in their operation or that lawyers would not be capable of protecting trust institutions if the state did attempt to do so.<sup>32</sup> Lawyers, he notes, too dwelled behind a wall of trustees and were particularly protective of their property, institutions, and more importantly their jurisdiction to self govern. He describes the institutional separation of law from the state the profession had accomplished through the trust device at length:

I imagine a foreign tourist, with Badeker in hand, visiting one of our 'Inns of Court': let us say Lincoln's Inn. He sees the chapel and the library and the dining-hall; he

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<sup>32</sup> Maitland recounts here that there had in fact been an early attempt by the state to put an end to, or at least begin to narrow, the trust concept dating back to the 14<sup>th</sup> Century. Maitland recites that a 1532 statute had declared that trusts for the use of "parish churches, chapels, church-wardens, guilds, fraternities, cominaties, companies or brotherhoods erected or made of devotion or by common assent of the people without any corporation...shall be utterly void in law if they extend beyond a term of twenty years" (Maitland, [1911] 2003:59-60). That this did not end the trust, Maitland argues was a direct result of the ingenuity of Elizabethan lawyers who interpreted the statute narrowly, as only applicable to uses that were "superstitious" (Maitland, [1911] 2003:60) and not possibly intended to cover trusts the use of which was "good and godly" (Maitland, [1911] 2003:60). Maitland ruses: "I will not say but that there were some words in the Act which in the eyes of good and godly lawyers might confine its effect within narrow limits, but I also think that good and godly lawyers, belonging as they did to certain already ancient and honourable societies for which lands were held in trust must have felt that this statute had whistled very near their ears" (Maitland, [1911] 2003:60).

sees the external gates that are shut at night. It is in many respects much like such colleges as he may see at Oxford and Cambridge. On inquiry he hears of an ancient constitution that had taken shape before 1422, and we know not how much earlier. He learns that something in the way of legal education is being done by those Inns of Court, and that for this purpose a federal organ, a Council of Legal Education, has been established. He learns that no man can practice as an advocate in any of the higher courts who is not a member of one of the four Inns and who has not received the degree of 'barrister-at-law'. He would learn that these Inns have been very free to dictate the terms upon which this degree is given. He would learn that the Inn has in its hands a terrible, if rarely exercised, power of expelling ('disbarring') a member for dishonourable or unprofessional conduct, of excluding him from the courts in which he has been making his living, of ruining him and disgracing him. He would learn that in such a case there might be an appeal to the judges of our High Court: but not to them as a public tribunal: to them as 'visitors' and as constituting, we might say, a second instance of the domestic forum.

Well he might say, apparently we have some curious hybrid – and we must expect such things in England – between an *Ansatz des öffentlichen Rechtes* [an institution of public law] and a *privilegierte Korporation* [privileged corporation]. Nothing of the sort, an English friend would reply; you have here a *Privatverein* [private society] which has not even juristic personality (Maitland [1904] 2003:106-107).

He was, however concerned about the diversity of corporate entities that were also able to accomplish similar feats behind the screen of the trust and how these corporate institutions might start to impact on the life of not only other institutions but society at large. He states: "It has often struck me that morally there is most personality where legally there is none. A man thinks of his club as a living being, honourable as well as honest, while the joint stock company is only a sort of machine into which he puts his money and out of which he draws dividends" (Maitland, [1904] 2003:114). Hager elaborates: "The issue identified by...Maitland was not unrelated to the vast and increasing power of concentrated capital...as recently as 1880s in America, most large capital enterprises had operated as unincorporated associations. Moreover, Maitland in particular emphasized the rise of the trust as a means of carrying on a large-scale enterprise without resort to formal incorporation" (Hager, 1988:592). So, although the trust had performed an important role historically, protecting *Genossenschaft* institutions from the individualistic state-centered theory of the corporation as *persona-ficta* in the common law, the trust was now to some extent over-performing, in Maitland's view, protecting any ostensibly corporate entity indiscriminately and absent of any guiding juridical principle.

What Maitland conceived to be necessary then is that all unincorporated corporate entities would need to come out from behind the walls of trust. At the same time, corporate entities could not be expected to do so when the dominant juristic theory under the

common law continued to be the *persona-ficta* theory. The theory of the fictional or artificial personality of groups premised on the concession of the state operated as a double bind. The best way to challenge the doctrine and the corresponding command theory of legal sovereignty would be legal recognition through the common law of the corporate life that existed behind the walls of trust. But, corporate life having developed behind the walls of trust was, not dissimilar to the corporate life of *Genossenschaft* institutions in Germany, of the ‘open air’. Their practices then were not yet taught law, learned law, *juristinrecht*. Although the legislature was beginning to give way through the recognition of personality or official status incumbent on registration under the *Companies Act* (1862) or *Trade Union Act* (1871) and the chartering of most professional associations that requested one, to accept that corporate status wholly depended on registration or permission would be to capitulate to the *persona-ficta* and command theory. It would be as if the associations that registered (or requested a charter), forced into the limited channels offered and put under the supervision and jurisdiction of the state, were effectively re-born as *persona-ficta*, relinquishing their rich material history (many of the associations having existed for centuries), which Maitland, following Gierke, perceived to be the ‘real’ source of their legal identity. Nolan sets out: “the fundamental premise of Gierke’s ‘Realism’ that the organic corporation reflected the actual working of the law rather than an alien legal theory, appealed deeply to Maitland’s understanding of English law” (Nolan, 2003:565).

In Maitland’s view then, a legal doctrine that would recognize the social and historical reality of corporate forms of organization as opposed to insisting on imposing a single creator was required. As long as the command theory of sovereignty continued to dominate, however, he also recognized that this was unlikely to happen: “...the thought of a ‘jurisdiction’ inherent in the *Genossenschaft* is strong in us, and I believe that it is at its strongest where there is no formal corporation. And so, the external wall being kept in good repair, our English legal *Dogmatik* [dogmatics] may have no theory or a wholly inadequate and antiquated theory of what goes on behind....Shameful though it may be to say this, we fear the petrifying action of juristic theory” (Maitland, [1904] 2003:106). At the same time, if the *Genossenschaft* was to survive, it was a matter of some political urgency that these institutions did come out of hiding as there was a predator in the midst. Hager states: “Maitland stressed that the trust form in America had spawned capital’s most colossal accumulations unchecked by the fiction theory’s flimsy constraints. Though Maitland could scarcely conceal admiration for the ingenuity and awesome achievements

of the trusts, he argued that capital's immense social power justified a shift to the real entity paradigm, which would regulate capital through the devices of tort and criminal responsibility. Corporate capital, which had thrived by imitating real entity theory, could be controlled only through the law's explicit adoption of that same theory..." (Hager, 1988:627).

The corporate entities that were behind trusts then were in need of oversight and integration into a new political and legal theory, but Maitland here was adamant that recovering them from trust needed to be a juridical operation, not legislative. Politically by reducing the only recognized entities to private company, trade union, or chartered corporation, the state through legislative action had demonstrated that it had no intent on sharing jurisdiction over political matters. And yet, the primary distinction between the organization of capital corporations and fellowship corporations was just this: a political or moral distinction. Law, in Maitland's conception, as an "organic system" (Nolan, 2003:561) was better situated to integrate corporate entities, he describes: "When we speak of a body of law, we use a metaphor so apt that it is hardly a metaphor. We picture to ourselves a being that lives and grows, that preserves its identity while every atom of which it is composed is subject to a ceaseless process of change, decay, and renewal" (Maitland, [1893] 1911:417). But for the law to retrieve corporate entities it would need to move away from the *persona ficta* theory to develop an alternative juridical principle that would recognize their existence by way of an existing form. If only then there was some other un-incorporate form of organization that could not be denied was both a corporate and a political entity, some entity closer in content to the legal profession than to the for-profit corporation, which through legal recognition as a real-entity the common law could reset the public-private parameters of corporate personhood. In an ingenious twist on Gierke's real entity paradigm and in direct confrontation with the command theory of state sovereignty, Maitland recognizes that there was one that might work: the state.

### **6.1.3 States: Associations and Corporations**

To understand how the *persona-ficta* doctrine had made its way into the English common law, Maitland in "*The Corporation Sole*" ([1900] 2003) traces the genesis of the English idea of the corporation sole; in his view a legal aberration that had originally developed under the influence of Roman law in the English ecclesiastical courts but had found a foothold in the wider English context through its association with the legal personality of

the Crown. The device of the corporation sole had originally been devised in what Maitland refers to as ‘Church Property Law’ as a means to express the idea that land donated to a parish church and forming what was to be understood as the parson’s estate did not fully vest in the parson as a natural person and, as such, could not be alienated by the parson for personal gain. The problem confronting the courts was that the church did not in law have a legal personality, and as the common law required a legal person to whom the property right could attach, it was difficult for a patron to make a donation of property to a church without the right of ownership technically needing to either remain with the patron or vest fully in the parson. Both alternatives presented problems. If the patron held the right, the parson would not be able to freely deal with the property for the benefit of the church and on the death of the patron the status of the property would be uncertain. If the parson held the right, the fear was that there would be no restriction on the parson’s ability to alienate the title for personal gain and, again, there would be uncertainty over the title to the land on the parson’s death. Initially then, the idea was formed that the donated church property would not be considered to be owned by any one but the parson would instead hold a “proof that the right of fee is not in them, nor in others” (Maitland, [1900] 2003:25). However, this temporary solution was widely considered legally unsatisfactory. It meant in practice “the right of fee simple is in abeyance; that is to say, that it is only in the remembrance, intendment, and consideration of law...such a thing or right will be in the clouds” (Maitland, [1900] 2003:25). Further, if the parson perished it was still, under this formulation, uncertain what would happen to the property.

It was to remedy this context, Maitland recounts, that a modified version of the Roman theory of the corporation initially found its way into the English common law through the device of the corporation sole. The English judge, Sir Edward Coke, wanting to rescue the fee from abeyance while not treading on the idea that the property of the church was also the parson’s estate, devised the idea that the parson could be conceived of as a ‘corporation sole’. The effect was that the parson himself would be conceived of as a corporation and, as corporation, holder of the title to the church property in his corporate capacity. Runciman recounts the idea as follows: “At any given moment, the individual parson was the office, and therefore there was no distinction to be drawn between the actions of the natural man and the action of the artificial person” (Runciman, 1997:98). By conceptualizing the parson as a corporation and asserting that the parson held the property only in his corporate capacity, it was thought it would allow for continuity in title as the

corporation sole could continue even if the particular parson perished and a different individual filled the role. But, Maitland observes, this was not well thought through. The problem was the “corporation sole is a man: a man who fills an office...but a mortal man” (Maitland, [1900] 2003:26). So, Maitland argues, when the natural person who was the parson would in fact perish, it was not clear how the corporation sole continued and transferred to another individual, as the natural person of the parson and the corporation were conceived as being one and the same. In effect then the right was, as before, in abeyance on the parson’s death and the corporation sole did not actually do the only thing it was really meant to do. Maitland teases: “If our corporation sole really were an artificial person created by the policy of man we ought to marvel at its incompetence” (Maitland, [1900] 2003:28). It was, he asserts: “a queer creature that is always turning out to be a mere mortal man just when we have need of an immortal person” (Maitland [1900], 2003:57).

Maitland suggests that had this doctrine of the corporation sole ended with the parson it would have simply been an innocuous device chalked up to legal trivia. However, before that had a chance to happen, the legal device of the corporation sole was once again called upon by the common law but this time to apply to a person of somewhat more import: the legal personification of the Crown. To understand why this was possibly perceived to be appropriate, Maitland sets out that one needs to understand the difference between the ideas that informed medieval conceptions of the monarchy to the more modern ideas of the sovereign monarch that corresponded to the legal invocation of the corporation sole in the 16<sup>th</sup> century. Medieval thought, Maitland argues:

...conceived the nation as community and pictured it as a body of which the king was the head. It resembled those smaller bodies which it comprised and of which it was in some sort composed...The ‘commune of the realm’ differed rather in size and power than in essence from the commune of a county or the commune of a borough. And as the comitatus or county took visible form in the comitatus or county court, so the realm took visible form in a parliament (Maitland, [1901] 2003:34).

Beginning in the 16<sup>th</sup> century, however, Maitland argues, corporative ideas began to break down and monarchial rule started to move towards a more executive style of politics, dominated by the personality of the monarch. It came to be politically understood, Maitland argues, that “the personality of the corporate body is concentrated in and absorbed by the personality of its monarchial head” (Maitland, [1901] 2003:35). And so, the corporation sole, developed initially for the parson, became to be perceived as the ideal

legal device through which to legally capture, metaphorically, this new political vision of sovereign power. Similar to the parson, then, the natural person of the King and the Crown as office would not be distinguished. The King, like the parson, in the contemplation of law would have two bodies (or two distinct legal capacities) but be one person. Maitland quoting from a case in the *Plowden* reports transcribes as follows:

So that he the king has a body natural adorned and invested with the estate and dignity royal, and he has not a body natural and distinct and divided by itself from the office and dignity royal, but a body natural and a body politic together indivisible, and these two bodies are incorporated in one person and make one body and not divers, that is, the body corporate in the body natural et contra the body natural in the body corporate. So that the body natural by the conjunction of the body politic to it (which body politic contains the office, government and majesty royal) is magnified and by the said consolidation hath in it the body politic (Maitland, [1901] 2003:35-36).

As a metaphor to capture the political theory of the monarchy at the time, the corporation sole then was the best available. But, this did not change the fact that the corporation sole had never worked particularly well as a legal idea and, Maitland argues, it did not really work as a political one either. Perceiving the body politic to be one man and that one man perceived to be the corporate form of the body politic meant to be “plunged into talk about kings who do not die, who are never underage, who are ubiquitous, who do no wrong and...think no wrong...”(Maitland, [1901] 2003:37). Also, like with the parson, as a legal doctrine the corporation sole could not cope in any logical way with succession. But, for all of its problems, the idea remained and went on to have a dramatic influence on modern political theory; Hobbes’ theory of sovereignty, for instance, validating the idea that the body politic and the sovereign could be one and the same. Runciman writes:

...once it is accepted that the soul of the body politic can be an assembly as well as a man, the parallels between Hobbes’s sovereign and the parson of the English parish are indeed striking. Like the lawyers of a hundred years earlier who turned the parson into a corporation sole, Hobbes wished to find a formula which could render sovereignty an office but which would identify that office with the natural man or men who held it. He could not allow sovereign right to reside in the group of natural men who appoint the sovereign ('the patron') because that would make impossible the independent exercise of right which he determined that sovereignty required; he could not allow sovereign right to reside in the commonwealth ('the church itself') because the commonwealth was no more capable of action itself than was a bridge; but nor could he allow sovereign right to reside in the natural person or persons of the sovereign ('the parson alone') because that would be to destroy the integrity of the office. So he made the sovereign representative of a corporate entity which could not exist where the sovereign ceased to exist, and the considerable attention to which

he devoted to the problems of succession shows that he knew just where the most pressing difficulties were likely to arise (Runciman, 1997:100-101).

Hobbesian political theory, which had amplified the corporation sole from a legal device to a political doctrine then, in turn, over time, reacted on legal theory, informing theories such as Austin's command theory that conceived of law as indistinguishable from sovereign command. Maitland, however, observed that in the actual political practice of the 19<sup>th</sup> century, the corporation sole had no relation whatsoever to the contemporary view of the Crown's political authority. As a matter of political practice, Maitland notes, the Crown's public right of command had more or less been entirely eclipsed by the aggregate idea of the state, which had developed in the interim. And yet, for the purposes of legal personification in law, public property in the 19<sup>th</sup> century was still legally conceived to be held by the Crown as a corporation sole. Maitland argues there still continued to be no formal recognition of public ownership by the state as an aggregate or a public or a commonwealth.

And it was this fact that there was no legal formulation of the state, which bothered Maitland. Not because he was particularly concerned the Crown would take advantage of its legal position to act against the state. As a matter of practice, this was not really a concern. But, Maitland believed that the legal metaphors used to give a legal meaning to political forms could have a significant impact on the political or normative theories that might emerge there-from and vice versa (Nolan, 2003). The way he conceived of this organic dialogue to work, however, hinged on each treating the ideas of the other as metaphor, maintaining a relation that refused to be drawn into the metonymic relation reducing one to the other. So, the legal theory of the crown as corporation sole was then a metaphor for the political idea that the figure of the crown embodied all the possibilities of power and alone personified every subject, his personality a reflection of their own. Hobbes developed this idea, through the idea of the social contract as a metaphor to politically conceptualize sovereign authority. As Nolan notes, metaphor was a powerful device in Maitland's scheme of history, as he conceived it as not merely a descriptive modality but a generative one: "New and apt metaphors [are] a source of new knowledge...new vocabularies can literally make new knowledge" (Nolan, 2003:567-568). It was his commitment to organicism she asserts that drove his understanding of the relation between law and politics in these terms and as such, she argues this meant that he had to confront a theoretical issue that plagues organic discourse: what was the relation between part and whole or "the vexed relation of organic totality to the fragmentary pieces

of the real that reveal it" (Nolan, 2003:561). The use of metaphor then is how he coped as the metaphor allows the general and particular "to be imagined at the same time, the detail and abstraction to be thought of together..." (Nolan, 2003:563). It is a mode of figuration, Nolan reminds us, that although a species of analogy, is fundamentally different because it is not saying 'the same as' but 'like' or 'similar to' and as such, she asserts: "enables a gesture to a whole without damaging the part" (Nolan, 2003:568).

With the command theory, however, Maitland perceives that this process of exchange between legal and political theory ends right when a new idea or a new metaphor was needed. Under Austin's theory, that conceptualized law as identical with sovereign command, the "side-by-side" relationship between law and politics was collapsed into metonymy, the terms interchangeable. In Austin's theory it was as if the corporation sole was political reality. It was as if the social contract had in fact happened. The law for Austin was the command of the sovereign, and nothing more as he mistook a metaphor for an analogy. In practice then, legal theory under Austin had been effectively divorced from political theory. There was no need to theorize the state legally if the law merely implemented the terms of political theory. But, in Maitland's view, the fact that the device of the corporation sole continued to exist showed exactly why there was a need. Political theory had moved on from conceiving of the relation between the Crown and the public in these terms but the law was saddled with this idea through its own theoretical inertia. At the same time, Maitland observes, the state had started to directly intervene in the legal form, indicating through legislation that the Crown held property (such as taxes or colonial tribute) in trust for the "Publick" (Maitland, [1901] 2003:39). But, Maitland argues, the trust was a conceptually poor metaphor for the public or state and simply did not hold legally in a literal form. From whom did the crown receive the property in the first place? The public or state was not a legal person and trusts, for all of their flexibility, still required specific agreements between two or more legal persons to operate. Further, to conceptualize the public or state as an unincorporated entity in legal terms implied that the public or state was an entity incapable of acting for themselves, like other unincorporate corporate entities in trust the public and/or state too was being conceived in terms that implied an incapacitated person or an incorporeal object in need of protection, the subject of an equitable property right not a personal obligation.

Law does not (and should not), Maitland offers, merely transcribe political will, as Austin would contend, but instead it must translate perceived political will into a legal

proposition. The relationship between legal particulars and general political will in Maitland's view then is always one of metaphor not analogy: side by side, but not the same. Austin's theory, by taking too seriously the device of the corporation sole, the co-identity of sovereign and body politic, and conceiving of law as identical with sovereign command had drawn an analogy where there was only ever intended to be metaphor. It was impossible, following Austin, to propose a legal theory of the state, which In Maitland's view prohibited the exchange of ideas that had historically driven both legal and political theory forward. The continuance of the corporation sole as a legal device was, Maitland urged, attributable to this collapse in the separate identities of law and politics and not allowing outdated ideas to move on. He argues: "We cannot get on without the State, or the Nation, or the Commonwealth, or the Public, or some similar entity, and yet that is what we are professing to do" (Maitland, [1901] 2003:38). It was this void that Maitland suspected was preventing what he thought was an urgent legal and political exchange to be had about the real nature of the relationship between not only the British Empire and her colonies externally, but also internally between the British state and other organized groups in society, corporate or unincorporated. He states:

In England we are within a measurable distance of the statement that the only persons known to our law are men and certain organized groups of men which are known as corporations aggregate. Could we make that statement, then we might discuss the question whether the organized 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 favor of the Fiction Theory. We suppose that we personify our offices (Maitland, [1900] 2003:10).

A simple resolution to the issue then, Maitland suggests, was to accept that the corporation sole was in fact, and ought to be in law, conceived of metaphorically as a corporation aggregate. Runciman argues: "When Maitland suggests that the Crown is in fact if not in law a 'corporation aggregate,' he corrects a substitution of content for form. It is not, he argues, the metaphysical body of the king that persists, but rather the corporate form of monarchical identity. To invoke an abstraction - a mystical body - is to ignore the way in which the Crown functions in the world, to substitute an unreal concept for the material operation of a law that recognizes the Crown as corporation but cannot identify it as such" (Runciman, 1997). If the Crown was conceived as a corporate aggregate, than the terms 'state', or 'commonwealth', or 'public' could come to replace or at least be understood as interchangeable with the term Crown and either way the basic idea of the collective name for a public would at least be captured. With the state metaphorically understood as a

corporation aggregate it would also take care of what Maitland argued was another problem the common law had invented: the idea that all corporate entities were fictional or artificial persons and as such needed to be authorized by the state in order to exist. Once the state is legally conceived of as a corporation then this theory ceases to make sense: how could the state authorize itself?

Here too then, recognizing the state as a corporate form would allow the metaphor of the corporation to be simply recognized for what it was: the legal form of an organized group. The state, as an organized group of people, is one embodiment of that form, but other corporate entities would be also, the difference between the state as corporation and other corporate entities properly, in Maitland's view, conceived of as a difference of degree not of kind. Of course, he acknowledges, this would not be compatible with command theory of sovereignty, but he asks: "whether we ourselves are 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 origins of species" (Maitland, 1900:4). Runciman summarizes: "His argument was, in outline at least, a simple one. Corporations are, like states, organized and durable groups of human beings, and though we may try to organize them in different ways, the way we organize the one has lasting impact on how we choose to organize the other. This had been lost sight of in England, because in England there lacked the conceptual framework to see the connections between legal activities of groups and the philosophical doctrines of politics" (Runciman & Ryan, 2003:7). The command theory of sovereignty and the *persona ficta* doctrine then were both caught up in Roman ideas about the relationship between the law and the state that had never really fit with the more organic relationship between the law and the state, and indeed the state and non-state corporate entities, in English public life. To determine the legitimate interests of states and associations respectively then, in Maitland's view, there needed to be both a political theory and a legal theory of the public.

## **6.2 English Political Pluralism**

Maitland's work on legal personality was carried on in the early part of the twentieth century until more or less the mid-late 1920's by what was referred to as the EPP school of thought in English political theory. EPP, however, was a diverse movement and, as such, cannot really be conceived of as a unitary philosophical method or even as a static set of assumptions. Paul Hirst, in his review of the EPP moment in political theory, notes that

even the use of the term ‘school’ in association with the pluralist writers is suspect, he states: “The pluralists were, however, not a comprehensive and coherent academic school, and it is important to preserve the open-ended and provisional, indeed ‘pluralist’, character of their discourse” (Hirst, 1989:15). This experimental quality of pluralist writing, however, makes it very difficult to provide a discrete summary of the intervention made by EPP and is perhaps why EPP as a distinct political theory so often goes unacknowledged.<sup>33</sup> Hirst, however, cautions against rejecting the value of the work produced by England’s pluralists simply due to this lack of conformity, noting:

...their writings have real virtues which summary exposition obliterates...[they] did not write for academic audiences or for some ideal reader in posterity. They wrote for popular and political effect...In consequence they do not argue as an analytic philosopher might wish or in a way that a Marxist schooled sociologist might recognize as theory. But there is a strong set of arguments and important concepts there. Provided one persists in seeking them through the somewhat paradoxical ‘difficulties’ of plain English and easygoing exposition (Hirst, 1989:15).

Hirst contends that one way to approach pluralist thought is to forego the attempt to postulate a definable set of prescriptions as being representative of pluralism generally, instead locating pluralist theory in what he suggests are a shared set of themes, including: corporate personality and associationalism, the critique of sovereignty, the principle of function and the critique of representative democracy, and a (sometimes uneasy) allegiance with Guild Socialism (Hirst, 1989:16). Still, as these are broad criteria, it can lead to a dispute about who’s work should and should not be considered as part of the EPP canon. Thus, while there appears to be at least some consensus that F.W. Maitland (although even he is somewhat contested) and Walter Figgis should be included from the pre-war period and G.D.H. Cole and Harold Laski from the interwar period, other possible pluralist figures are on less certain ground. So, for instance, some would also explicitly include Ernest Barker here (Runciman, 1997:xii), while others suggest that Barker did not himself write a pluralist text and was often critical of pluralist suppositions (Hirst, 1989:9). Julia Stapleton makes the case that George Unwin is often excluded, but argues that he did have some distinctly pluralist tendencies in his work and was in her view closer to Gierke than many of the pluralists who cited Gierke as an influence actually were (Stapleton, 1991).<sup>34</sup>

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<sup>33</sup> Hirst notes that Perry Anderson had claimed in an article in the *New Left Review* in 1968 that the “English lacked a native tradition of high social theory” (Hirst, 1989:15). Hirst counters: “One might say that he didn’t look very hard for one...” (Hirst, 1989:15) but acknowledged that Anderson was not alone in this view, stating: “A great deal of the most powerful social and political theory in Britain has been studiously neglected by both the academy and political circles” (Hirst, 1989:16).

<sup>34</sup> Stapleton argues that Unwin’s pluralism is particularly vivid in his critique of Adam Smith. She states (quoting from Unwin): “...Unwin decisively broke ranks with the political economy of Adam Smith. For

Hirst argues that the canon could also be expanded much further than the academic consensus would indicate to include a broader range of figures that were not necessarily writing for an academic audience. In this respect he identifies figures such as Hilaire Belloc, A.R.Orange and Ramiro de Matzeau as arguably fitting the pluralist bill in at least some of their work and/or political positions (Hirst, 1989:9-10).

For the purposes of exposition here, however, instead of attempting to synthesize in its entirety this differentiated school of political theory, I intend to focus instead on what I would suggest is at least one dominant feature of pluralist thought: the tendency to place a sustained emphasis on the relationship between forms of law and forms of politics. Hirst agrees that this is a part of the pluralist modus operandi, he states: "Pluralism is not an anti-legal theory like Marxism, which conceives law either as an instrument of class oppression or a phenomenon associated with commodity production and exchange, and contends that it will whither away like the state in a socialist society" (Hirst, 1989:29). Runciman too places some importance on the fact that EPP theorists did not shy away from considering legal doctrines, asserting: "To ask questions about the personality of associations, however, is not simply to inquire into their general character. It is to inquire into their specific ability to bear the character of persons" (Runciman, 1997:3). If the legal historical debate in Germany then was often as much to do with politics as law, the EPP school of thought in English political theory had a decidedly legal component. In fact, I would risk that if there can be said to be any central theme of pluralist thought, which at least permeates all others to a greater and lesser extent, a case could likely be made to suggest that this theme would be their shared concern with the concept of legal sovereignty and the consequences for political theorizing. Each of the prominent pluralist's theories, however much they differed, was an attempt in some way to decentralize the power of this doctrine, often ultimately honing in on two ideas: a rethinking of the role of associations and a rethinking of the meaning of democratic representation. In the crafting of their arguments in this respect, the pluralists often turned to juridical modes of argumentation, drawing on prominent case law of the period (certain cases such as *Taff Vale Railway Co v. Amalgamated Society of Railway Servants* [1901] UKHL 1 and *Amalgamated Society of Railway Servants v. Osborne* [1910] AC 87 repeatedly appear in pluralist texts), legal doctrine (real corporate personality or real entity theory, an idea inherited from Gierke,

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Smith's deep distrust of the 'corporate spirit' as leading inevitably to 'conspiracies against the public' was at odds with Unwin's enthusiasm for group life. Smith, he maintained, had mistaken the closed corporation of the mercantilist age for the essence of human groups. Unwin insisted that the corporate spirit in medieval history, at least – was by no means a purely selfish one, embodying instead the 'jealous spirit of professional honor' (Stapleton, 1991:674).

was a major theme of pluralist work), and even legal technique and imagery (the image of a ‘body of law’ often surfacing as a pluralist metaphor) as both a device to think through the structure of state authority and perhaps, more subversively, as a way of making express their objection to conceiving of the state as having a monopoly over legal reason. Many of the prominent pluralists, perhaps unsurprisingly, were also either legally trained or had legal experience and interests. Maitland, discussed above, had been a practicing lawyer and was in his academic career a legal historian. Similarly Harold Laski, while formally a historian and later political scientist, he also had a deep and sustained interest in law, having edited the *Harvard Law Review* and maintaining a frequent correspondence with American Supreme Court Justice Oliver Wendell Holmes, which would span over a decade.<sup>35</sup> As I am particularly interested in the contributions of the EPP canon to the legal organization of the person and the extension of Maitland’s thought in the interwar period, it is then Laski’s work I propose primarily to examine here in greater detail, drawing on some of the other pluralist writers where relevant.

### 6.3 Harold Laski: Pluralist Realism

Laski’s pluralist texts are generally where the discussion of pluralism ends, as it is with Laski’s abandonment of pluralist themes in the late 1920’s<sup>36</sup> and thereafter his explicit adoption of Marxism that the pluralist debate is said to draw to a close. Still, Laski’s work is also the best place to start for a pluralist chronicle of sorts, as, more so than any other pluralist figure, it was Laski that attempted to draw the ideas of various pluralist texts together. Runciman, for instance, notes: “His arguments echo Maitland on the law of corporations, Figgis on the Scottish Church, Barker on the history of modern political thought, Cole on functional democracy” (Runciman, 1997:179). Further, Runciman submits that it is Laski who comes closest to articulating a “coherent philosophical doctrine” (Runciman, 1997:178) rather than being merely “federalistic, polyarchic or even functionalist” (Runciman, 1997:178). Further, Laski, following on Maitland, is generally recognized as providing the most comprehensive theory of the legal personality of corporate entities. Hager (1988), for instance, notes in this latter respect: “Laski touched at one time or another on all the major progressive aspects of real entity theory. His radicalism can therefore be interpreted as the ideal condensation of real entity theory’s major progressive themes” (Hager, 1988:635). Laski’s work also fleshes out the context of

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<sup>35</sup> See: “Holmes-Laski Letters: The Correspondence of Mr. Justice Holmes and Harold J. Laski, 1918-1935”

<sup>36</sup> The publication of Laski’s work “A Grammar of Politics” in 1925 is said to mark Laski’s break with pluralism.

Polanyi's history of the 19<sup>th</sup> century liberal state, providing detail and analysis of the more covert and coercive tendencies of liberalism as a political paradigm and drawing on his colleague G.D.H. Cole's work to explicitly challenge the liberal model of democracy.

Still, while there is much to be commended in Laski's work, he is relentlessly experimental. This, at times, can lead him to articulate roadmaps that, in light of even some of his own observations, appear ill considered. Perhaps the most glaring example of this, which will be explored herein, is his misreading of the *Genossenschaft* and his application of the term to for-profit corporations, which was well intentioned but potentially shortsighted. Further, this misreading also leads him to propose a theory of industrial democracy, which although an interesting attempt to rethink the nature of democratic representation, is logically at odds with his own view of the close relationship between the state and the economic status quo. To his credit, however, Laski did not shy from challenging any view (up to and including his own) and he often uses his somewhat idiosyncratic brand of political theory as a way to unsettle taken for granted assumptions. So, for instance, Jeanne Morefield (2005) notes in her review of Laski's work "*States Are Not People: Harold Laski on Unsettling Sovereignty, Rediscovering Democracy*": "Unlike today's staid and compartmentalized understanding of what is possible..." (Morefield, 2005:660), Laski, she asserts, is writing at a time and amongst a group of thinkers who "pressed for a completely new conceptualization of what was rapidly coming to be known as 'international society.'" The sheer ferocity of the war and the complete failure of the pre war international system, many of them argued, meant that all bets were off, anything was possible to imagine" (Morefield 2005:660). And, while it is this politics of possibility that is so refreshing in Laski's work, it does mean that his tracts require revisiting in part to distinguish between what he can be said to add theoretically to the discussion on democratic representation and corporate legal personality from some of his more crudely instrumentalized claims, which tend to obscure the poignancy of his contributions. If Maitland is at times vague to the point of obscurity, masking his politics so deeply in method that the level of interpretation required to elucidate his positions carries a concomitant risk of reading too much in, Laski is the opposite extreme, his politics plastered so heavily on his texts that the level of un-stripping required to elucidate his position carries a concomitant risk of reading too much out. With this in mind, herein I will attempt to provide a brief account of Laski's early pluralist ideas on democratic representation and corporate legal personality.

### 6.3.1 Pluralist Representation

Theories of pluralist representation generally position themselves against the view that democracy is to be defined in terms of electoral suffrage undertaken at given intervals and based on territorial parliamentary representation (or, what is sometimes referred to today as the proceduralist view, see: Gathii, 2009). They argue this would not readily capture the “continuous initiative” (Laski, [1921] 1989:187) of a constituted polity in determining forms of government. G.D.H. Cole for instance in “*The Social Theory*” ([1920] 1989) laments:

There is in our day an almost general prejudice in favor of democracy. Almost everybody is a ‘democrat’, and the name of democracy is involved in support of the most diverse social systems and theories. This general acceptance of the name of democracy, even by persons who are obviously not in any real sense ‘democrats’, is perhaps largely to be explained by the fact that the idea of democracy has become almost inextricably tangled up with the idea of representative government, or rather with a particular theory of representative government based on a totally false theory of representation. (Cole [1920] 1989:82)

EPP then, in some of its varieties, attempts to extract the idea of democracy from the theory of territorial parliamentary representation. Cole sets out that the problem with the theory of parliamentary representation is that it purports to suggest that each individual in every aspect of their existence is represented through the process, which, he argues, is a false substitution leading to an appearance of consensus on a broad range of specific issues where none really exists. Instead, Cole thought that a more direct form of democracy could be observed in smaller more localized associations formed for specific purposes where “much of the control of proceedings of the association may remain in the hands of the general body of the members...” (Cole, [1920] 1989:83). Once associations become too large and diversified, in Cole’s view, control tends to pass into smaller constituencies where the “ordinary member is reduced to a mere voter, and all the direction of actual affairs is done by representatives – or misrepresentatives” (Cole, [1920] 1989:83). From this, he claims, a false and almost mystical theory develops to justify a state of affairs where the representative is somehow a substitute for the will of others, stamping acts of the representative with an aura of legitimacy. Cole puts the point as follows:

...It is impossible to represent human beings as a selves or centers of consciousness; it is quite possible to represent, though with an inevitable element of distortion which must always be recognized, so much of human beings as they themselves put into associated effort for a specific purpose.

True representation, therefore, like true association, is always specific and functional, never general and inclusive. What is represented is never man, the individual, but always certain purposes common to groups of individuals. That theory of representative government which is based upon the idea that individuals can be represented as wholes is a false theory, and destructive of personal rights and social well being.

The fact that a man cannot be represented as a man seems so obvious that it is difficult to understand how many theories of government and democracy have come to be built upon the idea that he can. Each man is a centre of consciousness and reason, a will possessed of the power of self-determination, an ultimate reality. How can one such will be made to stand in the place of many? How can one man, being himself, be at the same time a number of other people? It would be a miracle if he could; but it is a risky experiment to base our social system upon a hypothetical miracle (Cole, [1920] 1989:84).

Cole argued then that the worst form of representation was geographically based parliamentary representation. He argues:

Parliament professes to represent all the citizens in all things, and therefore as a rule represents none of them in anything. It is chosen to deal with anything that may turn up, quite irrespective of the fact that the different things that do turn up require different types of persons to deal with them. It is therefore particularly subject to corrupt, and especially to plutocratic, influences, and does everything badly, because it is not chosen to do any definite thing well. This is not the fault of the actual Members of Parliament; they muddle because they are set the impossible task of being good at everything, and representing everybody in relation to every purpose (Cole, [1920] 1989:85).

Laski takes up Cole's argument, primarily in the essay "*The Pluralist State*" ([1921] 1989) where he argues that the development of the theory of monistic sovereignty was historically contingent to periods of profound social crisis where unity itself came to be perceived as a form of self-preservation. Thus, he proposes: "...the monistic theory of the state was born in an age of crisis and that each period of its revivification has synchronized with some momentous event which has signaled a change in the distribution of political power" (Laski, [1921] 1989:184). He proceeds then to connect prominent political theories advancing the idea of the monistic state to periods of politically polarizing historical events, specifically identifying Bodin's theory with divisive religious conflict, Hobbes' and Bentham's theories with civil war, and Hegel's theory with the Franco-Prussian conflict. The danger, Laski suggests, is that as a result of this historical contingency of crisis and sovereignty, a false equivalency was often asserted between the monist state conceived of as a political imperative for a superior legality (a common

order), and the monist state conceived of as a moral imperative of a superior unity (a common good). He argues: “What, I would urge, the lawyers did was to provide a foundation for the moral superstructure of the philosophers. It was by the latter that the monistic state was elevated from the plane of logic to the plane of ethics. Its rights then became a matter of right. Its sovereignty became spiritualized into moral pre-eminence” (Laski, [1921] 1989:185). It was this latter equivalency of monistic sovereignty with the common good that Laski sets out to question. He states:

For its insistence on unlimited authority in the governmental organ makes over to it the immense power that comes from the possession of legality. What, in the stress of conflict, this comes to mean is the attribution of inherent rightness to acts of government. These are somehow taken, and that with but feeble regard to their actual substance, to be acts of the community. Something that, for want of a better term, we call the communal conscience is supposed to want certain things. We rarely inquire either how it comes to want them or need them (Laski, [1921] 1989:187).

Thus Laski recognizes that a politically sovereign order was necessary for law to exist but this was merely one of many legitimate interests to be advanced. Sovereignty, in Laski’s view, is not a good in and of itself and he was not convinced there could only be one sovereign authority in any polity. He suggests: “We have to decide what we mean the state to do before we pronounce that what it does is good” (Laski, [1921] 1989:161). The particular concern of the pluralists, here recalling Polanyi, is that they did not perceive the government of early 20<sup>th</sup> century Britain (both Cole and Laski are writing during the interwar period) to be acting in favor of any form of common good. While previous incantations of monistic state theory, Laski argues, were a call for unity in the face of violence and war, that justification did not hold when the source of violence and war was a state ostensibly unified by an economic strategy, which was systematically oppressing large portions of the population.

Democratic freedom, Laski argues, must be defined as the “chance of continuous initiative” (Laski, [1921] 1989:187). However, he advances: “But the ultimate implication of the monistic state in a society so complex as our own is the transference of that freedom from ordinary men to their rulers” (Laski, [1921] 1989:187). A further problem then that the pluralists identified in respect of a parliamentary sovereignty model is that it tended to ensure that parliament would be in favor of maintaining the status quo, particularly in economic matters, even if the same economic matters were determined to be the cause of the crisis at hand. So, while this served to benefit some segments of the population

governed: “English parliamentary government has proved a satisfactory thing for the man whose income is secure and reasonably comfortable...” (Laski, [1921] 1989:141) it certainly did not benefit all: “...it has accomplished little for the ranks below him” (Laski, [1921] 1989:141). What was not well understood, Laski argues, in the theory of the monistic state legitimated by geographic parliamentary representation and premising the right to regulate in the name of a national consensus, is “how large an extent theories of government reflect prevailing economic systems” (Laski [1921] 1989:141) and how much influence a monistic state then actively has in crafting the national consensus towards the goal of its own legitimization.

Laski attempts to take on this latter issue again in another essay entitled “*The Problem of Administrative Areas*” ([1921] 1989). Here he states: “The English state has become a positive state; by which is meant that instead of trusting to the interplay of possibly conflicting self-interests for the realization of the good, it has embarked upon an effort, for some time at least to come, definitively, to control the national life by governmental regulation” (Laski, [1921] 1989:131). Laski was critical of this approach as it was, he suggested, alienating a large section of the population from being able to participate in giving direction to matters that impacted on their well being. Here Laski is thinking specifically of the working class and the impoverished. He notes:

It is doubtless a good rhetorical answer to urge that the larger part of the working class has the franchise and that if it does not choose to exert its power it must take the consequences. But that is to mistake the superficial appearance of a political system for its inner reality...Surely the real source of this disharmony is to be found in the way in which a political system must necessarily reflect its economic environment. The local institutions of England, for example, do not reflect the mind or desires of the working class because they are in substance adjusted to a situation which, economically, at any rate, is far from democratic. They are representative in theory but not in practice...They will remain so as long as the poor endure them; and the poor will endure them until their economic power is so organized as to secure political expression (Laski, [1921] 1989:141-142).

So, Laski argued, “It is today a commonplace that the real source of authority in any state is with the holders of economic power. The will that is effective is their will; the commands that are obeyed are their commands” (Laski, [1921] 1989:140). He observes then that despite the extension of suffrage the working class had been able to make only a very fine dent in the structure of power. Partially this was a result of the conditions of industrial life, he states: “Modern studies in the problem of industrial fatigue explain how little of intellectual value can usefully, or even rightly, be expected from a population

whose energy is so largely consumed in the simple task of earning its own living...Certainly such evidence as we have tend to suggest that the increasing subordination of the worker to the machine does not improve the intellectual quality of our civilization" (Laski, [1921] 1989:133). But, partially, it was also a result, he argues, of the way in which the system was set up to prevent any real engagement with the conditions of the market. He states in this respect:

We have suffered from political inertia because the reaction of economic upon political structure is so profound. We have suffered from economic discontent because the structure of industry does not provide an adequate expression for the impulses of men. That is why it is rather upon industry than upon politics, upon function rather than area, that the consideration of a revival of political interest must centre. We are presented with a quasi-federal system: that is to say that large functions are left by the state to settle their own problems. But, on the other hand, no real effort has been made to relate that economic federalism to the categories of that political structure, and, on the other, within each function there is no adequate representative system (Laski [1921] 1989:158).

In Laski' view, this was not a problem that could be fixed by the inconsistent and ad-hoc social legislation that was sometimes passed by the state to placate industrial discontent. Social legislation, Laski offers: "has the incurable habit of tending towards paternalism; and paternalism, however wide be the consent upon which it is erected, is the subtlest form of poison to the democratic state. It may mitigate, but it does not solve, the essential problem; which is to interest the largest possible number of persons in the study of, and judgment upon, political questions" (Laski, [1921] 1989:136). Instead, Laski suggests, that what was needed was an engagement with the monistic theory of the state to allow the structures of legitimacy and authority therein to be contested and new alternatives to emerge. He asserts:

...mere announcement of a plenitude of power in any authority will solve nothing; the essential business is to get that power to work. We are, in fact, beyond the sphere of law. We are dealing not with the conference of rights, but with their realization, which is a very different matter. It is, of course, important to consider the purpose by which such a power is informed. But that purpose can never be, except for law, a mere matter of declaration...Purpose, in fact, must be discovered in pragmatic fashion, from the actual processes in heir joint operation (Laski, [1921] 1989:140).

Laski's proposal was to move towards a theory and structure of representation that would allow for an "...internal diversity of allegiance which makes possible the creation of active governmental centers..." (Laski, [1921] 1989:157) and that would give preeminence to what he terms "motives to originality" (Laski, [1921] 1989:157). Unlike Cole, who

favored the complete abolishment of geographic representation in favor of functional associations coordinated by a “Supreme Court of Functional Equity” (Cole, [1920] 1989:103), Laski argued that representation by territory should remain but that it needed to be complimented by more functional forms of representation particularly in economic matters. The problem, as Laski saw it, was that otherwise it was too easy to obscure the issue of the organization of the economy as not being a matter for politics. He states: “To give that industrial situation a domicile in politics is to give permanent expression to much which now escapes the immediate purview of political structure” (Laski, [1921] 1989:144).

Without going into too much logistical detail (Laski, himself, does not go into very much logistical detail) he imagines a system of what he refers to as ‘industrial democracy’ where economic producers would be in control to the extent that it would create “an economic sovereignty either outside the legal sovereignty of Parliament or using the latter merely as an organ of registration” (Laski, [1921] 1989:146). Instead of state direction in matters of the economy, then, charge would be given to associations of the factors of production (presumably trade unions) in combination with associations of capital (presumably profit-based companies) with each being equally represented as, he argues: “They at any rate know the conditions” (Laski [1921] 1989:147). This, he suggests, would therefore allow for “self-determination of conditions under which work is to be carried on” (Laski, [1921] 1989:147). And, while he acknowledged this could mean periods of economic shutdown as positions were negotiated, he countered that this was a risk that a democratic society must be able to bear as self determination accepts by definition the risk of discontinuity in order to ensure that there is the opportunity to state a case. He argues: “the opportunity organically to state a case satisfies the hunger for self-determination which cannot be subverted in any system which accepts the criteria of democracy” (Laski, [1921] 1989:153). Thus, he postures: “What, in reality, is involved is the meaning of freedom, the way in which we translate our definition of its content into the stuff of which the state is made” (Laski, [1921] 1989:154).

Laski argues that a functional differentiation between producers and consumers was necessary as “...any state in which a single class is predominant sooner or later must disregard the public interest in order to retain their power...The real truth is that the members of a state are powerless against an efficient centralization wielded in the interest of any social fragment, however large. It prevents the balance of associations which is the safeguard of liberty” (Laski, [1921] 1989:155). Liberty and equality, for Laski, were

understood as different facets of the same ideal of freedom and he imagined the practices of industrial democracy leading to a more decentralized polity, which he labeled ‘the pluralistic state.’ He concludes: “We are in the midst of a new movement for the conquest of self-government. It finds its main impulse in the attempt to disperse the sovereign power because it is realized that where administrative organization is made responsive to the actual associations of men, there is a greater chance not merely of efficiency but of freedom also” (Laski [1921] 1989:155). And yet, Laski’s framework begs certain questions. He wants to maintain representative territorial democracy that he identifies with “consumerism” (Laski [1921] 1989:151), as well as introduce a form of separate representation for producers, which he surmises to be labor and capital. What forms of labor and what forms of capital, however, are not clear? Would this include agricultural labor? Professional labor? Although Laski ostensibly conceives both forums as political, how would issues of economic-politics be divided from issues more political-economic in nature? Or, to put it in his terms, how would producer interests and consumer interests be sundered? How would such a division ever be settled and who would decide? Beyond logistics, it also seems an odd solution to remove concerns over industrial production to an entirely separate forum and then actually restrict the representation of the working class to an artificially instituted parity with capital in that forum.

Laski predates Polanyi’s *TGT* by over twenty years and is writing from within the crisis not in retrospect. In one sense then, his theory of industrial democracy hits almost exactly on what Polanyi will be far more celebrated for illuminating, observing that the problem facing Britain under market liberalism or *laissez faire* was that the economic sphere was being increasingly conceived of as distinct from the political sphere with devastating effect. Through Laski we can also begin to get a better understanding of the relationship between what Polanyi had identified as the countermovement and the state; Laski pointing out that the countermovement was not only organizing against the market but also against centralized authority insofar as the state was increasingly coming to be perceived as unresponsive to demands pertaining to the protection of the ‘human factor’ over the ‘money-making factor.’ Advocacy in favor of the general or public interest then that Polanyi identifies as emergent from the conditions of market society was not just as a result of the spread of democracy but about democracy – about what being a part of a democratic society would mean and how the practice of democracy ought to be defined in light of it. Laski can thus be read as a supplement to Polanyi’s analysis, the abstraction of politics from economics conceived of as not only utopian but also anti-democratic, the

movement against market-society conceived of as not only about self-protection but also about self-determination or the freedom to create political alternatives. And yet, Laski is (understandably) so desperate to pose an immediate solution, that his theory of industrial democracy suffers as he ends up in a sense instrumentalizing what he observes to be the current state of affairs; the disconnect between politics and economics, as the basis for a new form of political-economic co-sovereign social order. This does not do justice to his earlier observation of the state's investment in maintaining the economic status quo or Polanyi's later observation that the two cannot be readily separated.

Laski's limiting formulation of industrial democracy is unfortunate, however, as it tends to obscure his broader point, one that he shares with Cole, that territorial representative democracy, on its own, may not fulfill the full promise of what is meant by democratic participation. Laski in a critical passage outlines the existence in Britain of a fundamentally plural infrastructure that was becoming increasingly visible and that, in his own terms, extended beyond the confines of industry. He comments:

During the nineteenth century there has been growing around us an inchoate but vital economic federalism to which far too little attention has been paid. The rules and standards of things like the legal and medical professions, the trade unions, and, in a less degree, the teachers, constitute expressions of group solidarity of which the state has been compelled to take account. There have been inherent in them ideals of law and justice. They have implied a decentralization of industrial control which has grown ever wider in its ramifications...It is a solidarity which the essentially political conception of democracy...was compelled to deny...but is a solidarity which the Trade Union Act of 1875...tacitly admitted. They are, in reality, the abolition, for political purposes, of the economic abstraction called man as set up by the individualistic thinkers of the nineteenth century. The object of these groups was to safeguard professional interests. Each profession and industry had questions and standards peculiar to itself, upon which its own determination was the most competent (Laski, [1921] 1989:147).

There are criticisms of Laski, which suggest that he never really introduced any fundamentally new ideas to the EPP canon, simply parroting his more radical approach on the foundations laid by others (see, for example: Runciman, 1997:193).<sup>37</sup> Laski, however, does introduce a new idea here, gesturing towards what we would now recognize as a strong form of legal pluralist thesis. Generally, Eugen Ehrlich in his "*Fundamental Principles of the Sociology of Law*" (1936), is credited as being one of the earliest English writers to suggest that there could be law outside of the state through a distinction he

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<sup>37</sup> Runciman stipulates in respect of Laski's contributions to EPP: "...any difference between himself and Gierke, Maitland, Figgis, Barker or Cole is merely one of degree, not kind. And in this respect, a difference of degree is no difference at all (Runciman, 1997:193).

introduces between ‘rules of conduct’ and ‘rules of decision’ in his theory of ‘living law.’ John Griffiths summarizes Ehrlich’s view (quoting from Ehrlich) as noting that a rule of decision was “a law defined from the point of view of an official of the state as the rule according to which [he] must decide the legal disputes that are brought before him” (Griffiths, 1986:23) and a rule of conduct “a rule according to which men customarily regulate their conduct, but also a rule according to which they ought to do so, but it is an altogether inadmissible assumption that this ‘ought’ is determined either exclusively or even preponderantly by the courts” (Griffiths, 1986:24). Griffiths criticizes Ehrlich’s theory however as ultimately subscribing to legal centralism, he states:

Ehrlich’s objective was a scientific theory of law which in the name of a more open approach to legal reasoning removed ‘rules for decision’ formulated in ‘legal propositions’ from center stage. His conception of law is restricted thus, to legal *rules*. Furthermore, once he had what he needed in order to reform legal reasoning, he lost interest in the further implications of what he had said. Despite his observation that, according to his descriptive theory of law, the state is just another association, the state and its law in fact remained central to his discussion. The ‘legal proposition’, which he identified with state law, is the *terminus ad quem* of a process of social and legal evolution of which the other end consists simply in the inner ordering of associations” (Griffiths, 1986: 27).

Laski, however, can be distinguished from Ehrlich as he is not gesturing in this theory of industrial democracy towards the type of industrial democracy that we might identify now with German *Mitbestimmungsgesetz* (codetermination). His idea of industrial democracy was intended to be of a much more radical sort. It was built off ideas that he had earlier formulated around the real personality theory of corporations, and his proposal must be understood as a vision of co-sovereignty for associations not co-determination. As such Laski firmly rejects what Griffiths refers to as the ideology of legal centralism, which Griffiths defines as the normative claim that “law is and should be the law of the state, uniform for all persons, exclusive of all other law, and administered by a single set of state institutions. To the extent that other lesser normative orderings such as the church, family, the voluntary association and the economic organization exist, they ought to be and in fact are hierarchically subordinate to the law and institutions of the state” (Griffiths, 1986:3). Writing after one war and on the verge of another, the pluralists of the interwar period firmly rejected the Hobbesian idea that more than one sovereign could not consist with the peace of the people as recent history had shown centralized authority to be an equally combustible proposition. The better question for the pluralists is ‘why unity or why not unity’ and the conditions of industrial capitalism convinced them that subscription to one unified economic strategy, in the circumstances, would not avoid civil war but be the

source of it. Laski states: “Few things have been more obvious than the inability of the capitalist structure, in its pre-war form, to meet the national need. It has had to receive assistance from the state...The restoration of industrial conditions, at the close of war, can only be made upon the basis of returning within their basic trades, a large measure of popular supervision...to emphasize the human factor in industry at the expense of the money-making factor...Such, at least, seems the alternative to revolution, but it is to be noted that it is a minimum alternative” (Laski, [1921] 1989:160).

Although Laski wanted to see the normative orderings of associations become part of a more explicit political apparatus then, the apparatus he proposes, whatever one may make of its shortcomings, would not have been dominated by the legal institutions of a monistic state. Morefield acknowledges (quoting from Laski): “For Laski, the origins of liberal statehood revealed ‘internal’ conflicts – between the state and church, between trade unions and capital, between voluntary organizations and the state – that the legal fiction of popular sovereignty simply could not erase. To truly understand, in a critical way, the liberal conception of statehood required a focus on the vestiges of those historically particular conflicts that remained embedded within the modern variant. Such a methodology, he argued, ‘realizes the state has a history and is unwilling to assume that we have today given it any permanence of form’ (Morefield, 2005:662). His then was legal pluralism in a strong form and possibly the first expression of a strong legal pluralist thesis, the normative orders he identifies as existing outside the state apparatus ideally in his view sovereign.

The groups Laski refers to as part of this emerging counter-movement then tended to be non-state in character and organized towards social ends in their internal composition. They appear to be closely connected to the same sets of territorial organizations of the professions and agricultural associations (land) and working class trade unions (labor) that Polanyi also identifies as mobilizing around ideas of the public interest rather than narrow material concerns. What Laski points out, however, and what Polanyi underemphasizes in retrospect, is that the very associational nature of these groups was on consistently shaky ground politically at the time they were attempting to influence the state to legitimate their claims in the public interest. Morefield summarizes:

Laski’s work on the origins of liberal sovereignty consistently gestured toward the untheorized grounding of liberal doctrine in a political project that leaned just as, or frequently more, heavily toward an authoritarian ‘contempt for the people’ as it did

toward a theory of liberty...consistently to emphasize the need for 'order' over freedom, 'obedience' over revolution. The evolution of liberal sovereignty...must then, for Laski, be viewed from within the discursive push and pull of a foundational vision deeply wedded to legitimating authority (Morefield, 2005:662).

She continues:

Twentieth-century liberals, Laski cautioned, must be made aware of their own indwelling desire to avoid the troubling implications of the tradition's conflicted relationship with authority. Liberals, he maintained, have historically eschewed unresolved tensions between liberty and order within their political doctrines by characterizing human nature in terms of a natural predilection toward freedom and a 'fundamental' desire for rebellion, insisting that the moral compulsion to rebel against tyranny 'goes to the root of our philosophies of state.' Laski, however, read this tendency to valorize rebellion – to make this potential 'dissolution' of government the central premise upon which contract theory is ultimately based – ...[or] the liberal desire to be rid of authority as always conditioned by the equally potent desire to justify a particular form of liberal order. For Laski, liberal theorists simply protest too much. The fixity with which the foundational writings of the liberal canon have focused on rebellion revealed, he implied, an underlying awe with order itself (Morefield: 2005:662).

Laski thus demurs: "The existence of this accidental decentralization, valuable as it is, should not blind us to its imperfections" (Laski, [1921] 1989:148). His point here was that as a matter of empirical reality these groups existed and were mostly, in practice, legally constituted but as they went politically unrepresented as associations their existence was more a matter of chance or a concession to economic continuity rather than a recognition of political or legal right. The state could still attempt, calling on the dominant view of parliamentary sovereignty, to intervene in their organization and he speculates that the state possibly would do if these groups attempted to use their growing power to contest the state's ordering of the economic system. He states:

...the attitude of those who operate the machinery of the modern state...are dominantly influenced by the prevailing economic system and they cannot, in the nature of things, aim at the fundamental disturbance of the economic status quo. The concessions they seek to secure are not founded upon any theory of abstract justice but upon the minimum that must be given to maintain social peace. The object of labor is the foundation of a new social order which is incompatible with the fragmentary concessions of the last hundred years. Here, in reality, is the seat of modern democratic discontent. The liberty and equality implied in the modern state are purely theoretic in character. The industrial worker has the suffrage; but he is caught in the ramifications of a system which deprives its use of any fundamental meaning (Laski [1921] 1989:149).

Laski thus recognizes that there was a need to protect the associational forms of the groups of the countermovement independently of the state if any thing remotely

resembling his industrial democracy or any other alternative for that matter was to emerge. Morefield notes: "...for Laski, sovereignty was not merely a phenomenon to be studied in an international context, as if it had no impact on the internal politics of states. Rather, in Laski's analysis, the effects of sovereignty transcended the local and the international; they conditioned the politics of liberal modernity in its entirety...sovereignty justifies particular understandings of order for liberals, the way it transforms diverse populations into untroubled wholes, and the way it ultimately limits the democratic imagination" (Morefield, 2005:661). Working within the existing system then he, like Maitland, saw a place for the common law to intervene in the short term through the recognition and protection of corporate legal personality independently of the state, but, in Laski's thought, more so than Maitland's, this was also intrinsically connected to the continuing need to protect associations from the state.

### **6.3.2 Corporate Legal Personality**

Laski's notion of industrial democracy follows on his work on corporate personality where, drawing heavily on the work of Maitland, Laski had come to see the law as undergoing a process of differentiation from the state in respect of the protection of associations. As already explored in Maitland's work, for much of the 19<sup>th</sup> Century various state laws had ensured that without a state charter it was difficult in Britain to form associations with distinctly political or economic objectives. But as Maitland noted, the latter laws had never been entirely effective in prohibiting the formation of associations due to their mitigation through trust doctrines. Laski too acknowledges that trust law had provided in this way an "all protecting fold" (Laski, [1921] 1989:167). In his essay "*The Personality of Associations*" ([1921] 1989) Laski states in this respect:

Legal practice has improved on legal theory. The judges builded better than they knew; or, [perhaps] they have added yet another to the pile of fictions so characteristic of English law. If corporations can alone come up the front stairs they will admit the unincorporated association at the back. For, they know well enough, the life of the state would be intolerable did we recognize only the association which has chosen to accept the forms of law (Laski, [1921] 1989:167).

Laski's resentment over the 'forms of law' followed from his sustained commitment to the labor movement and a series of legal determinations that had restricted the permissible activities of trade unions. To condense: following the passage of the *Companies Act* (1862), parliament provided a legislative route for trade unions to obtain formal

recognition as official entities through registration under the *Trade Union Act* (1871) and the *Trade Union Act* (1876) respectively. These Acts did not, however, accord an official recognition of the legal personality of trade unions, as the trade unions did not want to be incorporated. Already facing significant liability due to the conspiracy laws, the unions were concerned that if they were to be officially recognized as corporate persons they would also be at risk of liability for the actions of their individual members in conflict with any number of legal prohibitions. As such, the Acts provided registration without incorporation. However, the judgment from the common law courts in *Taff Vale Railway Co. v. Amalgamated Society of Railway Servants* (1901) rendered any benefit from the void of legal personality moot as the courts determined that trade unions were substantially similar to for-profit corporate entities, and as such liable for the acts of their membership in the same way a company would be liable for an employee, despite the lack of official incorporation. The decision was strongly contested by the unions. Hager states: “Labor devoted all of its legislative energy toward restoration of the immunity supposedly secured in 1871 and 1876” (Hager, 1988:621) and, in response, Parliament eventually passed the *Trade Disputes Act* (1906) limiting the liability of the unions. Still, Hager contends: “nothing could erase the heavy costs the decision had inflicted, in terms of both damage payments and of timidity in strike activity, before it was reversed” (Hager, 1988:621).

Following the passage of the *Trade Disputes Act* (1906), however, the unions were for a brief moment in a strong legal position: recognized by the courts under common law as effectively legal persons but, by statute, the liability of the unions for the actions of their members was limited. The pluralist writers then, despite their support for the labor movement, were broadly in favor of the courts determination in *Taff Vale* as despite the interim situation it had created, they saw the courts decision as a long awaited move away from the fiction theory of corporate personality; recognizing the corporate personality of the trade unions despite the lack of official recognition by the state. The subsequent passing of the *Trade Disputes Act* (1906) then demonstrated what the unions could accomplish politically once their corporate status was legally recognized as a matter of fact as opposed to fiat. This favorable situation, however, would not last for long as shortly after the passage of the *Trade Disputes Act* (1906) a subsequent decision was made by the courts in the case *Amalgamated Society of Railway Servants v. Osborne* (1909), which struck at the heart of pluralist concerns over a more political role for associations. Hager provides a good historical summary of the *Osborne* decision and surrounding context, he elaborates:

*Osborne* involved a challenge to a union's practice of using union funds to support the Labor Party and to defray the expenses of pro-labor members of Parliament. The broad-sweeping opinion outlawed not only these particular union practices, but the entire range of "political" activities traditionally engaged in by unions.

...the decision's most striking and distressing feature was that it was couched explicitly in terms of the corporate fiction paradigm. The decision reasoned that registered unions, though they lacked formal corporate status, displayed characteristics more reminiscent of corporations than of mere contractual associations. From this it followed that the scope of permitted activity for registered unions should be analyzed as if they were true corporations. According to the fiction theory, permissible corporate activity could be defined only by the terms of a corporate charter. Since trade unions had no corporate charters, their "corporate" capacities under the fiction paradigm could be defined only if some trade union analogy for the corporate charter could be found. In a move which outraged labor opinion, *Osborne* identified certain provisions of the 1876 Act as the trade union equivalent of a corporate charter. Just as in *Taff Vale*, this reading of the Trade Union Acts was completely at odds with earlier understandings (Hager, 1988:623).

The problem was that in drafting the *Trade Union Act*, Parliament had purposely drafted the definition of a trade union as a wide as possible to ensure that most trade unions would be covered by the definition and be able to register under the Act. As such, the Act outlined that trade unions were engaged in the setting of terms and conditions of employment. However, the court, in reverting to the fiction theory then operationalized this definition under the Act as the *only* activities for which trade unions had been granted legal status or personality. Hager writes: "...the decision treated the definition not as a threshold but as a ceiling on permissible trade union activities. The authorized "corporate" functions of trade unions were thenceforth confined to strike-related activity, collective bargaining, and providing disability benefits (Hager, 1988: 623-624). The result was then, he comments, that "...an Act designed to assist trade unionism was transformed by *Osborne* into a straight-jacket. The enormous variety of trade union activities...were suddenly declared *ultra vires*. The prohibition touched on many activities central to traditional trade unionism, including the pursuit of labor objectives through politics, as well as the extensive general and technical education programs sponsored for union members (Hager, 1988:623-624). Laski too remarks on *Osborne*:

The *Osborne* case decided that a method of action which a trade union thinks necessary for its welfare and protection may be illegal because it is political and not industrial in its scope – political objects being eo nomine beyond the province of a trade society. But that is surely a too narrow interpretation of the facts. Where does a political object end and an industrial object begin? It is obvious to anyone who has eyes to see that at every point modern politics is concerned with the facts of everyday life in its industrial aspect. Therein they clearly touch the worker, and the

trade union is an association formed for his protection. On this view the political activity of trade unions means no more than giving emphasis to one branch of their industrial policy...The sovereignty of theory is reduced by the event to an abstraction that is simply ludicrous (Laski [1921] 1989:178).

Thus, if the judges had at one time, through the courts of equity, ‘builded better than they knew’, they were not doing so anymore. Although the impact of the decision was eventually again tempered by subsequent legislation (the *Trade Union Act* [1913]), it had a major impact on Laski’s thought in respect of corporate personality and saw him return to themes Maitland had explored twenty years prior. Trade unions, having left the confines of trust law and officially registering as private entities under state legislation, were now being treated explicitly as private corporations with no distinction being drawn between them and profit-based corporate entities; their political ambitions construed as illegitimate. Understanding the political context is essential to understanding Laski’s contributions on corporate personality, as his point of departure is pragmatic. His reasoning was that if there was to be no distinction drawn in law between a trade union and a for-profit company, then theorizing the legal form of the for-profit company was the best way to protect the trade union and/or other associations, which would ultimately be analogized to them. What was necessary then, in his view, was a comprehensive doctrinal theory that could apply to *both* the trade union and to the for profit company as legal persons, ensuring that for-profit companies would be held liable for harms that they caused *and* that trade unions would not have their objects interfered with by the state or the courts. Legally, it meant developing a theory of corporate personhood that would once and for all reject the *persona-ficta* theory, which Laski following *Osborne*, viewed now as not only a political constraint on the legal possibilities of personhood as Maitland had done, but a legal constraint seemingly operating independently of the more politically permissive legislation being interpreted.

One of the major problems of the fiction theory of corporate personality Laski identified, following *Osborne*, was the idea of ‘*ultra vires*’ or the notion that a corporate entity could only exist for a specified purpose and that any act outside that purpose would be declared out-with its capacity unless it was interpreted as ‘incidental’ to the original purpose.<sup>38</sup> Laski observed that the application of the incidental doctrine had very little consistency, even in the company context. By way of example, he notes; “It is incidental to the business of the South Wales Railway Company to run steamboats from Milford Haven, but

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<sup>38</sup> In respect of companies in the present context, the doctrine of *ultra vires* is now of little consequence due to provisions of the *Companies Act* (2006).

that function was seemingly beyond the competence of the Great Eastern. One steamship company may, without hindrance, sell all its vessels; but another company makes the mistake of retaining two of its boats, and its act is without the law..." (Laski, [1921] 1989:169). He continues through a long list of cases, all of which appear to come to inconsistent conclusions on similar sets of facts and argues therefore that this doctrine should be avoided through acceptance that corporations of all sorts were not fictional but real entities with purposes capable of evolution. Further, he suggests, accepting this premise would prevent "a manifest injustice" (Laski [1921] 1989:169) insofar as corporations, on the basis of the *ultra vires* doctrine, were unable to be held responsible for actions deemed *ultra vires*. So, for instance, he gives the example: "A company has by its charter the right to borrow no more than a specified sum; it borrows more. It is held that the lenders cannot sue for the surplus" (Laski [1921] 1989:169). The courts by viewing the issue of *ultra vires* acts as a matter going towards the fundamental capacity of corporations were, in effect, insulating corporations from liability. Laski asserts that the *ultra vires* doctrine then was a misdirected and unnecessary attempt to remain faithful to the tenets of a theory of the corporation as a legal fiction, the personality of which was conceded by the state. Under a real personality theory that was premised on legal recognition not state concession/authorship, the *ultra vires* acts of a corporate entity could still be a corporate act even if for reasons of policy they were not allowed. In other words, instead of deeming these acts 'apriori illegal' and as such impossible (as the state could not have authorized an illegal act): "the corporation, being a real entity, with a personality that is self-created, must bear responsibility for its actions. Our state may, in the result, be a little less sovereign in its right of delegation. Therein it will only the more certainly make a direct march upon the real" (Laski, [1921] 1989:170).

The second injustice Laski argued was manifest under the fiction theory of corporate personhood was that it tended to the result that for-profit corporations were evading liability in civil or criminal law for any torts or offenses that had a *mens rea* element. Laski argues that the state of the law at the time he was writing was such that when it came to corporate personhood "we must collect the opinion that it cannot have a mind at all" (Laski, [1921] 1989:172). He states:

Just as we have been compelled by the exigencies of events to recognize that the corporation is distinct from its members, so, too, we must have to recognize that its mind is distinct from their minds...When we talk of a company as a 'bad master', there is surely reality behind that phrase. Individually its members are probably meek and kindly; but the company is differently constituted...Why the courts should

refuse to take cognizance of that which is an ordinary matter of daily life it is difficult indeed to understand. Take, for example, the charge of manslaughter. Any student of workmen's compensation cases will not doubt that in a choice between the adoption of a completely protective system and the possibility of an occasional accident, there are not a few corporations anti-social enough to select the latter alternative. Human life, they will argue, is cheap; fencing, let us say, of machinery is dear. But admit the existence of the corporate mind and that mind can be a guilty mind (Laski, [1921] 1989:173).

He continues: "What is the alternative? To attack some miserable agent who has been acting in the interest of a mindless principal, an agent, as Maitland said who is the 'servant of an unknowable Somewhat.' But if that Somewhat be mindless, how can it have selected an agent? For selection implies the weighing of qualities, and that is a characteristic of mind" (Laski, [1921] 1989:173). Laski's concern here then again was the liability of for-profit enterprise. More directly than Maitland, Laski recognizes that the fiction theory had not only prevented the recognition of fellowship associations as having an independent existence from the state but it had also prevented an adequate theory of corporate liability from emerging. Hager notes: "More than any other student of the real entity theory, Laski connected it with the law's evolving need to impose social responsibility on the activities of capital" (Hager, 1988:607). In doing so, Laski then went beyond Maitland to address the underpinnings of doctrines for the imputation of liability that he viewed as potential obstacles to a real entity theory of corporate personhood. In particular, Hager (quoting from Laski) notes that Laski argues that liability should be allocated "...according to principles of public policy, not principles of negligence: 'The liability is made to arise not from any tort upon the part of the master, but upon the inherent nature of the economic situation...We cannot sacrifice social necessity to the logic of the law of torts'" (Hager, 1988:608).

Laski thought real personality theory then would re-invent the law on implied authority that Laski viewed as: "'a barbarous relic of individualistic interpretation'" (Hager, 1988:609). If corporations were instead conceptualized as real persons, not fictitious, a corporation could then be understood to act directly rather than needing to imply actions indirectly through agents. In turn, Laski theorized, along with the abolishment of *ultra vires*, the same idea would also legitimate the more political activities of trade unions and other unincorporated entities. The failure to recognize that even incorporated corporate entities could have a mind and a will, he argued, was having an even greater destructive effect on associations that had remained technically unincorporated. He states:

As if your unincorporate body were any less the result of self-will than its corporate analogue. We shall find no law of associations. What we shall find is rather a series of references to the great divisions, contract, tort, and the like, or ordinary law. For here, in the legal view, we have no bodilyness, nothing more than a number of men who have contracted together to do certain things, who, having no corporate life, can do no more than those things for which the agreement has made stipulation. Legally they are no unit, though to your ordinary man it is a strange notion that a Roman Church, a Society of Jesus, a Standard Oil Trust – the most fundamentally unified persons, so he would say, in existence – should be thus devoid of group will because, forsooth, certain mystic words have not been pronounced over them by the state (Laski [1921] 1989:174).

Behind the trusts then, Laski argued was the reality of the group life and he drew from Maitland the notion that without state interference the trust “had served to protect the unincorporated *Genossenschaft* against the attacks of inadequate and individualistic theories” (Laski, [1921] 1989:175). However, as in Laski’s time the common law was now beginning to reach behind the exterior of legal form, as it had in *Taff Vale* and *Osborne*, it was more urgent than ever that legal doctrines of corporate existence be integrated with a legal theory that would allow corporate entities to continue to develop unimpeded by what Laski perceived to be outdated notions derived from legal doctrines developed under the shadow of state sovereignty and centralism. He states:

We should all agree that if...a *Genossenschaft* is to live and thrive it must be efficiently protected by law against external enemies. If it is to live and *thrive* – let us repeat the words in the way which we would wish the emphasis to lie. The association is to thrive. It is not to have its life cramped, its development impeded. It is to be sheltered against the attacks of men willing to take advantage of its corporality...And yet it is in precisely the opposite way that the courts have interpreted their purpose. Men’s minds may change. Their purposes may change. Not so the purposes of men bound together in association (Laski, [1921] 1989:175).

Thus Laski thought it would be possible under a real personality theory to bring all associations more publicly into view and to then determine politically the scope of their respective liability as a matter of public policy.

In many respects, Laski anticipates the legal realism movement as it was his view that the law should be developed with the practical “consequences to the mass of men and women” (Laski, 1989 [1921]:186) in mind. He states: ‘...personality, as so defined, gives rise to interests; and in the modern state, it is largely by the interplay of interests that policy is determined” (Laski, 1989 [1921]:143). Laski’s realism should not be surprising given his correspondence with Holmes who was a major figure in the American Legal Realist school of thought (See: Holmes & Laski, 1953). Why it is somewhat surprising is that shortly

after Laski is writing, and as will be outlined in more detail in the chapter to follow, the realists largely reject the idea that the legal doctrine of corporate personality, to the extent that it conceived of corporations as real or fictional, mattered at all. Partially this was a result of positional differences between the political pluralists and legal realists on the state. Laski did not accept that the state was the all-absorptive entity legal and political theory had accepted and instead, he argued: “the parts are as real, as primary, and as self sufficing as the whole...They are, it may be, in relations with the state, a part of it; but one with it they are not. They refuse the reduction to unity” (Laski [1921] 1989:180). The state could then, in Laski’s view, be primarily conceptualized as a distributive entity but not a collective entity. He writes: “Men belong to it; but also, they belong to other groups” (Laski [1921] 1989:180) and in one of Laski’s more revealing passages he draws on an image of law to express the point:

It is purely arbitrary to urge that personality must be so finite as to be distinctive only of the living, single man. Law, of a certainty, is not the result of one man’s will, but of a complex fusion of wills. It distills the quintessence of an infinite number of personalities. It displays the character not of a Many, but of a One – it becomes, in fact, a unified and coherent. Ultimately pluralistic, the interactions of its diversities make it essentially, within the sphere of its operations, a single thing. Men obey its commands. It acts. It influences. Surely it is but a limitation of outlook not to extend the conception of personality into this incorporeal sphere (Laski, [1921] 1989:173).

What he begins to suggest is that in associations, as in law, there existed in legal terms a reserve jurisdiction or, in political terms, a right of self-determination, but he conceptualized this as not necessarily a right of the people against the sovereign *per se* but as the people differentially associated against sovereign unity. He states: “Every great crisis must show its essential plurality. Whether we will or no, we are bundles of hyphens. When the centers of linkage conflict a choice must be made” (Laski, [1921] 1989:180). The state, in Laski’s view then, should be judged by its actions: “Such it is submitted, is the natural consequence of an admission that the personality of associations is real and not conceded thereto by the state. We then give to this latter group no particular merit. We refuse it the title of creator of all else. We make it justify itself by its consequences” (Laski [1921] 1989:180). And, in Laski’s view, the state’s actions leading up to the interwar period justified the division of state sovereignty, which he thought could be accomplished legally through the recognition of the real legal personality of other associations that could potentially take on public policy functions. Law, not the state, for Laski was politically constitutive.

Laski's desire to debunk the idea of state sovereignty, however, does lead him to neglect the potential consequences of his other theoretical commitments. For instance, Laski consistently expresses a concern to eliminate the idea of individualism from legal and political discourse, but what he ultimately suggests is that associations could be conceived of in law as individuals and he, unlike Gierke, includes private corporations in his formulation (although conceived of as, rightly or wrongly, an association of people). His framework was meant to be transitional but this conception of the real legal personality of the corporation as a singular person will have a lasting effect on the idea of the legal personality of associations. The legal realist movement across the Atlantic in America, by contrast, while also concerned with state power and of the view that legal decision-making should be a matter of public policy, had very different political aims than English political pluralists like Laski. The realists were not concerned to debunk the myth of state sovereignty so much as expose just how powerful the state really was; not only as a publicly constitutive authority but also as a private one. The myth the realists were set on debunking was the myth of the self-regulating market. If it could be demonstrated that the state defined the legal institutions of the market, then the state could be held responsible for the distributional consequences and the theory of the self-regulating market could be put to rest. As such, the realists will attempt to politicize legal decision-making by attacking the idea that legal decision-making was merely a matter of established rules and doctrinal prescriptions. Like Laski, however, and as will be discussed in the following chapter, the realists desire to debunk the idea of the self-regulating market will also lead them to neglect the potential consequences of their other theoretical commitments. For instance, the realists consistently express a concern to focus on the distributive consequences of legal and political discourse, but their (non) intervention into the legal personality debate and their refusal to engage the conceptual consequences of corporate legal personality may have, inadvertently, assisted the development and growth of the modern corporation with the significant distributional consequences this has entailed today.

## 7. The Great Corporation

As examined in the previous chapter, when the English political pluralists were writing, the joint-stock company was already recognized by the state as having the potential for legal personality by registration. By extending the doctrine to other unincorporated membership-based associations the pluralists had thought the law, through the ideal of the legal person, would do the work of refining the doctrine to protect the superior moral and material personality of membership based associations at the expense of capital based associations that could, as real persons, be regulated and held accountable. The real entity theory of the corporation they devised was intended then to provide an ideological basis for the existence and continuity of associations as legal persons based on their historical and material existence in UK social life and their degree of resemblance to the association of the state. By placing the recognition of associations in the hands of the courts and jurists rather than the state, it was theorized that the jurisdiction of the common law, itself a device crafted through the presence of a strong unincorporated professional association, would interpret and develop the doctrine of group personality in such a way as to recognize the natural rights of people to associate and act collectively but also impose liability for harms associating in a particular way might engender. To the extent that the pluralists included the company form in their writing it must be understood in this specific historical and experimental context. What the pluralist writers perhaps failed to predict, however, was the massive expansion of the joint-stock company form in the early to mid 20<sup>th</sup> century, largely helped along by the law's failure to distinguish through the legal form of personality the very different material and symbolic structures that companies were beginning to take when compared with other associations.

This chapter will chart the development of the notion of corporate legal personality that emerged in the 20<sup>th</sup> century when the law, in the abstract, through both legislation and jurisprudence, adopted the real corporate personality theory the pluralists advocated, but in so doing ignored any need to differentiate the material and moral differences between the corporate groups the doctrine was being applied to. These ideas will be developed through an analysis of the judicial development of the company form in both England and, where relevant, the US, in terms of the initial understanding of the joint-stock company as a membership-based association, to the eventual radical separation of the joint-stock company from its shareholders or any human associates, to the retention of the idea of shareholders as owners for the purposes of internal governance, to the recognition of the

company as a real person in terms of civil, human, and constitutional rights. Further, I will explore how the legal realist school of thought assisted the process by refusing to engage the inconsistencies in the conceptual debate. And lastly, I will suggest that as a result of the implosion in the legal form of the person the law has effectively withdrawn from the normative conversation instituted by the regulatory construct of the legal person, leaving one particular form of corporate group to dominate and a very different democratic narrative than the pluralists might have envisioned to emerge.

## 7.1 Corporations as Associations of People

Paddy Ireland's academic work<sup>39</sup> exploring the historical emergence of the company form in Britain argues that to fully understand the modern legal form of the company today, one needs to understand how the doctrine of the legal personality of the corporation was historically developed. Critical to Ireland's account is that the initial formulation of the company as a 'legal person' did not conceive of the company form as an entity entirely separate and apart from the shareholders that were viewed as its members. He explains: "...it is important to remember that what we now call 'company law' began life in the early nineteenth century as 'joint stock company law', meaning the body of law applicable to joint stock companies, and that until the latter half of the century, it was considered and treated as an adjunct of the law of partnership" (Ireland, 1999:38). He continues that the dominant idea of the nature of the joint-stock company, incorporated or unincorporated, was that they were "...'public' partnerships, distinguishable from 'ordinary' or 'private' partnerships on quantitative rather than qualitative grounds. Like ordinary partnerships, all joint-stock companies tended therefore, to be conceptualized as aggregates of individuals. Incorporation was seen as creating a separate legal entity, but the resulting 'body corporate' was thought to consist of 'several individuals, united in such a manner that they and their successors constitute but one person in law, a person distinct from that of any of the members, *though made up of them all...*'" (Ireland, 1999:39). Ireland argues that this is apparent from the wording of the *Joint Stock Companies Act* (1856), which he asserts specifically indicated: "that people 'formed themselves' into companies, with its implication that companies were made *of*, rather than *by*, them" (Ireland, 1999:38). As such, Ireland stipulates: "...while incorporation created a legally distinct entity, the incorporated company, it did not effect a 'complete separation' of company and members.

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<sup>39</sup> The texts from Ireland that will be primarily examined herein include: "Corporate Governance, Stakeholding, and the Company: Towards a Less Degenerate Capitalism" (1996), "Company Law and the Myth of Shareholder Ownership" (1999), and "Shareholder Primacy and the Distribution of Wealth" (2005).

On the contrary, all joint stock companies, incorporated and unincorporated, were conceptualized as entities composed of those members merged into one body" (Ireland, 1996:289).

At the inception of the idea of a company as a legal person then, Ireland suggests: "Incorporation was seen as offering joint stock companies certain important legal privileges which took them to some extent outside the principles of the law of partnership, but it was not thought to provide a fully fledged alternative legal form" (Ireland, 1999:39). It was still then, he writes, "...a branch of the law of partnership" (Ireland, 1999:40) with the members of the company having an interest in the company assets, personally liable for company acts, and related to each other legally by way of contract and by equal rights to participate in the management of the enterprise. Further, Ireland sets out, the formulation of the company to some extent had to be conceived of in this way as to do otherwise would have offended the laws against usury that continued to govern in England until the early 19<sup>th</sup> century.<sup>40</sup> The laws against usury prohibited the making of capital from capital, so in other words the charging of interest on loans, and although the absolute prohibition against usury was relaxed in the mid 17<sup>th</sup> century the amount of interest that could be charged for a loan was still tightly regulated in England thereafter. As such, investment capital in joint stock companies had to be distinguished from a loan in order for higher rates of return to be allowed and this was accomplished on the basis that the investor as member of the joint stock company was conceived to take an active part in the business insofar as they put their capital at risk and their investment was converted into productive assets in the course of trade. In other words, instead of being constructed in law as 'lenders' the providers of capital were constructed initially in law as equivalent to 'partners.' Ireland states: "In a loan arrangement, it was argued, the money lender *transferred* ownership of his money to the borrower, took a fixed and guaranteed return, and dispensed with the risk to his property; whereas in a partnership the provider of money *retained* ownership of his

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<sup>40</sup> Ireland notes that the prohibition against usury and the division between investors and creditors is an ancient one, which found an early articulation in Aristotle. The reason for the offense of usury, Ireland argues, was that it was perceived to render exchange, and as such the community of exchange, unjust as it involved a situation where "the Usurer made money without working for it, taking, in the form of interest, part of the product of the labor of others"(Ireland, 1999:34-35). It was, in the Middle Ages, Ireland writes, a grave offense, and he notes (quoting from Dante) that in *The Divine Comedy*: "Dante located usurers, their faces charred beyond recognition by fiery rain, in the seventh circle of the *Inferno* at the very edge of the second division of hell, to reflect 'the degree to which [their] particular offense destroy[ed] communal life and the possibility of spiritual happiness...'" (Ireland, 1999:35). Thus, Ireland states: "In marked contrast to modern legal systems, Dante treated fraud more harshly than violence precisely because it eroded the trust and confidence without which community would disintegrate. The theory of usury which emerged in the Middle Ages was 'not, then, an isolated freak of casuistical ingenuity, but [a] subordinate element in a comprehensive system of social philosophy'" (Ireland, 1999:35).

property and thus put it at risk. This not only justified his return, it made it possible to attribute it to the goods which the money had been used to buy, rather than to the sterile and barren money itself. In this way, over time, the usury laws contributed to the radical differentiation of two sorts of money investor: lenders *outside* associations receiving interest; and partners *inside* associations sharing profits" (Ireland, 1999:36).

Beyond a rhetoric to justify the circumvention of usury laws however, Ireland argues, this distinction never made much sense in terms of the moral prohibition against usury as "...both received the return on their capital in the same form – as a reward for the mere ownership of money" (Ireland, 1999:37). Empirically, however, Ireland concedes, there was at least initially some material reality to the risk element of the distinction as legally shareholders constructed as partners were construed to maintain ownership of the enterprise and, as such, were held liable for partnership debts whereas creditors were not. Further, he suggests, "...even in relation to inactive rentier partners, there was some justification for this characterisation...By the later eighteenth century...as industrial enterprises grew in number, many partnerships were becoming permanent affairs, with the result that the money of rentier investors was often tied up in productive assets for a prolonged period, giving those investors the character of industrial rather than money capitalists, despite the passive nature of their investment and lack of managerial involvement" (Ireland, 1999:38). Further, although he suggests active participation was always a stretch for some investors during the period, he continues, "...compared to their latter day counterparts eighteenth and nineteenth century joint stock company shareholders took a much greater supervisory interest in their investments" (Ireland, 1999:39). At the core of the concept of the joint stock company then, Ireland argues, was always the rentier investor: "who could be accommodated within the ordinary partnership but who was largely peripheral to it..." (Ireland, 1999:38). But, critically in the early to mid 19<sup>th</sup> century, they were still a part of the personality of the company conceived of as an association of persons.

The characterization of the company form in the US during this time was remarkably similar. Morton Horwitz, who studies the history of company law in the US context,<sup>41</sup> remarks that the often maligned decision of the US Supreme Court in *Santa Clara Co. v. Southern Pacific Railroad* (1886) determining that corporations, as legal persons, were

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<sup>41</sup> The main article by Horwitz that I will be discussing at length herein is: "*Santa Clara Revisited: The Development of Corporate Theory*" (1985)

entitled to 14<sup>th</sup> amendment rights under the US constitution must also be read in the context that corporations were, in law at the time, conceived to be associations of people. He notes that in *Santa Clara* "...the central argument was that the fourteenth amendment protects the property rights not of some abstract corporate entity but rather of the individual shareholders" (Horwitz, 1986:177). Thus, he sets out, in a companion case to *Santa Clara* it was argued that the constitutional provisions applied to corporate entities "...not alone because such corporations are 'persons' within the meaning of that word, but because statutes violating their prohibitions in dealing with corporations must necessarily infringe upon the rights of natural persons. In applying and enforcing these constitutional guarantees, corporations cannot be separated from the natural persons who pose them" (Horwitz, 1986:177). Like in England then, the company form was conceived at least initially in the US as an aggregate of persons who, as members, made up the association. Horwitz further emphasizes that this could also be seen from the laws governing corporate decision making in the US in the latter part of the 19<sup>th</sup> century. He states: "During the 1880's, nearly all courts required unanimous shareholder consent to corporate consolidations as well as to other 'fundamental' corporate changes. The rule of unanimous consent, it should be noted, is a dramatic example of the extent to which partnership-contract categories governed important aspects of corporation law in the period immediately after the Civil War. Any fundamental corporate change was regarded as a breach of the individual shareholder's contract as well as, in effect, an uncontested 'taking' of his property" (Horwitz, 1986:200).

Ireland notes, however, that commencing as early as the mid 19<sup>th</sup> century and continuing well into the early part of the 20<sup>th</sup> century, the economic reality or external circumstances of the joint stock corporation began to change. This too was true in America and for similar reasons (see generally: Lipartito, 1990). The major development, which began to change the economic nature of joint stock corporations and investment on both sides of the Atlantic, was the development of the railway system. Ireland notes: "Investment in railway companies was not only on a much larger scale than anything previously seen, it embraced groups hitherto uninvolved in investment and took a radically depersonalized rentier form. As a result...there emerged for the first time a developed market in joint stock company shares, which transformed them into money capital – readily marketable commodities, liquid assets easily converted into money" (Ireland, 1999:41). As a result, Ireland argues, the legal nature of the share and by proxy the shareholder started to be

gradually reconsidered in light of the emergent economic context. So, Ireland recounts that in England:

...it came to be held that shareholders had no direct interest, legal or equitable, in the property owned by the company, only a right to dividends and a right to assign their shares for value. By 1860 the shares...had been established as legal objects in their own right, as forms of property independent of the assets of the company...with this, the capital of joint stock companies seemingly doubled. The assets were now owned by the company and the company alone...The intangible share capital of the company, on the other hand, was the sole property of the shareholder. A vital legal space thus emerged between companies – owners of assets – and shareholders – owners of shares (Ireland, 1999:41).

With the transformation in the nature of the share and the related development of limited liability (limiting the liability of shareholders in joint stock companies to the amount of their investment or shareholding), Ireland argues, the involvement of joint stock company shareholders in the supervision of the companies they were invested in steadily declined until by the 1870s it had more or less ceased. Instead, he stipulates: “Professional managers were paid to run enterprises and the great majority of shareholders were reduced to the status of functionless rentiers, receiving their income in the form (if not at the level) of interest – that is, as a return on their capital accruing with the mere passage of time” (Ireland:1999:42). This new relationship between the shareholder and the joint stock company was, he asserts, reflected in the change in the language of the *Companies Act* (1862). He states, on the provisions of the Act: “...people no longer ‘formed’ themselves into incorporated companies, they ‘formed’ incorporated companies, objects external to them, made *by* them but not *of* them. In short, the company was reified” (Ireland, 1999:42).

Horwitz too notes that similar changes were effected around the same time in the US and were also tied to the development of the railway system alongside other major national industries such as banking and insurance. The sheer scale of these enterprises, he argues, resulted in a shift in the supervision of the company by shareholders to the employment of professional managers, which had a profound effect on the nature of the corporate form that emerged. Horwitz states: “The shift in the internal constitution of the corporation was among the most important reasons for the demise of the partnership-contract theory of the corporation after 1900...where the whole sum of corporate powers is vested by law directly in a board of directors...such an organization...allows us to see in a large railroad, banking or insurance corporation rather an aggregation of capital than an association of

persons" (Horwitz, 1986:216). This then, he suggests, combined with "...the rise of a national stock market, which definitively converted shareholders into impersonal investors" (Horwitz, 1986:209) effected in material terms "...the culmination of a long-term transformation by which shareholders, once regarded as 'members' of a corporation, not fundamentally different from partners, came to be treated as completely separate from the corporate entity itself" (Horwitz, 1986:209).

## 7.2 Corporations as Real Persons

Thus both Horwitz and Ireland observe that the advent of the freely transferable share and the "move from seeing directors as subject to the direction and control of the company, meaning the shareholders in a general meeting, to seeing them as a self-standing organ of the company as a separate, depersonified entity" (Ireland, 1999:43) marked a fundamental change in the external and internal nature of the joint stock company. Requiring a way to legally conceptualize this change, which was beginning to stretch the bounds of the theory of the firm as an artificial legal person created through a nexus of contracts, jurists began to advocate and the courts began to implement a new doctrine of the corporate form that constructed the corporate entity itself as a 'real entity' or as, on its own, a separate legal person. The theory of the real personality of the company they advocated then held that the company had to be treated as a distinct person not only from the shareholders invested in the company, but also from the directors or managers who ran the company and the employees who worked at the company. Ironically, of course, the theory of the corporation as having a real legal personality as opposed to a fictional legal personality was derived from Gierke, who it will be recalled had explicitly stipulated that the joint-stock company was not an association based on fellowship and as such should not be afforded real legal personality. Further, the theory directly drew from Maitland's translation of Gierke into the Anglo-American context (see: Harris, 2006), which had been undertaken as a means to suggest the superior real personality of associations like trade unions and professional associations when compared to the joint stock company's more limited, if still at the time associational, aspects. And yet, by the time real personality theory starts to become the dominant expression of the corporations legal status, as both Ireland and Horwitz recount, it ultimately became inextricably associated with the new material form of the joint stock company emerging in the early to mid 20<sup>th</sup> century, which was by this time conceived as: "an object cleansed of people" (Ireland, 1996:46).

Horwitz confirms that it was the real personality theory across the Atlantic too that was ultimately used to justify the eventual development of doctrines of the limited liability of shareholders and the idea of general registration for US corporations, which would pave the way for even larger-scale enterprise. Through the rise in dominance of the real entity theory, he argues, shareholders stopped being viewed in law as partners or co-adventurists making it possible to limit their liability to the amount of their investment. It also, he suggests, became a way to retroactively justify general registration legislation such as that undertaken by the *New Jersey Act* (1889) that “for the first time allowed a corporation to hold the stock of another corporation in order to make the use of trust unnecessary” (Horwitz, 1986:195). Further, Horwitz stipulates, the real entity theory served to erode the rule of unanimous consent of the shareholders for major corporate decisions, giving rise instead to majority rule, in respect of which, he states: “made the merger movement legally possible. It not only made consolidations much easier to effect, it also dealt the final blow to any efforts to conceptualize the corporation as a collection of contracting individual shareholders” (Horwitz, 1986:202). Thus he continues, that in the US at least, “...by the time of the First World War, it was common for legal writers to observe that ‘the modern shareholder is a negligible factor in the management of a corporation’” (Horwitz, 1986:207). With the idea that the corporation had a real personality on its own, he asserts, “...the shift in the conception of shareholders from ‘members’ to ‘investors’...” (Horwitz, 1986:207) was complete.

Horwitz also emphasizes that the continuity of the real personality theory, once it gained recognition by the courts, became at least as much of a political proposition as a legal and economic one. He states (quoting from US legal commentators): “After the passage of the *New Jersey Act*, the entire expenses of the state of New Jersey were paid out of corporation fees. ‘[S]o many Trusts and big corporations were paying tribute to the State of New Jersey...‘that the authorities had become greatly perplexed as to what should be done with [its] surplus revenue...’ ‘[T]he relation of the state toward the corporation resembles that between a feudal baron and the burghers of old, who paid for protection...’” (Horwitz, 1986:195). Thus, Horwitz argues, in the US “the passage of the *New Jersey Act*, followed by a rapid capitulation of many other states, marked the end of all serious efforts to use corporation law to regulate consolidation” (Horwitz, 1986:195). It also, he argues, marked the end of any serious challenge to the view that the shareholders were radically separate from the companies they were invested in. He states: “At some point at the beginning of the twentieth century, American legal opinion began decisively to shift to the view that

‘the powers of the board of directors...are identical with the powers of the corporation.’ Earlier, the dominant view, as expressed by the United States Supreme Court, was that ‘when the charter was silent, the ultimate determination of the management of corporate affairs rests with its stock holders’’ (Horwitz, 1986:214).

Ireland too emphasizes the political reality in England that followed on the change to the nature of the corporation and its sanction by the courts as a real legal person. He sets out that in England a high degree of national importance began to be attached to the scope of the London Stock Exchange, which the real personality theory was perceived to make possible through the radical separation of the shareholder from any true ownership or management of the companies who’s shares were being traded. Through the interaction of real legal personality and the development of the legal device of the share, he states: “a class of property had been, if not created, then vastly expanded...new classes of people were encouraged to invest in the Stock Exchange resulting in new habits of employing savings, not only among professional men, small traders, widows, and others in the nascent rentier class, but also large merchants and industrialists” (Ireland, 1996:65). Thus, he continues: “By the middle of the century, railway shares had become well established in the study and drawing room, and newspapers were soon publishing, as a matter of daily routine, share prices” (Ireland, 1996:66).

On both sides of the Atlantic then, through a combination of new economic realities that changed the nature of shareholding and new political realities that saw the state become dependent on corporate contributions to national economies, the theory of the corporation as a real legal person in its own right began to be accepted as ‘natural’ or simply social fact. So, for instance, Horwitz quotes from a prominent legal scholar of the period, Arthur Machen, who states in a 1911 article in the *Harvard Law Review*: “In these days it has become fashionable to inveigh against the doctrine that a corporation is an entity, as a mere technicality and a relic of the Middle Ages; but nothing could be further from the truth. A corporation is an entity – not imaginary or fictitious, but real, not artificial but natural” (Horwitz, 1986:220). Ireland too notes that a similar commitment to the naturalness of corporate personality began to emerge in England, with the result that the doctrine became entirely disconnected from any representation of material reality the joint stock company had at one time represented. This was particularly apparent, he asserts, in the courts decision in *Salomon v. Salomon and Co. Ltd* ([1897] AC 22 HL) to extend the idea of real legal personality to a private company, one that was in economic reality a sole

proprietorship.<sup>42</sup> He states: “By 1914 vast numbers of ‘private companies’ had registered, and the term ‘company’ was coming to acquire its modern meaning, denoting a particular legal form of association with no economic connotations at all” (Ireland, 1996:45). What was once in England: “‘Joint stock company law’ (Ireland, 1999:44), Ireland asserts, “...became simply ‘company law’” (Ireland, 1999:44).

The theoretical idea of real legal personality then was completely transformed from an idea that could best capture and represent the collective status of people acting together in concert to an idea that effectively made it possible to ensure that people did not need to act together at all for a real legal person to exist. The corporate form of a real legal person then could be either an association of people (as was often the case when small partnerships incorporated), a single person (as was the case when sole proprietorships incorporated), or a mere aggregation of capital that really did not represent any association of people at all (as was the case with the joint-stock company). What then of the dogmatic legal person of Supiot’s articulation; both moral and material? Supiot suggests that the regulatory construct of the legal person must institute a prohibition that the legal person must not be reduced one-sidedly to either pure abstraction or pure empiricism – but, could a legal person be neither? The naturalization of the real personality of corporations was effectively reducing the legal person to an abstraction of a material reality of one form of business structure that was then starting to be applied to all kinds of associations without regard to their underlying material or symbolic differences.

### **7.3 Legal Realism and the Legal Person**

As might be expected from the previous chapter, pluralists like Laski were flummoxed by these developments, perhaps a contributing factor to their abandonment of their previous pluralist positions on the legal person. The real personality theory they had articulated was a way to symbolically represent associations of people and collective life and they were always careful to maintain that it was to be applied to associations of persons. It was clear, however, that this was not how it was coming to be applied as the legal pendulum had by the 1920’s swung very much in a different direction, giving a symbolic form to money

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<sup>42</sup> *Salomon* was a case under the *Companies Act* (1862) where Aaron Salomon, a boot maker by trade, incorporated his business under the Act by meeting the requirements for the involvement of 7 or more persons by allotting shares to himself, and a share each to his wife and five children. This allowed the newly formed company to take advantage of the Act’s limited liability provisions and prevented Salomon from being held personally liable to creditors. It is still widely considered “the most important case in company law” (Roach, 2012:529).

capital, divorced from producer's interests. Across the Atlantic, however, a different strain of theory was emerging under the broad label of 'legal realism' that specifically concerned itself with examining the relationship between legal doctrine and real social consequences. Surely, the realists would critique the idea that what was effectively an object or collection of objects could be conceived in law as a real legal person? While the realists did address it and it can be said that they were concerned about the growing power of capital, the realists were of the view that there was no essential connection between the theory of legal personality and the observable social consequence of corporate expansion. To understand their position it is necessary to understand the underlying aims and theoretical positions of the legal realist project.

Joseph Singer in "*Legal Realism Now*" (1988), summarizing Laura Kalman's "*Legal Realism at Yale: 1927-1960*" (1986) sets out that legal realism was a theory of legal reasoning and education that embraced certain meta-theoretical precepts. He sets out (summarizing from Kalman):

First it is a form of functionalism and instrumentalism. The original realists sought to understand legal rules in terms of their social consequences. To better their understanding of how law functions in the real world, they attempted to unify law and social sciences. They believed that this knowledge would enable them to reform the legal system to achieve efficiency and social justice.

Second, the realists proclaimed the uselessness of both legal rules and abstract concepts. Rules do not decide cases; they are merely tentative classifications of decisions reached, for the most part on other grounds. They are therefore of limited use of predicting judicial decisions...the realists emphasized the role of 'idiosyncrasy' in judicial decision making. At the same time they hoped to make judicial decision-making more predictable by focusing on the specific facts of the cases and social reality in general, rather than on legal doctrine. They sought to organize judicial decisions around situations rather than legal concepts...By making connections between law and actual life experience, they sought to make law less abstract and link it more closely to social reality. They believed that this would enable them both to predict judicial decisions more accurately and to promote just social reforms (Singer, 1988: 468-469).

Singer recognizes, however, that this is an oversimplification of the realists varied positions and suggests that it is also essential to see legal realism as part of a broader normative exercise. The realists were concerned to invalidate the public/private distinction in law specifically as it bolstered the idea of a self-regulating market. From the realist perspective "...the state determined the distribution of power and wealth in society both when it acted to limit freedom and when it failed to limit the freedom of some to dominate

others" (Singer, 1988:482). As such, the realists thought "a free market system could not be detached from the regulatory system...the rules in force have the effect of privileging the interests of some persons over the interests of others...For the realists, the important questions were not how to define the limits of state power or the boundaries of a private realm beyond state power, but instead, whose interests market regulations should protect, and what distribution of power the rules in force should foster" (Singer, 1988:482).

However, as politically valid as some of the realist critiques may have been, the realists had a major impact on the theory of the legal person at a critical moment in the debate on the future development of corporate legal personality. The major realist piece to address the subject is an article in the *Yale Law Journal* by John Dewey in 1926, in which he espouses the unlikely claim that all juridical debate on the nature of the corporation's legal personality should cease. It was an unlikely claim, as the debate on corporate personality was a major transatlantic discourse at the time of publication. Ron Harris writes: "The German-Gierkean real entity theory of the corporation journeyed through several contexts and discourses in Britain and the United States. It inspired numerous articles and books in English, French and German. Various scholars, counsel, politicians and judges used this and other corporate theories to advance different doctrinal and policy objectives" (Harris, 2006:1422-1423). But, as unlikely as it was, Dewey's critique was an extremely powerful intervention. Harris notes: "This was arguably the most intense legal discourse of the first quarter of the twentieth century. Around the mid 1920's it abruptly subsided, leaving only traces for historians to follow" (Harris, 2006:1423). The end of the debate is often directly attributed to Dewey's piece. Horowitz comments: "There are very few discussions of corporate personality after Dewey" (Horowitz, 1986:175) and Hager writes "Dewey's sharp critique of all this metaphysical argumentation took the wind out of the debate" (Hager, 1988: 635).

Dewey then, writing in response to the corporate personality debate, which by this time largely revolved around whether the corporation ought to be conceived of as a real legal person or an artificial legal person created by the state or from a nexus of contracts, made the argument that it simply did not matter. In his view, any particular theory of the personality of the corporate entity could be adopted as both (as any) could (and would) be used to support the same or opposing ends. The two theories were, he suggests, for all intents and purposes interchangeable as "...for the purposes of law the conception of person is a legal conception; put roughly 'person' signifies what law makes it signify"

(Dewey, 1926:655). Judges then, Dewey argued, could twist either theory to support their own view of corporate development. What was unfortunate about the legal personality debate, Dewey suggests, is that the law, through the advocates of one doctrinal theory or another, was being drawn into debates that were from the realist perspective of a non-legal nature. To the extent that this was occurring, Dewy argued, the law should be rid of the discourse of personality altogether and devise a different way of speaking about corporations and all legal entities that would highlight the law's *sui generis* functional form. He sets out:

The postulate, which has been a controlling principle although usually made unconsciously, leading to the merging of popular and philosophical notions of the person with the legal notion, is the conception that before anything can be a jural person it must intrinsically possess certain properties, the existence of which is necessary to constitute anything a person. If the conception as to the nature of these inherent and essential attributes had remained constant perhaps no harm would have resulted from shoving such a notion under the legal idea; the legal doctrine would have at least have remained as constant as that of the nature of the seat of personality. But the history of western culture shows a chameleon-like change in the latter notion; this change has never, moreover, effected complete replacement of an earlier by a later idea. Almost all concepts have persisted side-by-side in a confused intermixture. Hence their influence upon legal doctrine has necessarily been to generate confusion and conflict" (Dewey, 1926:658).

Dewey here makes an argument that bears the signature of the legal realist form of critique. The problem, he argues, in respect of the juristic debate on the meaning of corporate personality is the complication of legal theories by non-legal ones: "...law, at critical times and in dealing with critical issues, has found it difficult to grow in any other way than by taking over contemporary non-jural conceptions and doctrines. Just as law has grown by taking unto itself practices of antecedent non-legal status, so it has grown by taking unto itself from psychology or philosophy or what not extraneous dogmas and ideas" (Dewey, 1926:657). Legal form, Dewey cautioned, is not generative; it is only about function. So, while he admitted that "legal relations express struggles and movements of immense social import, economic and political" (Dewey, 1926:664), he suggests internal legal relations are not in and of themselves struggles or movements economic or political. To answer the question as to whether a corporation was, by nature, a real legal person or a fictional legal person was, he states:

...to engage in a survey of the conflict of church and empire in the middle ages; the conflict of rising national states with the medieval roman empire; the struggle between dynastic and popular representative forms of government; the conflict between feudal institutions, ecclesiastic and agrarian, and the economic needs

produced by the industrial revolution and the development of national territorial states; the conflict of the “proletariat” with the employing and capitalist class; the struggle between nationalism and internationalism or transnational relations, to mention only a few outstanding movements. These conflicts are primarily political and economic in nature (Dewey, 1926:664).

And, to the extent then that these political-economic conflicts had become a part of legal doctrine through the concept of legal personality and were therefore being made into a question of legal speculation, this only served to demonstrate a lack of understanding about the nature and function of law not the nature and function of persons. Legal personality, he argues, meant nothing more and nothing less than that the legal person was a “right and duty bearing unit” (Dewey, 1926:664). To ask anything more or less of a legal theory of the person was to ask the wrong question of the wrong institution.

It would be hard to get further away from Supiot’s argument surrounding the normative or dogmatic content of the legal person than Dewey does here. The construct of the legal person, in Dewey’s terms, did not inscribe a normative or regulatory proposition but merely reflected competing normative or regulatory prescriptions adopted by the particular judge in the particular circumstances the judge was making the decision. So, while Supiot argues that the legal person the law dogmatically constructs ensures that no human being would be reduced in law either to pure body or pure mind, Dewey argues the legal person is “no longer either a physical body or a rational substance” (Dewey, 1926:669). Dewey argues then that the most heated controversies concerning legal personality emerged as “rationalizations of the positions and claims of some party to a struggle. It is this fact which gives such extraordinary interest to the history of doctrines of juridical personality. Add to this the fact that the intellectual and scientific history of western Europe is reflected in the changing fortunes of the meanings of ‘person’ and ‘personality’, a history which has both affected and been affected by the social struggles, and the interest and complexity of the doctrines about juridical personality are sufficiently obvious” (Dewey, 1926: 665). However, Dewey stipulates, this is exactly why one should not imply normative content into the concept. He notes that there have been a variety of theories of the person and the nature of the corporation, but in the context of legal practice theories meant to do one thing, often do another. In Dewey’s view, the function of jurists should not be to argue for or against a particular theory, but instead to argue about how to functionally ensure the empirical consequences they want to achieve are achieved through public policy rationales. The choice of one particular legal theory or doctrine over another does not inevitably lead to a particular result; “...we cannot say, without qualification in respecting time and

conditions, that either theory works out in the direction of limitation of corporate power” (Dewey, 1926:668).

Dewey suggests then that the development and application of the theory of the ‘real’ legal personality of corporations and associations itself was actually a good example of this essential doctrinal indeterminacy. So, he argues, that in the time and conditions of the mid 20<sup>th</sup> century, the real entity theory was actually having the opposite impact pluralists like Maitland and Laski had theorized it would have; opening up the door to the growth of big business instead of regulation. At the same time, the concession theory the pluralists had consistently argued against, was now being advocated as the theory of choice by those who wanted to curb the power of corporations. Dewey states: “In spite of their historical and logical divergence, the two theories flowed together” (Dewey, 1926:668) and, he continues: “The fact of the case is that there is no clear cut line, logical or practical, through the different theories which have been advanced and which are still advanced on behalf of the real personality of either natural or associated persons. Each theory has been used to serve the same ends, and each has been used to serve opposing ends” (Dewey, 1926:669). It was the same in respect of the attempt of legal theory to attribute a legal personality to the state. He submits:

The doctrine of the personality of the state has been advanced to place the state above legal responsibility on the ground that such a person has no superior person – save God – to whom to answer; and in behalf of a doctrine of the responsibility of the state and its officers to law, since to be a person is to have legal powers and duties. The personality of the state has been opposed to both the personality of ‘natural’ singular persons and to the personality of groups. In the latter connection it has been employed both to make the state the supreme and culminating personality in a hierarchy, to make it but *primus inter paros*, and to reduce it to merely one among many, sometimes more important than others and sometimes less so. These are political rather than legal considerations, but they have affected the law (Dewey, 1926:669).

Doctrinal legal theories of the nature of anything or anyone, in Dewey’s view, were “transcendental nonsense” (Cohen, 1935:809) and belonged to what Cohen would later articulate as the “heaven of legal concepts” (Cohen, 1935:809).<sup>43</sup> This does not mean that

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<sup>43</sup> Cohen stated the matter thusly: “Some fifty years ago a great German jurist had a curious dream. He dreamed that he died and was taken to a special heaven reserved for the theoreticians of the law. In this heaven one met, face-to-face, the many concepts of jurisprudence in their absolute purity, freed from all entangling alliances with human life. Here were the disembodied spirits of good faith and bad faith, property, possession, laches, and rights in rem. Here were all the logical instruments needed to manipulate and transform these legal concepts and thus to create and to solve the most beautiful legal problems. Here one found a dialectic-hydraulic-interpretation press, which could press an indefinite number of meanings out

Dewey was uncritical of the fact of the expanding power of corporations and he was alert that this was being effected by legal means, however he did not think it had anything to do with a particular doctrinal conception of personality; instead the question of the doctrinal conception of personality was serving to obscure the fact of corporate power, which was a problem of the law's "entanglement with *any* concept of personality" (Dewey, 1926:669). He states: "a legal theory should not have any concept of personality that is not about rights/duties that inure in such a way and apply in certain situations...any conception that, by ignoring context and purpose, tries to introduce unity into a conception where the facts show utmost divergence. There is a forced assemblage of persons" (Dewey, 1926:671). Jurists then, he argues, ought to eliminate the idea of personality altogether. Although he does not deny that there is a "social reality" (Dewey, 1926:673) to the idea that groups are more than mere aggregates of his persons, his concern was that the real and artificial debate had become about other things: "...why should such a fact be thought to have any bearing at all upon the problem of personality?" (Dewey, 1926:673)

There are a few problems, however, with Dewey's construction of the matter. First, Dewey wants to argue that legal conceptions of personality are irrelevant, but then on his own reasoning he argues for a particular 'functional' conception of a corporation or any legal person as simply "a right and duty bearing unit" (Dewey, 1926:656). But, is this not in itself a particular legal conception of personhood? It appears initially to match the Cheshire Cat conception discussed previously, but then he writes that conceptualizing the legal person in this functional form would not mean including "molecules, or trees or tables...as fit candidates for legal attributes" (Dewey, 1926:660). He states: "The reason that molecules or trees are not juridical 'subjects' is then clear; they do not display the specified consequences...molecules and trees certainly have social consequences; but these consequences are what they are irrespective of having rights and duties. Molecules and trees would continue to behave exactly as they do whether or not rights and duties were ascribed to them; their consequences would be what they are anyway" (Dewey, 1926:661). Lurking beneath the surface of his argument then is not only a stipulation that a legal entity must bear a human being, but he also appears to suggest that they must recognize themselves as a bearer of legal capacity. His own definition of legal status is in this

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of any text or statute, an apparatus for constructing fictions, and a hair-splitting machine that could divide a single hair into 999,999 equal parts and, when operated by the most expert jurists, could split each of these parts again into 999,999 equal parts. The boundless opportunities of this heaven of legal concepts were open to all properly qualified jurists, provided only they drank the Lethean draught which induced forgetfulness of terrestrial human affairs. But for the most accomplished jurists the Lethean draught was entirely superfluous. They had nothing to forget" (Cohen, 1935:809).

respect actually more exclusionary than a personhood conception, which does not reduce the legal person as a civil status to an issue of competence. Further, insofar as Dewey stipulates a right and duty-bearing unit would need to be a human being, this was exactly the issue that was at stake in the debate about corporate personality? The corporation was by this time, through the application of the real personality doctrine in law, constructed as a legal person when, at least in the case of joint stock companies, it was in fact an aggregate of capital, or an aggregate of molecules and trees and tables. Arguably, the social consequences of this were not benign as status is a more relational idea than Dewey's formulation allows.

Further, Horwitz contends that although Dewey may have accepted the distinction between persons and things for the purposes of his ascription of rights and duties to humans only, this was not a distinction generally that the realists paid much attention to. He expands:

Progressives had struggled to emancipate themselves from legal conceptions rooted in natural rights individualism. If the central goal of earlier natural entity theorists had been to extend the natural rights of individuals to the corporate ‘personality’, the Progressives instead sought to show that all rights, both corporate and personal, were entirely the creature of the state. ‘When we speak of a corporation being the subject of rights,’ ... ‘we mean that it has the capacity to enter into legal relations – to make contracts, own property, bring suits. Rights, in this sense, are pure creatures of the law...There is no reason, except the practical one, why, as some one has suggested, the law should not accord to the last rose of summer a legal right not to be plucked’’’ (Horwitz, 1986:221).

Underlying the realist position that law should be cleansed of ideology was actually a very particular ideology. The idea of the legal personality of corporate groups then could not be for the realists “an expression of any philosophic quality in the group – of any group will or group organicism” (Horwitz, 1986:222). But, as a result, it became in the realist view “no more than a convenient technical device...to achieve the practical results desired, of unity of action, continuity of policy [and] limited liability...”’ (Horwitz, 1986:222). However, this too was a conceptual commitment against a natural doctrine of rights and in favor of a political conception: “The assumption that a person alone can be the subject of rights is based on the conception of right as a philosophic entity, springing out of the nature of man, independent of the law and anterior to it’...there were, in fact, not ‘rights’ but ‘interests.’”’ (Horwitz, 1986:222) And, although this did not mean that the realists argued in favor of corporate interests, it did mean that they did not object to the view that a corporation could be constructed in law as having interests if it would achieve a functional or practical result. The realists then legitimated the idea that an aggregate of capital could

have interests, which could be legally protected through the assignment of rights and in turn trivializing any notion that the legal person was a civil status reserved for the protection of human beings or groups of human beings; moral and material.

Lon Fuller, in his critique of legal realism, argues that this was exactly the problem of the realist view. For a theory of legal reasoning that privileged social consequences, the realists did not always appreciate the consequences of such a functional construction of law. Thus, Fuller stipulates, the realist critique of the distinction between public and private was also about the relationship between law as a discipline and society as a whole. When it came to the relation between law and society, the realists were firmly of the view that “society is the active principle and that law is simply a function of this principle” (Fuller, 1936:222). Thus, for the realists, Fuller elaborates: “Law, the principle of conscious guidance, is relegated to the background, and becomes a kind of midwife called in occasionally to assist the process of nature, but having no hand in the creation itself” (Fuller, 1936:219). If the positivists had went too far in the direction of law being the active principle that molded society, the realists denied any impact of legal concepts on the social norms that developed. Fuller argues:

...bias for the society side of the relation may answer to a real need in our law. Lawyers have been too prone to think of society as mere clay in the hands of the ‘Law’. Our courts too often talk as if their task was merely to cut channels, largely after a design of their own fancy, through which the waters of life are expected to flow inertly and complaisantly. To this conception [legal realism]...offers a needed antidote. But it is wise to remember that antidotes can be administered too liberally, and that in the case at hand there is a danger we may escape one simplification only to fall victims to another (Fuller, 1936:221).

As a result of this philosophy then, under a realist view, Horwitz argues, it became possible to view the legal personality of the corporation as a mere “‘practical’ necessity of modern life” (Horwitz, 1986:222). Realist legal commentary following Dewey then came to suggest: “The commercial world...whose habits of thought so largely influence the development of law, has come to regard the business unit as the typical juristic entity, rather than the human being...New economic phenomena, railroads, industrial combinations, the emergence of hitherto disregarded social classes, determine its growth” (Horwitz, 1986:222). Thus, Horwitz continues: “Standing behind the pragmatism of the Progressive view of corporations, then, was an acceptance of the recent triumph of the corporate form as ‘a normal business unit.’ No longer, was it necessary to resort to

‘metaphysics’ to establish the legitimacy of the business corporation. It had become a *fait accompli*” (Horwitz, 1986:222).

Dewey and the realists however, Horwitz, like Fuller, suggests, had overstated the case. Legal conceptions are not, he suggests, “...infinitely ‘flippable’...they do have ‘tilt’ or influence in determining outcomes” (Horwitz, 1986:176). So, while Horowitz does not deny the necessity of the realist critique of legal formalism generally, and in fact acknowledges that “their attack on formalism continues to be as powerful today” (Horwitz, 1986:176), he continues: “But their attempt to discredit the then orthodox claim to a non-political, non-discretionary mode of legal reasoning led them to ignore the obvious fact that when abstract conceptions are used in specific historical contexts they have more limited meanings and more specific argumentative functions” (Horwitz, 1986:176). By in effect gravitating in the direction of law is merely social politics by other means, realist critique during the period, Horwitz argues, “...spent too much effort repeating the demonstrations of the indeterminacy of concepts in a logical vacuum; but not enough time trying to show 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” (Horwitz, 1986:176).

It was not then necessarily true that any theory of corporate legal personality could have been manipulated to either limit or enhance the development of large-scale business enterprise. Instead, Horwitz argues, that for very specific reasons pertaining to the time and conditions in which the real legal personality theory started to be in law applied, the real personality theory over any other available at the time was particularly vulnerable to being harnessed in this fashion. Only the theory that the corporate entity was on its own a real legal person, an aggregate of capital as an individual rather than a group of associated individuals, could have possibly accommodated a theory of the corporation as an entity that was distinct from the state, shareholders, managers, and employees. Legal realism, and the functional view of law, in a very specific ideological way contributed to the acceptance of this doctrine by asserting that legal concepts did not matter and could not on their own restrain economic forms emergent in society. Horwitz states: “For the first time, the full implications of general incorporation laws began to be developed, and the view that legal forms cannot interfere with the natural evolution of the economy gained ascendancy” (Horwitz, 1986:196). It became, he argues, acceptable to suggest: ‘The laws of trade are stronger than the laws of men’” (Horowitz, 1986:196). And, while this was

certainly the opposite of what the realists set out to achieve; their entire edifice oriented towards discrediting the view of the self-regulating market by rendering the market a public concern, by failing to “adequately construct a new vocabulary and stance toward normative legal argument” (Singer, 1988:532), legal theory post legal realism returned to “recreating the idea of the autonomous market system, and by attempting to generate answers to controversial questions by reasoning from supposedly non-controversial premises” (Singer, 1988:532).

### **8.3 Implosion of the Legal Person**

Singer then contends that following the intervention of the legal realists, legal theory entered a state of normative paralysis. He sets out: “How exactly do we come by our normative commitments...The legal realists removed the possibility of answering these questions by appeal to natural law or to the logical implications of abstract concepts. Yet they gave us no way to answer these questions convincingly” (Singer, 1988:541). As a result he suggests, the reaction of legal theory “rather than confronting questions of value directly...fled to process. The only remaining, seemingly uncontroversial approach, was to defer to the considered judgments of individuals in society, and then somehow to aggregate all of these individual choices by a fair community decision procedure” (Singer, 1988:541). This flight to process, however, meant that the conceptual structure of the corporation; the possibility that an aggregate of capital could be a real legal person, was left untouched. Ireland argues that since the adoption of real personality theory the basic conceptual structure of the company in law has remarkably changed very little and has generated, he suggests, a number of conceptual, empirical, and indeed normative problems. He states:

In short, a body of law designed for application to nineteenth century joint stock companies – single entity, national companies whose shareholders had been relieved of any meaningful ownership function – has come to be applied to both small private concerns, in which shareholders and company are for all intents and purposes one, and to multi-unit, multi-divisional, multi-national corporations. As a result the conceptual structure of company law has become ever more divorced from the economic realities to which it applies and taken on a life of its own. Detached from its own history and material origins, it tends to be seen as flowing naturally and inevitably from the legal act of incorporation; as existing apart from any economic reality. This has not only facilitated its manipulation by capital, it has contributed to absurdities – most notably concerning the treatment of parent companies and their subsidiaries – and to conceptual ossification” (Ireland, 1999:44-45).

Doctrinal incoherence in the area of the real legal personality of the corporation has had significant consequences on the material and political form of the legal person. While the real legal personality of the corporation doctrine opened the door to the idea that a legal person could be neither material nor moral but a mere aggregation of capital, the law has had trouble holding to this conception and has in effect attempted to re-create and re-attach the prohibitions of the legal person to the corporate form in highly implosive ways.

### A Material Body

Following the real personality theory then shareholders in large modern business enterprise are in respect of the company conceived of as merely creditors. They are, Ireland sets out: “...money capitalists, external to companies and to the production process itself. Disinterested and uninvolved in management, and, in any case, largely stripped (in law as well as in economic reality) of genuine corporate ownership rights...” (Ireland, 1999:47). This status of the shareholder as external to the company, Ireland argues, is reflected in the legal nature of the share, which is now conceived as “...a particular form of money capital: property in the form of a claim on company profits” (Ireland, 1999:47). As such, the public corporation is essentially a depersonified entity; a collection of assets or aggregate of capital that has a technical legal status as a real autonomous legal person but does not bear the characteristics of other human beings constructed as legal persons. This, Ireland suggests, reflects the reality of what the company in some instances has become: “The consequent autonomization of the company was, and is, then, a material reality...a product of the growing separation of the circuits of industrial and money capital and the emergence of the share as an entirely independent form of property” (Ireland, 1996:304).

However, Ireland acknowledges, this is not always the case. Thus, he sets out, when it comes to the relationship between parent and subsidiary companies and in the context of private companies like with *Salomon*, where there is not a distinction between the shareholder and the company, the conception of the company as a legal person becomes more problematic. In these contexts, it would make sense to revisit the doctrine as the factual circumstances do not warrant the radical separation of company from member. But, Ireland sets out, this has not happened. As such, small private companies that are in effect sole proprietorships or partnerships and/or groups of companies that are in reality connected to each other via integrated shareholding structures, continue to be constructed in law as separate real legal persons in contradistinction to material reality that underlies

the form. The leading UK case of *Adams v. Cape Industries plc* ([1990] Ch. 433)<sup>44</sup> confirms, the courts have stood behind the idea that the company is a real legal person, refusing to identify the shareholders (or the shareholding parent company) with the company itself and maintaining that the corporate legal form is inviolable except in very rare circumstances thereby detaching the legal form from any attempt to represent reality.

By contrast, however, Ireland suggests, in other areas “...company law has not taken separate corporate personality *really* seriously in contexts where it would be entirely justified to do so” (Ireland, 1999:48). Thus, he sets out: “Fuelled by the ownership myth and legal remnants which sustain it, company law continues to treat the company and shareholders as in crucial respects synonymous” (Ireland, 1999:48). When it comes to corporate governance then, the law is not able to sustain the idea of the lack of a material body of the company and as such seeks out individual human beings to whom the company can be attached (owned by). Ireland states: “As a result of this anomalous hangover from earlier times and despite the fact that the company ceased to be a ‘they’ and has come to be seen as an ‘it’ the law insists on treating shareholders, collectively, as [its] only legitimate constituency” (Ireland, 1999:48). This is so, he states:

... notwithstanding the true economic nature of the share; notwithstanding the absence of any property nexus between shareholders and the company’s assets; notwithstanding the radical externality of shareholders to ‘the company’ and their superfluousness to and disinterest in the process of production; notwithstanding the fact that there are serious question marks over the legitimacy of their residual control rights, as well as over their desire, competence, and practical ability to exercise them; and notwithstanding that company law itself has done so much to demote them from the status of owners (Ireland, 1999:48).

The main justification rehearsed by the courts for the role of the shareholder in corporate governance then, he argues, is the idea that they are the ‘owners’ of the company, justifying “...the anachronistic retention by shareholders of exclusive governance rights and for the claim that public companies should be run predominantly, if not exclusively, in their interests” (Ireland, 1999: 50). But this does not make sense given the real personality theory, which accepts the corporation itself as a real legal person radically separate from

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<sup>44</sup> In *Adams* the UK parent company based in England ran an asbestos business, mining asbestos in South Africa and selling it in the UK and the US through subsidiary companies. The US subsidiary sold asbestos to a factory in Texas where the employees developed a number of medical conditions directly related to asbestos exposure. Two groups of employees sued the US subsidiary in the US, with the first receiving a settlement and the second obtaining a judgment of just over 15 million. The UK parent company liquidated the subsidiary and the claimants attempted to enforce the judgment in the UK against the parent company. The court held that the US subsidiaries were separate and distinct from the parent company and as such the UK parent company was not responsible to satisfy the judgment (Roach, 2012:531).

the shareholders. If the shareholders are not a part of the company as owners of the industrial corporate assets but merely the recipients of a share of profits as property then why do they have any legal privileges at all in respect of how the company is governed?

Thus, while the doctrine of the real personality of the company was accepted in respect of liability what the law could not readily do was make a break with the idea that the corporation had to be owned by some material physical person in other instances. As such, shareholders retain residual ownership rights in the corporate assets on insolvency and maintain their status as voting members in terms of corporate governance while, at the same time, being externalized in respect of liability and management. Ireland remarks however that this is an incoherent position, noting that the emergence of company law “...as an autonomous legal category was premised precisely on a recognition of the complete separation of the shareholder from the joint stock company, company law, while stopping short of acceding shareholders ownership rights over corporations, nevertheless [continued to] vest significant property rights in the shareholders as residual claimants. It still does, clinging on to the vestiges shareholder ‘ownership’ and retaining for shareholders their place at the centre of the governance stage” (Ireland, 1999:45). The company as a legal person is either de-personified or it is not. It cannot be both without generating theoretical confusion and inertia in the concept of the corporation’s or indeed any other legal entities’ legal personality.

The lack of clarity on whether or not shareholders are or are not part of the company is having global consequences also as corporate governance models in a number of jurisdictions are beginning to crystallize around a shareholder driven model. Henry Hansmann and Reiner Kraakman, for instance, in *“The End of History for Corporate Law”* (2000) chart the trend towards convergence on what they assert is now the standard shareholder driven model of corporate governance between the European, American, and Japanese legal systems. That this model will become uniform they suggest is likely due to “the recent dominance of the shareholder-centered ideology of corporate law among business, government, and legal elites in key commercial jurisdictions” (Hansmann & Kraakman, 2000:439) and, as such, they stipulate there is “no longer any serious competitor to the view that corporate law should principally strive to increase long term shareholder value” (Hansmann & Kraakman, 2000:439). In accordance with this model, then, they state:

...ultimate control over the corporation should rest with the shareholder class; the managers of the corporation should be charged with the obligation to manage the corporation in the interests of its shareholders; other corporate constituencies, such as creditors, employees, suppliers, and customers, should have their interests protected by contractual and regulatory means rather than through participation in corporate governance; non-controlling shareholders should receive strong protection from exploitation at the hands of the controlling shareholders; and the market value of the publicly traded corporation's shares is the principle measure of its shareholder's interests (Hansmann & Kraakman, 2000:440-441).

Further, Hansmann and Kraakman argue that "this consensus on the appropriate conduct of corporate affairs is also a consensus as to the appropriate content of corporate law, and it is likely to have profound effects on the structure of that law" (Hansmann & Kraakman, 2000:441). While they suggest in economic reality there can be diverse ownership structures, under the dominant model of the corporation as legal person there is emerging a normative consensus that shareholders alone are the parties to whom the corporation, as a real legal person, should be accountable to while other interests will need to be protected outside corporate law. The authors capitulate that the primary argument for this model is an economic argument not a legal one. If the shareholders interests are protected first, they argue, it ensures that the company will generate 'efficiency' as it prevents the company from adopting 'inefficient policies' that would be adverse to the competitive pressure of global commerce and attached to the site of the company or to the people who work there. But, while this is an economic case, they suggest it is becoming the dominant legal view.

Ireland, however, argues that the economic rationale for this model is debatable and that there is no reason in law, following the real legal personality theory, why this should be a *fait accompli*. If the corporation is a real person detached from shareholders, then it is not clear why other stakeholders would not have an equivalent claim in the running of the company.<sup>45</sup> To the extent there can be some divergence between shareholder dominated theories and more social institutional models, if material embodied beings are to be reattached to the corporate form it should not just be a given that it would be shareholders

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<sup>45</sup> Ireland, however, cautions that this is not to say the company would not still remain in principle a capitalist institution if stakeholders governed. The idea that it might not, he argues, is another consequence of the corporate personality debate, with advocates of stakeholder theories suggesting that the company could be returned to being an association of persons if only a stakeholder view of the corporation's material human associates was adopted. Ireland warns against this wishful thinking: "The capitalist may have disappeared both as shareholder and manager from the company and the production process, but capital itself has not...No amount of fiddling with company law...can change this. Capitalist production demands that to survive the company follow the dictates of capital accumulation through extraction of surplus value from the workforce" (Ireland, 1996:304). Thus, shareholders and stakeholders may disagree on the relative importance of short-term and long-term profits and how and to whom these are distributed, but profit will always be the sole criteria of a company's best interest.

only. Ireland notes then, it is important to remember who the shareholders are: “share ownership...continues to be skewed in the extreme, with the result that shareholder primacy is, in reality, the primacy of a small, privileged elite” (Ireland, 2005:52). He argues then that it is important shareholders be “recognized for what shareholders really are...functionless investors, passive owners of claims to part of the labor of others with a resemblance to old fashioned usurers – and not mistaken for dynamic, risk taking, deserving, corporate ‘owners’” (Ireland, 1999:55). The danger in the simultaneous conception of a company as an autonomous entity or a mere aggregate of capital and the company as a personified entity made up of human associates is that it is obscuring the material identity of the people being detached and reattached. Ireland states:

It is precisely because of the growing power of finance and the capital-owning shareholder class that the shareholder primacy norm is likely to continue to strengthen in the future. As this happens, it will, no doubt, continue to be claimed by the neo-liberal clerisy that this benefits ‘us all’...But the strengthening of the shareholder primacy norm is not producing, nor is it intended to produce, a happy and harmonious state in which everyone is better off. It is, rather, contributing to ever greater levels of inequality, both internationally and nationally – particularly in places like Britain and the US where neo-liberalism and the Anglo-American model of corporate governance have been so enthusiastically embraced. Against this backdrop, it is important that scholars of corporate governance do not permit deeply political processes to be passed off as the products of politically neutral, purely economic logic...Nor should they succumb to the complacent assumption that what exists works. They should, at the very least, ask ‘works for whom?’ (Ireland, 2005:81).

By continuing to feign that the corporation is an association of persons and the law continuing to inconsistently attach and detach shareholders (or other stakeholders) as company members, Ireland notes, that the answer to “how have we lawyers handled the notion that a company is a separate ‘person’?...is ‘very confusingly’” (Ireland, 1999:48).

### A Moral Conscience

The establishment of the corporation as a real legal person, divorced from human beings, is also creating incoherence in the normative notion that all legal persons have a moral or qualitative dimension, or a symbolic identity that they are entitled politically to express. As noted above, the corporation as a real legal person is very often an aggregate of capital or a collection of things / assets. The real legal personality of the corporation cannot then be seen to be either moral or biological. However, as with the material dimension, the law is also uncomfortable with unsettling the moral imperatives of the legal person prohibition

and often misrecognizes the legal personality of the corporation as expressing a moral imperative; re-affixing a moral dimension to what is in fact a technical artificial construct. Carl Mayer, for instance, notes in the US context that through a number of US Supreme Court cases dating from the 1960's onwards, US corporations have successfully invoked the US *Bill of Rights* as a defense against government attempts to regulate, shifting "the constitutional battle from the fourteenth amendment to the first, fourth, and fifth amendments" (Mayer, 1989:606). The courts, he argues, have been increasing the rights given to corporations in the US as persons as a matter of recognizing their 'personal liberty' without questioning what this really means in the corporate context. The same could be said of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* ("ECHR") jurisprudence that consistently recognizes that corporations, like all legal persons, have human rights that can be protected under the ECHR, again seemingly taking the corporation's moral status as a person for granted under the extension of the ECHR's applicability to "non-governmental organizations" via Article 34.

Mayer asserts that the US Supreme Court's invocation of the *Bill of Rights* to protect corporations against government legislation was only possible because the US Supreme Court had simply stopped considering the nature of corporate personhood. He writes: "Without some theory of corporate personhood, it is unclear how corporations can claim the succor of Bill of Rights amendments written only for 'persons'...the Court's modern, pragmatic, anti-theoretical approach is the prosaic legitimation of the corporation's constitutional status" (Mayer, 1989:621). However, more recently the US Supreme Court has revisited the issue of corporate legal personality in *Citizens United v. Federal Election Commission* (2010) (558 US 310; 130 S. Ct. 876). The *Citizens United* decision is perhaps the best recent illustration of the law's inability to accept corporate legal personality as functionally devoid of a moral element, determining that corporations, as real legal persons, had a right to free political speech and as such could not be limited from making independent expenditures to political campaigns through Federal campaign contribution laws.

One of the striking elements of the *Citizens United* decision is the insistence of the court that the corporation is an association of 'citizens' as opposed to an aggregation of capital (often foreign capital) and as such, the majority suggested, the ban on corporate speech (interpreting speech as the expenditure of capital) is no different than banning either a

wealthy individual or a labor or other membership based association's speech. Atiba Ellis in "*Citizens United and Tiered Personhood*" (2011) remarks, however, that there is a fundamental difference between the nature of unions and other non-corporate associations of people and the for-profit business corporation. He sets out: "...unions are distinguishable from corporations...because unions are organized by their members for the purpose of benefiting their membership" (Ellis, 2011:720). By contrast, he suggests, "the predominant view of the purpose of corporations is to generate profit for their shareholders...Thus, the political interests of individual union members may directly affect the interests of the union, and the union may be held accountable to such interests by its members, whereas a corporation's directors or employees may undertake action that is disinterested in the political interests of its shareholders, or even in opposition to the political interests of its shareholders so long as it can be justified on the grounds of maximizing profit" (Ellis, 2011:721).

In *Citizens United* then, Ellis argues, the Court for the first time explicitly rejected this distinction, basing the judgment "not merely on the conventional view of corporate personhood; it sought justification for its decision with the idea that a corporation is an 'association of persons'. At least part of the core justification for the decision is the view that an association of persons, whether a corporation or labor union or some other 'association', ought to be imbued with the same rights as the rights the persons themselves possess. In other words, these 'associations' should be wholly equated to natural persons in regards to constitutional rights" (Ellis, 2011:721). But Ellis maintains, the corporation is not an association of persons, stating: "*Citizens United* continues to blur the distinction between artificial and natural persons. This blurring suggests that we ought not only look at *Citizens United* as merely a case that resolves a conflict about the First Amendment, or that pushes the boundaries of corporate personhood; we should recognize that *Citizens United* forces us to look at our assumptions about how legal personhood—for both natural and artificial persons—is constructed in the law. This shift raises the question of what the ramifications of our legal norms are if we accept this assumption" (Ellis, 2011: 721-722).

*Citizens United* then not only accepted that the corporation was a real legal person but that this real legal person has a symbolic dimension; a political point of view. Ellis argues this is a categorical change as despite limited recognition in the previous jurisprudence suggesting the corporation was entitled to some due process rights, the line of declaring the corporation as a political person had never been wholly crossed. Ellis argues then that

*Citizens United* is distinguishable from previous decisions as: "...we see the political personhood process at work. The majority decided to first find a constitutional issue relating to free speech (when it had the option to decide the case on far narrower grounds). Second, the Court categorized corporations as persons by making a decision as to whether corporations fit into the notion of a political person, and then once a corporation was deemed to be sufficiently like a political person, the Court decided to imbue it with rights" (Ellis, 2011:743-744). Thus, Ellis states: "...the conception of personhood in *Citizens United*...adopt[ed] a position relating to political personhood—the kind of personhood...previously suggested was ordinarily applicable to human beings solely" (Ellis, 2011:) and this, he argues, triggers a number of substantive democratic concerns not previously contemplated. He argues:

Granting this privilege of absolute First Amendment freedom of speech creates a right that the holders of the right—the corporations themselves—may use to inculcate and replicate their privilege...the Court's ruling has the effect of providing a means for corporations—who are organized by, controlled by, and provide profits to a privileged group of mostly straight, white men—to ensure their dominance over society through insuring their privilege through the political process...the potential now exists for corporations to distort the political process for their own ends and dominate politics through unlimited spending. By allowing corporations an unfettered voice in the political marketplace, they have the potential through their amassed capital to dominate ordinary citizens. By their sheer power, and their ability to replicate and enforce that power, corporations can, arguably, operate on a different tier of political personhood than ordinary citizens and political parties.

...

It can be argued that the potential exists to shift control of the American democratic process absolutely from individuals to corporations. The political, economic, and social concerns of individuals may then be ignored because corporate concerns will rate as more important. The more important political person after *Citizens United* – indeed, the now-privileged class – is apparently the corporation and the people who control it (Ellis, 2011:744-747).

Although *Citizens United* is a US legal decision specific to the US constitutional context, it is a worrying development because, as Hansmann and Kraakman point out, due to the transnational character of business, company law tends to be a migratory discourse. Indeed there are already some signs of the migration of the underlying logic of the *Citizens United* decision linking corporations to trade unions and charities in recently passed UK legislation the *Transparency of Lobbying, Non-party Campaigning and Trade Union Administration Act* (2014) that limits the election spending and campaigning activities of not only external corporate consultant lobbyists but also trade unions and charities,

implying that they are of equivalent political or moral status. Ilana Gershon in “*Neoliberal Agency*” (2011) notes in this respect (quoting from John and Jean Comaroff) that laws are “...neoliberalism’s preferred technology of regulation...because laws are widely recognized as technologies that...offer a universal means through which anyone can negotiate with anyone else...‘In so doing, it forges the impression of consonance among contrast, of the existence of universal standards that, like money, facilitate the negotiation of incommensurables across otherwise intransitive boundaries’” (Gershon, 2011:541). Thus she suggests: “...law is particularly useful because of its capacity to define entities as equal, or at least commensurate, despite wide disparities in size and internal organization. In other words, law has the potential to operate by misrecognizing levels of scale, a potential that neoliberalism finds especially useful (Gershon, 2011:541). When misrecognition of scale are necessary to justify ideological or normative propositions, the law is called in.

Supiot in seeking to restore the law’s humanist vision forgets the potential of law to be manipulated in the service of less noble interests. Gershon states that the technology of law, indeed corporate legal personality, has been essential to the neoliberal project:

Another transformation has been to how one has agency—any one or group that is agentive should be agentive as a corporative entity. At the same time, these actors have alliances with others, alliances that ideally should be distributing risk and responsibility so that no corporate entity bears another’s risks. These actors cannot be relied on to police themselves and their own alliances effectively, and as a result, laws become the central medium for regulating practices. In short, a neoliberal perspective of agency depends on transforming liberalism’s possessive individualism into corporate individualism, viewing all agents as commensurate corporate entities so that social organization or differences in scale can be ignored (Gershon, 2011).

Thus, we are left with a situation where the legal personality of the corporation, that is in reality an aggregate of capital, is simultaneously in law constructed as a technical form, an association of material human beings, and a moral being on its own. This has to be recognized as what Valeria Ugazio has labeled the “disaster area” (Ugazio, 2013:53 &138) of middle positions. In Ugazio’s model, meaning in a society is organized by dominant polar oppositions and narratives are generated when a position is taken within the multiplicity of possible positions the dominant polarities open. Legal personality then, it could be said, was intended to establish a coherent value position that sought a balanced position between moralist and materialist extremes and from which new meaningful narratives could be generated. Indeed, middle positions, Ugazio offers, can be productive

positions so long as they are reflexively acknowledged as positioned rather than falsely claiming to be neutral. However, the concept of legal personality in legal theory has become so paralyzed by an inability to decide between abstraction and empiricism; individualism or collectivism; or how to be both material and moral at every level of organization, that it can be argued that it is no longer reliable as a regulatory construct capable of crafting a normative co-position between competing representations of the social world as it no longer claims any position. The solution to this crisis in the legal order cannot be to restore the legal order as Supiot advocates, when the implosion of the legal order is at least partially responsible for the current fix. What would we be restoring? Ugazio notes that a subject-position that is overly balanced or centralized between two polar extremes is effectively a withdrawal from conversation, it represents the basic impossibility of a total centre when the construction of meaning is involved. In this respect the juristic discourse on corporate legal personality is indication that the construct of legal personality secured by an overarching state and the practice of law does not provide a solid foundation for a normative organization of the person as it is premised not on a position but a pathological refusal to seek one. Indeed it is through this framework that people and groups of people acting collectively together can be re-defined as commensurate with the actions of capital units. The inability of the law to work out an acceptable position, or to “gather crucial information to resolve the doubt” (Ugazio, 2013:139) on who (or what) should and who (or what) should not be a legal person or even how this criteria should be assigned has led instead to the emergence of a dominant ideal of the person that is the epitome of this explosive condition: the corporation.

## SECTION 3

### The Corporate Person

#### **8. The Corporate Person: Ordered Disorder**

The previous section explored the legal organization of the person and the difficulties the notion of equating individuals with groups of individuals and aggregates of capital has created when it comes to legally defining the status of the corporation. It was suggested that the legal organization of the person has imploded, effectively withdrawing from the conversation on corporate legal personality. Herein it will be suggested that the failure of the state and legal system to restrain the development of the for-profit corporation has led to the emergence of the corporation as a normative ideal of the person. First, Claus Offe's account of the failure to distinguish between associations will be examined. Secondly, it will be suggested that new paradigms of neo-liberal governance are modeled on the corporation, with the structure of the corporation and the value of wealth maximization as the constitutive constructs. The state, through the adoption of discursive frameworks like public value, acts as the regulator of this new normative organization and all other associations and individuals are deemed to facilitate the arrangement through their passive construction as corporations, or collections of assets, themselves. But, like all organizations of meaning and normativity, the organization of the corporate person is also a polar configuration that externalizes certain democratic narratives as forbidden while permitting others. The question for political discourse confronting the corporate organization of the person is are the democratic narratives forbidden ones we can afford to displace?

##### **8.1 Claus Offe: The Forms of Interest(s)**

Claus Offe in “*Disorganized Capitalism*” (1985) is concerned with exposing the empirical relations of exploitation in what he refers to as the ‘matrix of social power’, or the points of intersection between civil society and political authority in which, he argues, the “dominant modes of interaction consistently favor one category of actors and result in the systematic exploitation of others” (Offe, 1985:1-2). Like MacIntyre and Supiot, Offe is also concerned that there is a deeply rooted crisis of value taking place under modern liberal forms of governance and, like MacIntyre and Supiot, he asks a similar set of questions to try and understand why this is the case; namely: “How are relations of social

power translated into political authority, and how, conversely, does political authority process and transform these power relations within civil society” (Offe, 1985:1). Perhaps because Offe approaches the question through political sociology and not moral philosophy or legal theory, he is less concerned than MacIntyre or Supiot to advance a particular normative resolution. Instead, what he is keen to provide is a detailed explication of an observable empirical phenomenon, which, he argues, ensures that a normative resolution is not at present possible because of the way the mediating structures of interest formation and expression are orientated to systematically prevent politically normative claims. What emerges from Offe’s text then is an empirical analysis of differences between forms of association, which starts to bridge a gap between Supiot and MacIntyre on the specific subject of the practices of evaluation and the significance of practices of association in respect of the relationship between civil society and the state.

First, Offe defines the state as “a highly complex agency that performs a variety of different, historically and systematically interrelated functions which can neither be reduced to a mere reflection of the matrix of social power nor considered as part of an unlimited multitude of potential state functions” (Offe, 1985:4). Drawing on modern political philosophy, Offe traces the accumulation of functions and standards of legitimacy attributed to the state from the 18<sup>th</sup> century onwards. First, Offe argues, the state was presumed to have the function of “the securing of peace” (Offe, 1985:4), which he argues was a function attributed to the state in the early stages of modernity by political philosophers such as Machiavelli and Hobbes. Secondly, the state then acquired the function of “the institution of ‘passive’ citizenship” (Offe, 1985:4), which he argues corresponds to the notion of negative freedom that emerged with liberal philosophy and liberal theories of the state. Third, the state became identified as responsible for ensuring the “equality of rights” (Offe, 1985:4), or a more active notion of citizenship, which he argues came to be posited in the writings of Tocqueville and Mill. And lastly, Offe argues, the state was supposed to “manage and distribute societal resources in ways that contribute to the achievement and securing of prevailing notions of justice” (Offe, 1985:5), which, he surmises, developed alongside the welfare state and is primarily based on the philosophy of Keynes.

Offe notes that the list of acquired state functions he sets out is not comprehensive but what it is meant to show is that there are definable limits on state functions (the state is not responsible for an unlimited amount of social claims) and yet, there are still a wide variety

of incommensurable claims within these boundaries, which can lead to the manifestation of potential inconsistencies. As a result of this latter observation, Offe argues, the state will be highly dependent on “mediating links and channels of communication” (Offe, 1985:5) or the “procedures, patterns of organization, and institutional mechanisms that supposedly mediate and maintain a dynamic balance between social power and political authority” (Offe, 1985:6) to govern legitimately. These mechanisms must “seek to coherently organize the socio-political systems of contemporary welfare state capitalism” (Offe, 1985:6) if the state is to be perceived as a legitimate authority. Offe’s argument, then, is that it is these organizing mechanisms, which are currently in systematic disarray and are putting the legitimacy of the idea of the state as a democratic and representative association in question.

To construct a model of the relationship between civil society and political authority, Offe identifies that there are two critical institutions that dominate the imaginary of each domain in modern capitalist social structures: the labor market in the domain of civil society and the liberal state in the domain of political authority. Thus, he suggests, that the modes by which these two institutions (the labor market and the state) interact with each other will define the dominant modes of interaction of a particular society and will constitute what he refers to as the ‘matrix of social power’. He argues: “Only if the means of political intermediation and the channels of communication between civil society and political authority are ‘neutral’ (in the sense that they permit the effective and non-discriminatory transmission and processing of diverse interests, rather than selectively privileging some interests at the expense of others), can these procedural forms themselves be considered as legitimate or worthy of acceptance. Wherever the adequacy and fairness of these procedures is questioned, the conflict over interests will be supplemented with a meta-conflict concerning the appropriate institutional forms for processing and resolving conflicts of interest. As a consequence, substantive conflicts are transposed...into constitutional conflicts” (Offe, 1985:6-7). So, Offe suggests that there is indeed a problem with the organization of these political intermediating mechanisms today, as they do not empirically operate in a neutral fashion. At the same time, however, he observes that this conflict of interest or constitutional crisis is not really registering in the way one would expect given the inconsistency. To understand why, he suggests, some consideration of the forms available for interest organization and representation is necessary.

### **8.1.1. Personality and the Labor Market**

Where MacIntyre focuses on the constitutional role of associational practice and Supiot the regulatory power of the legal person, Offe starts from the institution of the labor market in civil society. Under modern capitalist state formations, Offe argues, the labor market is the form (based on legal personality) and substance (subsumes all associational practices) of both. He asserts: "...the institution of the labor market, which treats labor power as if it were a commodity, constitutes the most significant feature of capitalist social structures. It is a power generating mode of interaction that leads to a relatively stable and consistent matrix of social power, which at the same time also serves as starting point for the explanation of power dispersion" (Offe, 1985:2). Although Offe recognizes that the labor market, which he suggests "rests on the basic institution of the 'free' labor contract" (Offe, 1985:13), is in essence the paradigmatic economically exploitative form of interaction between labor and capital, he submits, however, that a collective class conflict between labor and capital is unlikely to materialize from the mere fact of this inequality. He explains:

The conflict component of this scenario does not follow deductively from the recognition of the fact of exploitative forms of interaction...They might also engage in displaced or limited forms of conflict that produce a secondary dispersion of power: workers can either be compensated...or they can engage in conflicts among themselves...Given the possibility (and reality) of such secondary processes of the dispersion of social power, the theoretical anticipation of comprehensive class conflict can be challenged. As a model of the structure and dynamic of relations within civil society it is of doubtful validity. Indeed, there are good reasons why it may be rational for individual actors in a class society not to act in reference to classes or in accordance with their class interests (Offe, 1985:2-3).

Thus, to understand why certain conflicts do not always materialize in modern polities where the labor market is the key institution of civil society, it requires more than simply acknowledging the fact of economic exploitation. Instead, he argues, it requires a deeper understanding of the way the conflict between labor and capital in the labor market is *managed* through politically intermediating forms.

One of the primary modes of interaction or political intermediation, that Offe notes both makes the conflict possible and simultaneously makes it less likely to occur, is the legal form. First, Offe argues, the law is at the heart of the conflict because without a particular conception of the legal contract the labor market would simply cease to exist as such. The labor market itself, argues Offe, is then first and foremost an institution based on a specific legal form. Further, the institution of the free labor contract, in turn, he argues, requires a

particular legal conception of the individual or, in other words, the *homo juridicus* of Supiot's exegesis. Offe asserts: "In this manner, a type of abstract standard employee is supposed to be created, whose social position is no longer determined through inherited or ascribed group status, but solely through a collective class position and anonymous market processes, on the one hand, and through the strictly individual characteristics of achievement and market success resulting from these premises and limitations, on the other" (Offe, 1985:13). Offe, however, is critical of the idea that the institution of the legal person or an abstract civil status is enough to clear the slate of past prejudice from impacting the distribution of risks in labor market. This, he argues, is not borne out on the facts. Three facts in particular, says Offe, demonstrate that empirically the institution of the legal person and the corresponding institution of the employment contract have not lived up to their promise of equal non-discriminatory treatment. He states:

First, there is a characteristic lumpiness in the social distribution of labor market risks...we find a high degree of overlap between the social groups differentiated according to separate labor risks. Second, these features may be closely connected not only with each other, but also with social characteristics that are not 'acquired' (such as education, income, place of residence), but are socially 'ascribed' and connected with certain fixed and internationally unchangeable qualities (age, sex, physical condition, ethnicity)...The third fact significant...is that since the 1960s...a group specific disaggregation of policies regarding the labor market can be observed. Labor market policies and their legal foundations are no longer directed only at the global goals of employment, qualifications and mobility. Additionally, and increasingly, they seek to positively influence the market situation of specific, often very finely differentiated occupational, sectoral, age, gender and regional segments of the entire work-force (Offe, 1985:12-13).

On this basis alone, given the problem of unequal and group-specific distribution of labor market risks, Offe asserts: "this model of an abstract and largely homogenous group of 'employees' (a 'working class'), in which quasi-feudal and other inner principles of group organization are meant to play at best a subordinate or diminishing role, is in need of at least a certain amount of revision" (Offe, 1985:13).

However, even putting aside the imperfections of the fiction of civil status as an erasure of longstanding prejudices against particular groups of people, Offe argues further that the very institution of the labor market itself also introduces another wholly contingent division between people based on their position in the market as either buyers or sellers of labor. So, where Supiot's analysis of the legal person focuses on the contingent form of the absolute state to the legal person and the guarantee of an inviolable civic status, Offe focuses on the other side of the equation, specifically the absolute state's guarantee of the

inviolability of legal property and the contingent form of labor as commodity. Offe notes that from this vantage point, legal personality does not create equal participation between the buyers and sellers of labor as the competitive strategies available to the owners of capital or the demand side of the labor equation far outweigh the competitive strategies available to the property-less or supply side of the labor equation. Because the construct of the legal persons of labor are in fact *actual persons*, Offe argues, this places limits on their ability to compete in an open market insofar as they are unable to control the “quantity, quality, and timing of supply” (Offe, 1985:20). The “relative strategic rigidity of the supply side of the labor market” (Offe, 1985:20), Offe argues, distinguishes the labor market from other commodity markets as it “...is paid for above all through relative losses of income. Because the individual seller or labor power – or workers organized as a whole – cannot, for structural reasons...employ market strategies, they must compensate for these strategic handicaps through a drop in the rate of pay demanded for labor. Exploitation results from the asymmetrical strategic capacity of supply and demand...” (Offe, 1985:20).

Offe’s concern is essentially that one particular group in society (the owners of capital) will, in effect, be able to over-determine the ‘good’ or the ‘interests’ of labor as they are in the best position to not only determine the composition of the labor force (who gets employed) but also to exercise competitive strategies to control how they (employed or not) perceive their own interests, which over time becomes limited to the accumulation of individual income. While Offe acknowledges that to some extent the differential competitive position of the supply side of labor could be (and sometimes is) rectified by the state through regulation, the problem is that it is often not in the interest of the state to do so due to other incompatible demands. To even make the notion that the state would be more consistently responsive a thinkable proposition, would at least require the effective representation of collective labor interests, which, Offe argues cannot really take place given the limitations placed on labor associations by their position in both the legal order and the order of capital at present. The idea, then, that there is ‘organized capitalism’ or that “the competitive market interaction between individual economic actors is...in the process of being superseded by formally organized collectivities of economic action (corporate firms, cartels) and interest representation (trade unions, business associations)” (Offe, 1985:6), Offe argues, is a myth and a myth with a very specific origin in the treatment of all associations as equivalent through legal practice. In his view, the model of associations as political intermediaries between labor and capital in the realm of social

power and the translation of these then conceptually ‘equal’ interests into political authority is creating a dangerous misperception that there is in fact equal interest representation in civil society *and* the political sphere when empirically, he argues, there is not.

### **8.1.2 Interest Formation in ‘Equal’ Associations**

So, Offe questions the ideal of ‘organized capitalism’ under current conditions for its tendency to create the perception of a ‘false identity’ between interest groups. Offe argues that this is not the case and takes as example the assertion of equivalence between business and labor associations, which, he argues, must be redirected to the relationship between capital and labor. Offe notes that under a capitalist economic system, this forced equivalence will always ensure that capital interests are the primary organizers of political authority whereas the interests of labor, as represented by trade unions, will always be secondary insofar as their organization depends on the structure of capital that they are responding to. Offe expands that in order for capital to function it requires the acquisition of what he refers to as two forms of labor: dead labor and living labor. Dead labor is the capital goods (such as machinery etc.) representing labor power that has been applied in the past and “congealed into capital goods” (Offe, 1985:176). Living labor, by contrast, is the labor that cannot be physically separated from the person and cannot be bought as “a certain quantity of activity” (Offe, 1985:176). These are discrete categories of labor and combining them is, he argues, a very different empirical proposition. Offe analogizes that combining dead labor is like pouring two glasses of water into the same pot whereas combining living labor is like combining two rocks in the same pot. The latter can be combined – but only in association with each other as opposed to seamless integration or immersion. Human beings, unlike capital, remain discrete and indissoluble even in their associational form. Thus, he argues, there is an empirical difference in the qualities of interests developed within and between the two forms of association. In Offe’s observation: one interest (the capital interest) can be easily integrated and unified as a quantity of ‘dead labor’ whereas the other interest, the atomized and divided interest of living labor, cannot be so easily combined. The association of labor will always require the association of broad and competing life interests, which will require deliberation and compromise on the part of members, in order to compete for recognition with the relatively mergeable properties and interests of profit.

Unions organizing labor interest(s) then, says Offe, face a much more difficult associative task than the organizers of capital. While capital provides its own readily calculable interest (cost and return), labor interests' material attachment to human beings means that the interests, plural, of labor cannot be detached from all of the human interests that inform the narrative of a human life, such as health, job satisfaction, leisure time, security, welfare of family, etcetera. Further, this difference or limit will then structure the efficiency of combination on both sides of the capital-labor divide. For capital, the mode of combination of dead and living labor can be improved to ensure the efficiency of capital reproduction, for instance by substituting technology (dead labor) for people (living labor.) Whereas, notes Offe, workers cannot really increase the efficiency of the process of reproduction and will be dependent almost entirely on the willingness of capital to employ them as labor. Their alternative is, of course, to attempt an exit from the labor market (for instance by joining a commune) but this is not much in the way of a genuine choice. As such, workers too will have an interest in the viability of capital as they are in effect imprisoned in the labor market. Offe argues then that "...differences in the position of a group in the class structure...not only lead to differences in power that the organizations can acquire, but also lead to differences in the associational practices, or logics of collective action, by which organizations of capital and labor try to improve their respective positions vis-à-vis each other. These differences tend to be obscured by the 'interest group' paradigm and the underlying notion of a unitary and utilitarian logic of collective action that covers all associations" (Offe, 1985:180).

But, Offe notes, by and through association with each other, living labor can change the practices of capital, although he is careful to caution that the change a labor association produces in the equation cannot be put down to the mere fact of collectivity without more. Even in a collective conflict between capital and labor – capital will hold the more powerful position if the conflict is determined by a mere aggregation of individual interests. It is more powerful to have a single interest as opposed to many competing interests to contend with. Thus the change in power by collective association cannot be obtained by simply increasing the bargaining pool. Instead the associations of labor must aim to overcome "the comparatively higher costs of collective action by changing the standards according to which these costs are subjectively estimated within their own collectivity" (Offe, 1985:183). To be in this position, Offe notes, union membership must be perceived by the members as a "value in itself" (Offe, 1985:183) as a source of "collective identity" (Offe, 1985:186). Thus, he argues: "The logic of collective action of

the relatively powerless differs from that of the relatively powerful in that the former implies a paradox that is absent from the latter - the paradox that interests can only be met to the extent that they are partly redefined" (Offe, 1985:183-184). So, says Offe, unions must "simultaneously express and define the interests of the members" (Offe, 1985:184). This is a different mode of organization from capitalist associations where the formulation of interests is usually not within the mandate of the organization because there is only one underlying interest to contend with. The capitalist association then is "confined to the function of aggregating and specifying those interests of members, which from the point of view of the organization, have to be defined as given and fixed" (Offe, 1985:184).

Further Offe notes that to achieve the aims of association in the labor market, the association (capital or labor) must be in a position to mobilize sanctions and these sanctions must be beyond what an individual would be able to accomplish without belonging to the association. Offe argues again that this creates a specific difficulty for trade unions as it relies on the union being able to "mobilize a common willingness to act that flows from a notion of shared collective identities and mutual obligations of solidarity" (Offe, 1985:187). Unions are always in the precarious position, Offe observes, of trying to balance the mobilization of resources and the mobilization of activity. To mobilize resources they need membership dues and this will require increases to membership. However, increases to membership tend to dilute collective identity, weaken internal democracy (move to more bureaucratic modes of management), and therefore actually threaten the ability of the union to exercise the power accumulated by generating apathy amongst the membership. Offe argues that virtually none of these conditions will apply to associations of capital as they do not depend on internal democracy to the same extent or require collective identity to generate a willingness to engage in a solidarity action. This is so, he says, because "they are already in a structural power position which renders complications like these avoidable" (Offe, 1985:188). Thus, if capital based associations want to sanction the government or a labor association, they can simply withdraw their support for a government or refuse to recognize a trade union as a legitimate bargaining agent.

Another important distinction between business and labor associations is that business associations will tend to receive the cooperation of the state as the state, in turn, depends on them to maintain the perception of state legitimacy. The state, Offe argues, in welfare

capitalist society “depends on the flourishing of the accumulation process” (Offe, 1985:191). He notes:

Even before it begins to put explicit political pressure and demands upon the government, capital enjoys a position of indirect control over public affairs: Businessmen thus become a kind of public official and exercise what, on a broad view of their role, are public functions...Although governments can forbid certain kinds of activity, they cannot command business to perform. They must induce rather than command...businessmen cannot be left knocking at the doors of the political system; they must be invited in (Offe, 1985:191).

As such, Offe argues, business associations enjoy a structurally superior relationship to the state when compared to labor associations. On this basis alone, the idea that labor associations can equally influence political regulation to strengthen their status (competitive position) in the labor market and alleviate their associational burdens is far-fetched. Further, Offe submits, because of the unique relationship between capital and the state, this public power differential will not be clearly in the public view. He states: “The entire relationship between capital and the state is built not upon what capital can do *politically* through its associations, as the critical theory of elitism maintains, but upon what capital can *refuse* to do in terms of investments, decided upon by the individual firm. This asymmetrical relationship of control makes comparatively inconspicuous forms of communication and interaction between business associations and the state apparatus sufficient to accomplish the political objectives of capital” (Offe, 1985:192). Thus, he argues, the relationship between business associations and the state is irregular in terms of the way power is exercised between them and, inimically, at the same time less visible than the relationship between the state and labor associations because the latter must exercise whatever power they have managed to accumulate (given the inherent limits on their associational form) over the state politically. He continues:

Compared to the communications between unions and the state, the communications of business associations with the state differ in that they are less visible publicly (because there is less need to mobilize the support of external allies), more technical (because the insight into the political ‘desirability’, that is, factual indispensability, can be presupposed as already agreed upon), more universal (because business associations can speak in the name of all those interests that require for their fulfillment a healthy and continuous rate of accumulation which, from the point of view of capital and the state, is true of virtually everybody), and negative (because, given the fact that the government has to consider as desirable what is in fact desirable for capital, the only thing that remains to be done is to warn governments against imprudent, ‘unrealistic’, and otherwise inopportune decisions and measures).

The dependency of the state apparatus upon the performance of capital (which includes the indirect dependence upon capital of all those interests which, in their turn, depend upon the state and the goods and services delivered by it) is unparalleled by any reciprocal dependency relationship of the capitalist class upon the state. This structural asymmetry is exploited and fine-tuned by the operation of business associations, but it is by no means constituted or created by them. Their success is not accomplished by or because of the organization itself; rather, it derives from a power relationship that is logically and historically prior to the fact of any collective action of businessmen (Offe, 1985:192).

If the dogmatic function of law (according to Supiot) is then to institute the dogma of legal personality, Offe counters that this dogma contains an implicit assumption of a practical positivism or “the belief that an individual’s interest is simply what he says it is” (Offe, 1985:194). Insofar as this dogma remains the pinnacle of our political and legal systems and the corresponding equivocation of all forms of association, labor or capital based, as ostensibly equal to each other and both equally subordinate to the state, Offe argues it must be rejected. He notes, however, that it has become extremely difficult to make this argument in modern liberal democracies as it is alleged to be ‘totalitarian’ or at least anti-democratic to even “consider any imputation of counter-factual interests” (Offe, 1985:194) or attribute “different degrees of validity to interest articulations” (Offe, 1985:194). He argues however, that this should not be the case if there is deception or a lack of opportunity to express real interests because of the presence of institutional arrangements. It is, however, this latter proposition, Offe argues, that liberal philosophy cannot withstand as the very institutional arrangements at issue are those arrangements such as civic status, civil liberties, and a competitive political process that liberal philosophy suggests “guarantee that no expression of interest deviates from actually perceived interests (due to the impact of force etc.) and that no major interest remains unexpressed in the open and competitive political process” (Offe, 1985:195). Yet, Offe argues, it is these very institutional mechanisms, which actually make the lack of opportunity to express real interests (and perhaps, more fundamentally, a material constitutional conflict) more likely as the idea of civil society on which they depend is “simply not constituted according to any principle that could be expected to bring empirical and true interests into close proximity...there is no mechanism which could conceivably neutralize distortions that lead to an incongruity between the two” (Offe, 1985:196).

### **8.1.3 Two Logics of Collective Action**

Offe notes then that there is an institutional crisis interior to the ‘liberal equation’ of interest articulations insofar as the empirical consequence is a misrecognition of inequalities in the modes of interaction between different interest-based associations and the state. This notion, Offe argues, is tied up with the idea that there are two spheres in society: the sphere of “institutionalized democratic politics” (Offe, 1985:196) where interests are registered and the sphere of civil society where interests are formed. Offe argues that these spheres are in fact interconnected by the ‘sameness’ of the individuals who play roles in both spheres. This, in turn, relates back to the institution of the labor market. He summarizes: “The ambiguity in interest derives from the concept of market participants of themselves as each having a particular unit of labor power, as well as skills, experience, and so forth (i.e. a concept of what they have to sell) and a concept of themselves as *being* wage-labor... (i.e. a concept of themselves in terms of the fact that they have to sell)” (Offe, 1985:200). Liberal equation then, or the equivocation of all individuals and associations through the device of legal status, “inspires and legitimates political forms which in turn favor those interests that for structural reasons are likely to be already ‘enlightened’ or accurately perceived. At the same time it opposes – usually in the name of ‘individual freedom’ those political forms able to increase the accuracy of interest articulation on the part of a subordinate class” (Offe, 1985:201-202). He continues: “interests which are ‘identical with themselves’ can be fed into the political process in an individualistic form without distortion by form of articulation. Those interests which require a collective discourse for their articulation and an ongoing dialogical pattern of communication are less likely to be articulated with equal accuracy within the framework of these political forms” (Offe, 1985:202).

As such, Offe argues, class conflict goes on at two levels: “class conflict *within* political forms and class conflict *about* political forms” (Offe, 1985:202). Class conflicts of the first type, he submits, are the standard conflicts between “interests that are able to crystallize within given organizational and procedural ‘rules of the game’” (Offe, 1985:202). He suggests that these types of conflict are the standard arguments over distribution and they bear resemblance to the claims that both MacIntyre and Supiot illustrate in respect of incommensurable claims to justice. They take the form of: “How much does each group get of what it has already defined as desirable to get” (Offe, 1985:203), and, as such, “the question of what is valuable, and hence desirable to get, is presupposed as a question that has been answered through the existing political forms and the preferences that are revealed within them” (Offe, 1985:203). Offe, however, argues

that there is a second latent level of class conflict that will not register in this domain even as it implicitly complicates it (renders it incoherent) and these are conflicts of the second type or conflicts about political forms. Offe argues that these conflicts are “hidden by a pretence of ‘neutrality’ concerning those very political forms that are to be attacked or defended on this level of conflict” (Offe, 1985:202). They concern questions like: “In which way do we most reliably find out what it is that we want to get?” (Offe, 1985:203) and “What notion of collective identity embraces the totality of those who want to get it?” (Offe, 1985:203). As such, he argues, they invoke a conflict over a dialogical interest: “collective action is concerned with a redefinition of what we mean by ‘costs’ and ‘benefits’” (Offe, 1985:204) and the purpose of the second logic of collective action is “not to ‘get something’, but to put ourselves in a position from which we can see better see what it really is that we want to get, and where it becomes possible to rid ourselves of illusory and distorted notions of our own interest” (Offe, 1985:204).

It is this second level of conflict or mode of collective action that Offe argues is denied by liberal political theory with the institutionalization of legal status. Liberal theory, argues Offe, cannot concede that people can be mistaken about their interests as it “assumes that everyone knows at every point in time with incontrovertible certainty what his/her interest is” (Offe, 1985:204). As such, Offe argues this precludes a “shift from the first to the second level of political conflict, from one logic of collective action to the other” (Offe, 1985:204). If everyone always recognizes their own interest with incontrovertible certainty then there is no need to “challenge those established political forms which are nothing but forms for registering whatever preferences are revealed” (Offe, 1985:204). So, the genius of liberal theory, for Offe, is that it more or less completely denies that the second level of political conflict exists even though when we look to the material reality of particular forms of associations (as Offe does with trade unions and business associations) there are clear empirical differences in the obstacles faced by these ostensibly equal interest-mobilizing vehicles. Offe concludes then that current political forms, as such, are having a ‘disorganizing’ effect on class consciousness as they are not, in effect, allowing class interests to be organized effectively.

Offe ultimately attributes this to the problem of the construction of all forms of association (other than the state) as ‘voluntary’ and ‘equal’ forms of collective action and the presumption that the institutional form of any association is ‘neutral’ via the interests that are represented. He suggests that the combination of labor market factors and state

dispositions towards capital means that the forms of association are not neutral but rather, as currently organized, privilege some interests at the expense of others. The outcome of ignoring or misperceiving this conflict of interest, he argues, is (rather bizarrely) that the state has started to behave like an interest-based association. The executive agencies of the state, he sets out, instead of representing the will of the majority of the electorate have begun to usurp the representative functions identified with a select set of business based associations in civil society. He comments: “The welfare state administration...has become increasingly sensitive to the parameters of ‘feasible’ policy making, as well as to the threats, obstructive tactics and incentives established by the powerful actors within the respective segment of civil society within which its administrative organizations operate” (Offe, 1985:8).

At the same time, in turn, he observes that labor based associations in civil society have started to behave more like governments. Instead of articulating and transmitting the interests or particular political will of their constituents, they have come to act as “organs of (at least) two-way communication” (Offe, 1985:8) taking on a governmental character. He refers to this as: “the problem of fusion of those channels of mediation through which actors within civil society act upon political authority, with those channels of communication through which, inversely, the state acts upon civil society” (Offe, 1985:7) and suppresses the necessary constitutional conflict. He observes that the paradox of this, however, is that the only way to translate and rectify the problem under current arrangements is to call the constitution of society into question. He argues: “At the very least, these conflicts erode the binding and legitimacy-conferring capacity of the institutional forms...that aggregate, shape and communicate the will of socio-political collectivities” (Offe, 1985:6-7). However, he asserts, that because of the fusion of intermediating functions, the institutions of legal personality, and the misperception of interests formed by these not quite the same but not quite different associations, this is the exact questioning or conflict that is least likely to occur.

## **8.2 Corporate Persons and Corporate Groups**

What Claus Offe had observed as an emergent empirical phenomenon in 1985 the public value perspective has more recently put forward as a normative proposition. As noted in the introduction, the public value perspective does not see the governmental or managerial character of civil society as a problem but explicitly advocates the recruitment of civil society into public managerial roles or networks of governance. In accordance with the

theory of public value then, the state should: “think of citizens as shareholders in how their tax is spent” (O’Flynn, 2007:358) and civil society should seek to “balance technical and political concerns to secure public value” (O’Flynn, 2007:358). Janine O’Flynn (2007) suggests that the public value approach to governance in this respect is conceived of as a ‘post-competitive’ paradigm as it suggests an “overarching framework for post-competitive collaborative network forms of governance” (O’Flynn, 2007:358) and “signals a shift away from strong ideological positions of market versus state provision” (O’Flynn, 2007:358). The line between state and capital that Offe points to with the fusion of intermediating functions between civil society and the state and Ellis suggests the *Citizens United* decision in the US compromises is simply not there anymore from a public value perspective. State provision and market provision become one and the same because state, civil society, citizenry, and corporation under the public value perspective become one and the same. In a public value perspective there is no other actor beyond corporate actors in various positions acting to increase their capital.

Gershon, however, cautions that we should be careful of taking the claim that this opens up a ‘post-competitive’ space too seriously. It is not that competition disappears but that competition is so naturalized that it no longer requires explication. She sets out: “The freedom that neoliberalism provides is to be an autonomous agent negotiating for goods and services in a context where every other agent should ideally be also acting like a business partner and competitor” (Gershon, 2011:540). Competition, she suggests, is framed positively by neoliberalism as neoliberalism involves a transformation in the engagement with risk. Gershon states:

According to the neoliberal perspective, to prosper, one must engage with risk. All neoliberal social strategies center on this. Managing risk frames how neoliberal agents are oriented toward the future. And it is implicit in this orientation that neoliberal agents are responsible for their own futures— they supposedly fashion their own futures through their decisions. By the same token, regardless of their disadvantages and the unequal playing field, actors are maximally responsible for their failures... Instead of equating freedom with choice, it might be more apt to say that neoliberalism equates freedom with the ability to act on one’s own calculations. Freedom of this kind is inevitably unstable, especially since, in capitalism, calculating to one’s advantage is all too frequently also calculating to someone else’s disadvantage (Gershon, 2011:540).

Everyone is thus competing; however everyone is competing on what is in reality a very uneven playing field. Further, every social imaginary is conceived of as corporate, but there continue to be differences in the position of different corporate forms, with corporate capital playing the constitutive role, the corporate state taking on a regulative position, and

corporate civil society associations and corporate individuals facilitating the hierarchy by incorporating in their own evaluative practices neoliberal social strategies. Civil society and individuals are imagined by the public value perspective then as taking on a facilitative role in generating and securing capital's goal of 'value maximization' through a second order evaluative practice of asset management or the implementation of self-management techniques achieved through dialogue and consultation. Civil society actors are thus repositioned as 'public managers' that must be concerned with 'what works' and must attempt to 'negotiate up' to make a case for the value of any activity in the public sector.

The concept of public value, Fisher and Grant emphasize, is therefore grounded in a traditional "utilitarian" (Fisher & Grant, 2009:253) conception of value or a cost-benefit calculus. Defining what is publicly useful becomes the role of civil society as public managers ensuring that "...citizens are constantly engaged in buying a story about what is valuable in public enterprises by public managers...the correlation with the private sector is explicit...a policy is to the public sector manager what a prospectus is to a private entrepreneur" (Fisher & Grant, 2009:252). As leaders of particular public enterprises, public managers then "have to have a story, or an account, of what value or purposes that the organization is pursuing" (Fisher & Grant, 2009:252) and as such "a public value approach...emphasizes the importance of mission statements" (Fisher & Grant, 2009:252). Essentially, the public value approach suggests that civil society associations (re-fashioned as enterprise) should use similar techniques to what Offe had set out tended to be strategically deployed by powerless actors to re-define the cost and benefits or value of collective identity. But, following the public value approach, they should now use these techniques instead to inculcate the very utilitarian perception of cost and benefit collective identities tended to re-define. The techniques of collective identity are refashioned as a potential governance technique to undo collective identities and in the process the possibility of collective action.

What will not be a part of a public managers mission statement then is any form of situated collective action that is antagonistic to the goal of value maximization for the citizenry conceived as a whole. The mission of civil society, redefined by public value, will be crafted in a utilitarian vernacular based on consultation with broad constituencies of "citizenry" (O'Flynn, 2007:360) rather than individuals or clients. Civil society leaders in the guise of public managers are not simply to seek out public opinion on what is valuable, but they are to explicitly exploit their positions of trust and loyalty within the community to actively craft the narrative of the public or citizenry in their expressions of collective

preferences. Kelly, Mulgan and Muers for instance writing for the UK Cabinet Office suggest that public value is only meaningful in the context of what the public is willing to give up in exchange. Similarly, Albert and Passmore in research commissioned by the Scottish Government set out: “This is not merely a question of...‘giving the public what they want’, but a process for involving the public...on the basis that citizens have the capacity to engage and understand the dilemmas faced by politicians and public managers...” (Albert & Passmore, 2008:7). Further, they continue: “Sometimes public opinion may be ill-informed...but the role of the public manager is to respond sympathetically to these concerns, offer an account that tries to change the public mind and listens carefully to the views of citizens as the process unfolds” (Albert & Passmore, 2008:14).

Gershon argues that this re-definition of civil society as public manager is fairly typical of neoliberal conceptions of expertise in relation to public agency. She states:

In differentiating between skill sets, the neoliberal perspective creates a new status for the expert—the expert becomes someone with the unique reflexive role of explaining to other autonomous entities how to manage themselves more successfully. Selves may intend to choose and risk well, but the potential for failure always haunts such projects. When failures occur, the responsible self turns to an expert to learn how to choose more effectively...Experts embody an external reflexive corrective that a self can choose to remedy unsuccessful self-management (and thus continuing to be responsible for their own failures). While law may be the neoliberal preferred technology of regulation when relations go awry, experts are the neoliberal preferred technology of regulation when selves go awry (Gershon, 2011:542).

Gershon suggests then that there is a distinction then between liberalism and neoliberalism in this respect. While, she submits, the liberal project had been successful in getting people to see themselves as having property, as individuals but also, and problematically for liberalism, in their collective identities; to facilitate a corporate organization of the person requires a shift from the “liberal vision of people owning themselves as though they were property to a neoliberal vision of people owning themselves as though they were a business. From a liberal perspective, people own their bodies and their capacities to labor, capacities they can sell in the market. In contrast, by seeing people as businesses, a neoliberal perspective presumes that people own their skills and traits that they are a collection of assets that must be continually invested in, nurtured, managed, and developed” (Gershon, 2011:539). She continues:

A neoliberal perspective presumes that every social analyst on the ground should ideally use market rationality to interpret their social relationships and social

strategies. This concept of agency requires a reflexive stance in which people are subjects for themselves—a collection of processes to be managed. There is always already a presumed distance to oneself as an actor. One is never “in the moment”; rather, one is always faced with one’s self as a project that must be consciously steered through various possible alliances and obstacles. This is a self that is produced through an engagement with a market, that is, neoliberal markets require participants to be reflexive managers of their abilities and alliances...every self is meant to contain a distance that enables a person to be literally their own business (Gershon, 2011:539).

Managing the self, Gershon stipulates, “involves taking oneself to be a collection of skills or traits that can enter into alliances with other such collections” (Gershon, 2011:539) and civil society as management is to facilitate these alliances. In doing this however, they must also be ultimately answerable to the state. As such, Moore sets out: “At the core of political management – the actors who are always present and must always be attended to – are those who appoint managers to their offices, establish the terms of their accountability, and supply them with resources. The single most important figures in this context are the managers’ immediate supervisors – usually political executives” (Moore, 2005:118-119). The state in this paradigm will be concerned with the “politically mediated expression of collectively determined preferences, that is what the citizenry determines is valuable” (O’Flynn, 2007:360). Thus, the state too takes on a corporate role but at the executive regulatory level. The state, through public value techniques, will need to actively regulate the team of managers deployed to ensure that the values that are expressed by the public are redefined in line with definitions of utility that the state can accept. Difference, which Gershon states was a problem for liberalism, is not, she suggests, an issue under neoliberalism so long as the vernacular and agency of difference is engineered to reflect the language and goals of neo-liberalism in the creation of “homogeneous heterogeneities” (Gershon, 2011:544). She asserts: “Unlike under liberalism, shared traits can serve as a basis for collective action without endangering the neoliberal status quo” (Gershon, 2011:542). However, she stipulates, this new acceptability is conditional on that these “social unities cooperate in acting corporate” (Gershon, 2011:542).

By way of example, Gershon (drawing on the work of Susan Cook) points to new relationships between neoliberal governments and indigenous communities. Specifically she directs attention to the relationship between the South African government and the indigenous Royal Bafokeng Nation. What was once a difficult relationship has been in recent years substantially re-translated as cooperative. She states

The Bafokeng leaders are reimagining kingship in corporate terms and in the process are taking over many of the services the nation state previously was supposed to provide. ‘It is the Bafokeng authorities who deliver water, electricity, and waste removal. The Bafokeng community provides ambulance and fire services. Roads, street lighting, and community halls are built with Bafokeng money’...neoliberal South African government policies encourage a decentralization that allows one group to reinvent tribal authority as a corporate authority and in the process renegotiate new forms of autonomy from the nation-state. As long as King Leruo acts as the head of a corporation in his relationships with the South African government, the government supports this practice (Gershon, 2011:541-542).

Thus, Gershon argues, “...neoliberal policies are perfectly willing to accommodate indigenous claims, provided that the indigenous are willing to treat their culture as a corporation would, as an asset, skill, or commodity” (Gershon, 2011:542). The same can be said for any and all other collective identities in civil society under a corporate organization of the person viewed through the state regulatory lens of public value. To the extent that collective identities can be redefined to ‘act corporate’ they will be perceived to ‘add value’ to the public sphere. But, if they refuse to cooperate, the state will exercise its power to ensure they are dismantled. This dismantling, however, is unlikely to look like the very public battles with the unions such as that which transpired under the Thatcher government in the UK for instance (see: Milne, 1994). Instead, neo-liberal policing is a more stealth exercise of power that uses law and managerial practices to effect corporate re-structuring; often preserving the external brand to which the public is loyal but internally changing the way values, operational procedure, and internal direction by exerting fiscal pressures (see: Leys, 2001). This is particularly relevant to the professions, which the public value approach explicitly targets. Albert and Passmore for instance in the report to the Scottish Government list the professions as a hazard to the public value approach and state part of the public value justification is “an interest in countering the power of professionals” (Albert & Passmore, 2008:9). In line with a corporate organization of the person, the professions should expect to experience pressure from the government to conform to the terms of the new approach to governance being instituted: to act corporate or lose their monopoly on service provision. As will be set out in the conclusion, this is fairly visible in the UK at present.

The state too must come to express the values that it represents as also being in line with the private sector ideas of maximizing assets, skills, and commodities, that are under state control. Gershon expands:

If neoliberal selves exist before relationships, what are relationships under neoliberalism? They are alliances that should be based on market rationality. Under

liberalism, an employer rented the worker's body and labor capacity for a set amount of time in exchange for a wage. Under neo-liberalism, the employer and the worker enter into a business partnership, albeit an unequal partnership. The worker provides a skill set that can be enhanced according to the employer's requirements—part of what is being offered is the worker's reflexive ability to be an improvable subject. By framing social relationships as market alliances, a neoliberal perspective refigures the ways in which governments and employers are obligated to citizens and workers. Under liberalism, the idealized social contract ensures that individuals give up some of their autonomy in exchange for some security, economic or otherwise. Under neoliberalism, relationships are two or more neoliberal collectives creating a partnership that distributes responsibility and risk so that each can maintain their own autonomy as market actors (Gershon, 2011:540).

But this raises the issue, who is the state as a market actor working for or partnered with? To what corporate entity is the state primarily allied? Benington admits that the paradigm of public value was “developed initially in the United States in the 1990s, at the height of the dominance of neoliberal ideology...where the state is seen as an encroachment upon, and threat to, individual liberty” (Benington, 2009:233). He suggests that the public value approach then was conceived as a way of defending the role of government in a neoliberal climate by in effect making the government more neoliberal. It is quite clearly then conceived as a response and a defense to the demands of capital. The state like the corporate communities subordinate to the state must also act corporate to be accepted by capital but it must be democratic to be perceived as legitimate. Thus, Benington suggests public value is an attempt to reconcile “both neoliberal and social democratic thinkers” (Benington, 2009:234).

Whether this succeeds or not likely depends on your definition of democracy. What is clear is that it is not compatible with a democratic narrative that hinges on a normative organization of the person that is committed to ideas of economic equality, social justice, or collective action. Colin Leys in “*Market Driven Politics: Neoliberal Democracy and the Public Interest*” (2001) contends, “...politics everywhere are now market-driven. It is not just that governments can no longer ‘manage’ their national economies; to survive in office they must increasingly ‘manage’ national politics in such a way as to adapt *them* to the pressures of transnational market forces” (Leys, 2001:1). The major social imaginary driving this marketization, Leys argues, is the transnational corporation. He states: “Capital mobility has not just removed the ‘Keynesian capacity’ of national governments – their ability to influence the general level of demand. It has made all policy-making sensitive to ‘market sentiment’ and the regulatory demands of TNCs. Governments can try to reduce these pressures...but they can’t escape them. States are obliged to become more ‘internationalised’, adapting to serving the needs of global market forces” (Leys, 2001:2).

Leys argues, however, that this “is incompatible with democracy – and in the long run, with civilised life” (Leys, 2001:5). Indeed, a forthcoming publication by Martin Gilens and Benjamin Page looking at 1,179 policy issues, sectoral opinions, and government actions in the US has concluded: “The central point that emerges from our research is that economic elites and organized groups representing business interests have substantial independent impacts on U.S. government policy, while mass-based interest groups and average citizens have little or no independent influence” (Gilens & Page, forthcoming fall 2014:5). Thus they argue that their study demonstrates empirical support for the proposition that there is economic elite domination and a biased form of pluralism operative in the US policy context at present but would not support the proposition that majoritarian electoral democracy or majoritarian-based pluralism are currently playing any role in determining the actions of the state.

Corporate capital, in this new configuration of governance by public value, is moving into the constitutive position and calls on the rest of civil society, re-defined as corporate agents, to facilitate the dominance of the corporate form. The law, of course, is implicated in this transition having recognized the corporate form as a real legal person and facilitating its global expansion. Structurally not content to be dominant within civil society, however, capital via the logic of the corporation has moved into pole position; actively re-defining the values civil society and the state are increasingly coming to adopt by changing the definition of what is permissible and forbidden democratically in part by changing the way human beings define their own collective identities. When capital becomes the pinnacle of our normative configuration of personality, the third party that guarantees our normative relations, we all become businesses; our associations transformed to alliances and our persons into assets. But the emergent corporate organization of the person, as all previous organizations of the person, is also vulnerable at the margins to polarizing processes taking hold. To the extent the forbidden narratives of income equality, social justice, and collective action, can be made legible as forbidden by a corporate organization of the person constituted by corporate capital markets, governed by a utilitarian concept of public value, and facilitated through the discipline of social and self-management, the possibility of democratic opposition; the creation of difference and tension, remain a latent potential of the conversation a corporate organization of the person orchestrates. The co-optation of civil society is still a necessary element of the corporate person’s organization. It remains to be seen whether civil society will capitulate in the facilitation of its own subordination and irrelevance or resist the democratic narrative

being imposed with a revitalized democratic narrative in opposition to the values the corporate organization of the person would seek to externalize.

## 9. Conclusion

The previous chapters have examined the moral organization of the person, the legal organization of the person and ultimately the emergence of the corporate organization of the person through three framing texts by MacIntyre, Supiot, and Offe. Each of their three texts laments what they respectively identify as the characteristic feature of a modern liberal democratic order: the interminable quality of debate on public value(s), which effectively prevents any rational resolution of conflicting claims. Further, each author specifies this failing; not, as MacIntyre sets out, “just that such debates go on and on and on – although they do” (MacIntyre, [1981] 2007:6) but as the function of a systemic disorder in the way modern political systems conceive of the relationship between morality, law, and collective politics. All three texts agree then that there is an intractable problem inherent in modern discourse and more specifically they agree that this problem can be traced to the development of a distinctly modern ethos or rupture in the conception of personhood. Further, they identify three distinct but related modern concerns, which they assert are in urgent needs of address: the growing irrationality of normative claims to public value, the rise of a process (competition) based conception of value, and the nefarious premise of value-neutrality, which implies that the current mode of organizing value will impact on everyone in equal measure (when in actual fact, they assert, it does not).

Beginning with normative argumentation, MacIntyre, Supiot, and Offe each suggested that political claims appealing to normative values in the public sphere are becoming increasingly (and necessarily) incoherent. Taking claims for ‘justice’ as an example, each of the authors argues that the meaning of justice has progressively become inscrutable. So, MacIntyre argues that there is no way to resolve whether a claim for justice based on principles of just distribution should succeed over a claim based on principles of just acquisition/entitlement (or vice versa). He states: “...our pluralist culture possesses no method of weighing, no rational criterion for deciding between claims based on legitimate entitlement against claims based on need. These two types of claim are indeed...incommensurable, and the metaphor of ‘weighing’ moral claims is not just inappropriate but misleading” (MacIntyre, [1981] 2007:246). He attributes this inability to decide publicly on the ‘desert’ of one moral claim over another to a conception of morality as a purely subjective and private matter, which, he argues, coexists paradoxically with a tendency in public discourse to invoke a moral vocabulary to express an increasingly

diverse range of public desires. The paradox, he argues, is that under modern conditions one can express almost anything in an ethical or moral vocabulary but ultimately one can communicate very little because the language of morality no longer has any readily discernable meaning.

Supiot likewise acknowledges the incoherence of value claims in modern life. However, for Supiot, this is not necessarily a crisis of moral philosophy but a symptom of a crisis in the legal system's dominance. To take MacIntyre's example of two incommensurable claims to justice based on need and legitimate entitlement, Supiot argues that it is and must be the function of law to be able to render the claims commensurable. To do so, he suggests, requires as a necessary condition for a coherent framework of value, a third party guarantor that acts as a common reference point external to the social framework in which the incommensurable claims are articulated. This third party must be entrusted by society with the authority to prescribe certain dogmatic beliefs for the society as a whole so that a rational distinction can be made between otherwise incommensurable claims and allow for a determinative decision favoring one or the other. Thus, the crisis of normative pluralism identified by MacIntyre also exists for Supiot, but it is retranslated as a crisis of legal pluralism or the tendency in modern life to delegate what ought to be decided as a matter of dogmatic legal prescription to be decided as a matter of private decentralized regulatory decision. Supiot argues:

Every society must develop a vision of justice that is shared by all its members, in order to avoid civil war, and this is what the legal framework provides. Whereas conceptions of justice differ from epoch to epoch and from country to country, the need for a shared representation of justice in a particular country at a particular time does not. The legal system is where this representation takes shape and, although it may well be contradicted by facts, it gives a shared meaning and a common orientation to people's actions. These are the very simple truths which the horrors of the Second World War fixed firmly in everyone's mind, and which jurists are today forgetting when they claim, in the name of science – and returning to the positivist ideals of the pre-War years – that every 'value choice' falls within the sphere of individual morality and must therefore be excluded from the strictly legal sphere (Supiot, 2007:20).

Similarly, Offe too also recognizes that there is a value crisis in today's social and political configurations, however Offe identifies this as ultimately resulting from the conflicting demands placed on the state in the development of modern liberal polities. So, Offe argues, since early modernity the state has become the site for an increasing number of political claims, which in turn define its legitimacy. Offe identifies these demands as at a

minimum: securing of peace, guaranteeing individual liberty, guaranteeing the equality of rights, and distributing common resources in accordance with the dictates of just distribution (Offe, 1985:6). Recognizing the variety of these claims, Offe asserts that there is a “potential inconsistency of functions which have been assigned to the modern state” (Offe, 1985:6). As such, he argues: “For this complexity to be maintained, and the manifestation of incompatibilities between state functions to be avoided, adequate institutional mechanisms of intermediation and communication must be developed and maintained. Their function is to regulate the relationship between civil society and its matrix of social power and the state and political authority” (Offe, 1985:6). In Offe’s view, however, under modern liberal capitalism, this function has been almost entirely delegated to “competitive market interaction between individual economic actors” (Offe, 1985:6) or, in other words, the labor market, which is in turn ostensibly “superseded by formally organized collectivities of economic action and interest representation” (Offe, 1985:6). Offe, however, questions whether this ideal of ‘organized capitalism’ is in fact very organized at all and points to the inarticulate value claims found in civil society to suggest that it is not. Thus, like Supiot and MacIntyre, Offe also agrees there is a crisis of value, however Offe suggests it is the lack of mediating mechanisms at the level of the capitalist organization of the labor market and its corresponding impact on the forms of collective association in civil society, which has assured this result.

Despite differences in identifying the specific causes of contemporary normative disorder then, all three authors agree there is a value crisis and, perhaps more significantly, they in turn also all recognize that despite this, one value, which is really a process, has not been prevented from rising above the fray. As recognized explicitly by Offe above, competition, they all argue, has become the dominant value of modern social configurations. The authors, however, assert that competition is not really a value as such but a process to differentiate between values when there is no other accepted way to demarcate a difference in value of differentiated claims. Thus the rise (and mistaken index of) competition as a ‘value’ in modern conditions is to be expected. If values are to be engaged in a survival of the fittest for legitimacy then competition between value choices, in effect, is posited as the only ‘value-neutral’ way to determine their relative importance. Supiot, however, suggests this is a precarious position to be in: “...free competition between formally equal individuals becomes the sole criterion of justice. When competition is thus elevated into the organizing principle of private life (freedom in marriage and in personal life), of politics (free election of leaders), of civil administration

(free access to public service positions) and of economic life (free competition), it becomes the very motor of social existence rather than being confined to its margins as something dangerous and deathly” (Supiot, 2007:16).

MacIntyre too implicitly recognizes the role of competition, although for him the notion that there is a stake to compete for under current conditions is manifestly false. He notes that although there is (and must be) an appearance of competition between individualism and collectivism in a modern liberal order; the two stakes or antagonists are more like partners in the creation of the current worldview. He argues that “...in fact, what is crucial is that one which the contending parties agree, namely that there are only two alternative modes of social life open to us, one in which the free and arbitrary choices of individuals are sovereign and one in which the bureaucracy is sovereign, precisely so that it may limit the free and arbitrary choices of individuals. Given this deep cultural agreement it is unsurprising that the politics of modern societies oscillate between a freedom which is nothing but a lack of regulation of individual behavior and forms of collectivist control designed only to limit the anarchy of self-interest” (MacIntyre, [1981] 2007:35).

All three of the authors then question whether or not this order without order (or order by disorderly competition) is in fact neutral for the members (or citizens) of modern liberal democracies. All of them determine that it is not. MacIntyre argues that the ethos of value neutrality does not allow for a discussion of even the possibility of a public discourse on normative order or disorder. If morality is a purely private judgment, then it becomes incomprehensible to suggest the possibility of an objective hierarchy of values that are in everyone’s interest because they serve a public good. As a result, when moral discourse does make its way into the public sphere (as it often does) the disagreements it expresses take on their “interminable quality” (MacIntyre, [1981] 2007:6). In MacIntyre’s view there is no rational way of securing moral agreement in our culture and as such moral debate becomes an assertion/counter-assertion of rival premises. At the core of this is a disquieting private arbitrariness” (MacIntyre, [1981] 2007:5). The result of this, MacIntyre argues, is that morality becomes about what is ‘effective’, and what is deemed effective (or competitive) is determined by power. So, he notes, regarding the supposed competition between individualist and collective viewpoints: “The mock rationality of the debate conceals the arbitrariness of the will and power at work in its resolution” (MacIntyre, [1981] 2007:71). When effectiveness becomes the dominant mode of moral theory, he argues, it entails “the obliteration of a genuine distinction between manipulative

and non-manipulative social relations" (MacIntyre, [1981] 2007:23). Others are always means as reason (objective) and value (subjective) become mutually exclusive. In this situation, MacIntyre asserts, "authority is nothing other than successful power" (MacIntyre, [1981] 2007:26).

In this ostensibly 'value neutral' space value will still be determined, the only difference is that it will be determined not as a matter of genuine social deliberation but simply by whomever holds effective power to make the ultimate determination. MacIntyre argues that in modern liberal states as organized at present, the allocation of power and, as such, of value is allocated almost solely by the economic system. Supiot also argues that there are winners and losers in this new constellation of value anarchy where public law no longer plays the centralizing role of kingmaker. Like MacIntyre, Supiot agrees that this tendency to delegate value decisions as a matter of private resolution (or regulation) has the effect of allowing economic power to fill the role that, on his argument, public law once held, effectively separating power from any form of authority able to humanize it. He argues: "The resulting asymmetry between an economic sphere, which has regulatory authorities, and a social sphere, which has none, gives rise to all sorts of harmful effects in the opposition between the two. The market regulatory authorities do not consider that they have to take into account the social dimension of the issues they address, not because such a dimension is absent but because no organization exists that is entitled to authorize States to appeal to social considerations in order to limit the effects of competition law. Hence decisions can be taken that are liable to destroy, with one stroke of the pen, the material conditions of existence of whole societies, especially the poorest ones" (Supiot, 2007:159). For Supiot, this condition results from an ideology of governance that offers no distinct public space for a collective debate on the meaning of value for the society as a whole. A return to some idea of public solidarity, he insists, is necessary lest private corporations are to become the rulers of people in a sort of "democratic dictatorship" (Supiot, 2007:184). He continues: "For if contractualization invents new ways of harmonizing particular and general interests, it can also pave the way for new forms of oppression...One of the most disquieting aspects of the ideology of governance is that it assigns no place to conflict or collective human action in the functioning of society. Paradoxically, this leads it to resemble the totalitarian utopias of a world purged of social conflict" (Supiot, 2007:184).

Offe too is concerned with how this value incoherence impacts on the matrix of social power in terms of what category of actor is favored by the incommensurability (or impossibility) of moral, legal, and/or political claims in civil society and, in turn, how this translates into political authority, in terms of reinforcing the same dominant actors in both spheres. Like Supiot then, Offe too is primarily concerned with the rise of ‘voluntary’ models of interest regulation while, at the same, Offe also recognizes, like MacIntyre, the unique role of associations in making claims of value legible. Thus, Offe’s analysis focuses on a case study of the changing circumstances and role of trade unions as representatives of the values of the labor movement. He points out that as a result of both a shift to a new form of post-fordist or ‘network’ capitalism (see also: Boltanski & Chiapello, 2005), which has meant the disappearance of the work-site (factory) at the ‘centre of life’ exposing the conflict of interest between labor and capital and, simultaneously, a crisis in capital generally (i.e. the significant rise in unemployment as a total proportion of the population) there has been a change in the values underpinning and organizing working class consciousness. This, says Offe, “is a structural change that will not leave untouched the social structure and organization of the industrial ‘work society’, including trade unions” (Offe, 1985:154). What it tends towards, he argues, is the “accentuation of the economic and moral divisions within the working class. The result, in other words, is a growing heterogeneity in the objective situation of different groups of employees, as well as in their subjective perceptions and interpretations” (Offe, 1985:154). While trade unions in the past have been able to provide a shared orientation to workers values and interests, their ability to do so in these conditions is diminishing and, as Offe notes, this is a political problem for both the practice of trade unionism and the legal form of association. The consequence of changing economic conditions and the decline of trade union representation is that, asserts Offe: “The burdens of crisis have been largely shifted on those ‘problem groups’ least capable of resistance, and hidden away in various positions within the ‘silent reserves’ of the labor market. Accordingly, the psychological and social consequences of persisting mass unemployment (in contrast to the various economic ones) have dropped out of the focus of public attention” (Offe, 1985:155).

Thus, while I have spent the majority of the thesis outlining how the moral organization of the person MacIntyre advocates differs from the legal organization of the person that Supiot sets out and, further, how the legal organization of the person Supiot sets out in turn prompts Offe’s critique, it should not be discounted how much in substance MacIntyre, Supiot, and Offe, in fact agree. At the core of all of their texts is a concern that the basis

for a democratic determination of values is being undermined and that this is a dangerous development of contemporary political discourse. While they may not agree with each other on the solutions they propose; there is a consensus between them against a definition of value that does not recognize that *value is contingent on organization* (see also: Herrnstein-Smith, 1988). Partially I have focused then in the body of the text on their differences to show how the public value approach, which pretends not to specify any particular vision of value, in fact expresses a very specific organization of value that is radically opposed to a number of major alternative historical perspectives and organizations of the person that preceded it. Public value, like all value, is contingent on organization. What is troubling about the public value discourse is that it explicitly denies this to be the case.

To answer the question of how the professions ought to respond to this; I would not pretend to give a normative answer. The professions are collective organizations in charge of their own identity. I would, however, anticipate that the professions as associations of persons, historically defined by certain social contexts, will have difficulty adapting to a corporate organization of the person should this normative configuration gain dominance. What is evident is that insofar as the professions base their unity on moral or legal conceptions or both they will not be able to be placed in a managerial role without compromising aspects of their collective identity that relate to these discourses. For instance, the established professions were at one time constituted by (and constitutive of) a moral organization of the person, which is still apparent today in their continued subscription to ethical codes of conduct as well as in the provision of *pro-bono publica* (literally meaning in the public good) services. Further, the professions as legal persons are also accustomed to defining professional standards autonomously from the state and in the public interest by their own definition. The ethical responsibilities and autonomy of the professions from the state then will not be easily accommodated if the professions are placed en masse into public managerial roles, which would distract from their commitment and responsibilities to their primary constituencies, interfere with professional autonomy from the state, and undermine the institutional values that were inscribed by the professions in the ideals of their *pro bono publica* ethos.

Recent restructurings of the role the professions play in the provision of public services in the UK can be seen in light of the commitments of the public value perspective. For instance, in 2012 the government passed the *Health and Social Care Act* (2012), which re-

positioned GPs employed by the NHS to head Clinical Commissioning Groups (CCGs), which will now see GPs take on managing a large proportion of the NHS budget and overseeing public service commissioning and tendering decisions. Critically, CCGs are permitted to outsource health care provision to private providers and as such their decisions will likely be subject to UK and EU competition and procurement law. As opposed to eliminating managerial practices in the provision of health care, the Act then effectively shifted the responsibility for the management of the National Health Service away from state administrators and onto the private GPs, directly in line with the ideals behind the public value framework of placing professionals into public managerial roles. Further, the Act also critically removed the Secretary of State's duty to provide comprehensive health care coverage and instituted a clause that suggests the Secretary of State should leave the decisions primarily to the CCGs, raising the issue of whether there in fact would be any appeal to parliament in the event of professional 'mismanagement.'

The response of the medical profession to this re-interpretation of their role in public service delivery has been a source of internal division, but signs of resistance are emerging. In the context of the medical profession, certain professional regulatory bodies such as the Royal College of Physicians and the Royal College of General Practitioners have voiced strong opposition to the Act and the placement of GPs in managerial roles. Other professional bodies, including the Royal College of Medicine and perhaps more surprisingly the British Medical Association (BMA), have expressed reservations but have been more conciliatory, or perhaps corporate, in their response. Dissatisfaction with the latter, however, has led certain prominent members of the BMA to act independently through the formation of the National Health Action Party (NHA), an official state political party that has announced an intention to contest the seats of MPs against the repeal of the *Health and Social Care Act*. They are also fielding candidates at the European elections in a bid to exempt the NHS from the terms of the *Transatlantic Trade and Investment Partnership* (TTIP) between the EU and the US, which the NHA fear would open up health care provision by the NHS to US private health care companies and prevent their effective regulation through the dispute settlement mechanism, which would make the government answerable to private service providers

The legal profession's role in public service delivery, namely through their role in legal aid, has also started to be restructured, so far largely by extensive cuts to a number of areas of legal aid provision (in some cases eliminating entire areas of civil legal aid) but also

through the introduction of new tendering rules for the provision of criminal legal aid, which it is predicted will effectively re-structure the criminal bar. The criminal bar, for instance, under the new rules will be forced to restructure into consortiums in order to be able to tender for the legal aid duty contracts that smaller firms on their own would not be able to cover. The expected tender bids are also significantly lower than in the past meaning that to tender criminal firms will be placed in a position where they may in the future be reluctant to take on time consuming cases due to the cost consequences of doing so, raising the spectra that lawyers too are in effect becoming cost-benefit public managers even if they still operate in a private capacity (the public value perspective recall does not accept this distinction). While still privately employed, to survive criminal law firms will need to start triaging legal aid driven caseloads by the overall capacity of the firm to take the case rather than the merit of the case itself, exercising a managerial function rather than one orientated towards the ‘public interest’ and the notion of “justice for all” (Hynes & Robins, 2009:70) the establishment of the legal aid system as part of the welfare state was supposed to represent.

A similar internal division of how to react to the change in their professional role has emerged within the legal profession as with the medical profession. Practitioners involved in areas of the legal profession dependent on legal aid have attempted to organize against the changes proposed to the legal aid system but other areas of the profession have been seemingly less concerned. Thus, while the cuts to legal aid have provoked strong resistance, including work stoppages, from the Criminal Bar Association and the Criminal Law Solicitors Association, marking the first time history that the lawyers have taken collective action; the Law Society while expressing opposition has, like the BMA, taken a more conciliatory tactic participating actively in negotiations with the government. Further, with respect to the corporate bar there is a suggestion that the legal profession is potentially less uncomfortable embracing the more corporate view of the lawyer’s role. Recent empirical research by Robert Nelson and Laura Beth Nielsen (2000) on in-house corporate lawyers in the US suggests that compared to the past, lawyers working in-house at corporations have willingly adapted to the expectation that they become more entrepreneurial, using their legal skills creatively to invent legal devices that “generate profits and competitive advantages for particular corporations” (Nelson & Nielsen, 2000:476). They state: “Lawyers are now eager to be seen as part of the company, rather than as obstacles to getting things done. To do so, it appears that in-house counsel are themselves interested in discounting their gate-keeping function in corporate affairs”

(Nelson & Nielsen, 2000:477). The interests, they note, of these lawyer-entrepreneurs are financial. Still, even in this context, they note what is surprising is how strongly even lawyer-entrepreneurs attach to their professional identity. They state: "...inside counsel still strongly identify as lawyers and are reluctant to consider changing to a non-legal executive position...even though they see themselves as performing a business oriented role, they do not want to leave the law to become business people" (Nelson & Nielsen, 2000:477-478). Thus even corporate in-house counsel stipulate an attachment to their collective professional identity, although it is unclear what exactly this means to them.

The professions are not uniform phenomenon. It bears mentioning that many of the government reforms have been spearheaded by individual members of the professions themselves, in particular those who stand to benefit from the opening of legal and medical services to private competition. This diversity (or fracturing) is an issue the professions have always struggled with in terms of collective definition. It is, as such, a pervasive theme in the literature on the history of the professions. Anne Digby (1994) for instance in her excellent study of the political economy of medical practice from 1720-1911, recounts that prior to the establishment of the NHS most doctor's, and GPs in particular, were not particularly wealthy, with many doctors in the early days of the profession going bankrupt, becoming unemployed, or needing to take on a dual incomes in an unrelated field. Partially she suggests this is because doctors were particularly bad at deciding whether it fit with their professional ethos or not to demand payment, maintaining sliding fee scales that attempted as far as possible to match fees to income or ability to pay and then struggling with the indignity of forcing payment from the wealthier clients they almost wholly depended on to make up the difference. Factoring in all of the other costs of training, transportation, equipment etc. for the most part, Digby suggests, a person would have needed to be independently wealthy to practice general medicine in the early days of the profession. Digby recounts then that it was really not until the beginnings of national insurance and later the NHS then that doctors as a profession started to become more consistently middle class and/or relatively affluent and the taboo of commercial objectives is still today a defining, if contested, aspect of their collective professional identity.

Murray Frame then notes that the literature on the professions postulates primarily two explanatory models for the collective identity of the professions. The first model views the professions as primarily altruistic, legitimated and justified by a public service orientation. He states:

According to this view, professional associations and their programmes exist to promote the aims of the group, for example by exchanging scientific knowledge or contributing to the formulation of public policy. Professionals are able to apply their expertise in a 'disinterested' manner because most of them receive fixed fees or, in the case of so-called 'socialized' professions, state salaries. Their livelihoods, therefore, are not directly dependent on commercial performance. This ostensible attribute of the professions is commonly contrasted to the profit motive of commercial organizations, which exist primarily to accumulate capital and rely directly on the market. A distinction has consequently been made between the professional and entrepreneurial ideals, and it implies that they operate in essentially separate economic domains (Frame, 2005:1026).

The second model recognizes the influence of the market on the provision of services and suggests that professions are little more than organized occupational monopolies that maintain their professional structure solely in the economic self-interest of their members. Frame summarizes the argument as follows: "Recognition of the market's significance for professionals gave rise to the second basic 'model', which interprets professionalization as a process fundamentally designed to protect an economic and social advantage by controlling access to an occupational group, regulating mobility within it, and establishing a service monopoly. Professionals are not detached from the market, therefore, but manipulate it for self-serving reasons, and the images of altruism and aloof 'disinterestedness' are merely elaborate facades or, as George Bernard Shaw famously described the professions, 'conspiracies against the laity'" (Frame, 2005:1027). Both explanatory models, suggests Frame, represent opposite sides of the spectrum and both are generally considered flawed, with the first failing to recognize that most if not all professions will depend on a demand for their services even if the services are socialized by the state and the second failing to recognize that most professions cannot be held to be purely market driven as professional ethical codes have often self-limited professional jurisdictions in ways that would not be conducive to economic gain. Rosemary Crompton remarks on this tension in her work "*Professions in the Current Context*" (1990); she states: "Even in the earliest commentaries on the emergence and growth of the professions in Britain, a paradox is immediately apparent. On the one hand they are described as selfish occupations concerned to achieve maximum rewards for their services...Alternatively, professions have been characterized as islands of occupational altruism in a sea of self-interested commerce, seeking to protect standards of service delivery, and the interests of clients, even when not strictly in their interest to do so" (Crompton, 1990:147).

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The answer that most theories of the professions tend to settle on is that professions to some extent encompass both orientations: a middle position. What is an open question however is whether or not professional identity could survive if the professions lost any credible claim to the first model: to a public service orientation. This is the position, however, that the professions will be confronted with if re-defined in the public sector as public managers seeking to secure public value and in the private sector as entrepreneurs seeking to maximize private profits. The corporate organization of the person, like the corporation itself, generates permissible and forbidden democratic narratives and the question for the professions, like all civil society actors, will be whether or not their collective identity can survive a shift to the corporate values of wealth maximization and asset management or whether they will find the positions open to them by this paradigm difficult to reconcile with other relevant narratives such as the public good and the public interest that have historically circumscribed their collective sense of purpose. How the professions will resolve this conflict, for the moment, remains to be seen but what is becoming increasingly clear is that a middle position, a position in-between, in the current context, may no longer be an open possibility.

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