

He, Dan (2019) Public State, Private Corporation : A Joint History of the Ideas of the Public/Private Distinction, the State, and the Corporation. PhD thesis. SOAS University of London. <http://eprints.soas.ac.uk/32467>

Copyright © and Moral Rights for this thesis are retained by the author and/or other copyright owners.

A copy can be downloaded for personal non-commercial research or study, without prior permission or charge.

This thesis cannot be reproduced or quoted extensively from without first obtaining permission in writing from the copyright holder/s.

The content must not be changed in any way or sold commercially in any format or medium without the formal permission of the copyright holders.

When referring to this thesis, full bibliographic details including the author, title, awarding institution and date of the thesis must be given e.g. AUTHOR (year of submission) "Full thesis title", name of the School or Department, PhD Thesis, pagination.

PUBLIC STATE, PRIVATE CORPORATION

- A Joint History of the Ideas of the
Public/Private Distinction, the State, and the
Corporation

DAN HE

Thesis submitted for the degree of PhD

2019

Department of Law
SOAS, University of London

TABLE OF CONTENTS

TABLE OF CONTENTS	3
ACKNOWLEDGMENT	5
ABSTRACT	6
I. INTRODUCTION	7
1. Theoretical Foundation I: <i>The Multiple Meanings of the Public/Private Distinction</i>	19
2. Theoretical Foundation II: <i>The Debates on the Public/Private Distinction</i>	28
3. Theoretical Foundation III: <i>The Distinction between Public Law and Private Law</i>	48
4. Methodology: <i>The Cambridge School and Contextualization</i>	64
5. About this Thesis.....	70
II. THE PRE-MODERN PHASE	73
6. The Origin of the Public/Private Distinction	74
7. The Origin of the State: <i>From 'Body Politic' to the Crown as Corporation Sole</i>	84
8. The Corporation: <i>Franchises, Townships, Municipal Corporations and Corporate Colonies</i>	91
III. THE EARLY MODERN PHASE	115
9. The Public State	116
10. The Private Property Owner	127
11. The Overseas Trading Corporation: <i>The Hybrid of the Public Interest and the Private Interest</i>	133
IV. THE LIBERAL TRANSFORMATION OF THE PUBLIC/PRIVATE DISTINCTION I: <i>The Public Sphere and the East India Company</i>	146

12. The Discursive Public Sphere	148
13. The East India Company.....	160
14. The Controversy over the Company-State	167
V. THE LIBERAL TRANSFORMATION OF THE PUBLIC/PRIVATE DISTINCTION II: <i>Edmund Burke on the East India Company</i>	180
15. The Impeachment of Warren Hastings.....	182
16. Contextualization.....	194
VI. THE AFTERMATH	209
17. The Rationale for the Public/Private Distinction as <i>laissez faire</i>	211
18. Public Corporation vs. Private Corporation.....	217
19. Personifying the Colonial Government as Corporation	225
VII. CONCLUSION.....	239
BIBLIOGRAPHY	258

ACKNOWLEDGEMENTS

My profound thanks are due to Professor Matthew Craven, whose groundbreaking postgraduate course *Colonialism, Empire, and International Law* helped me to steer my perennial intellectual interest with Frederic William Maitland's works on corporate personality towards some imperative legal and political issues of the moment: multinational corporations at first, and then the more general idea of the liberal public/private distinction. As a supervisor, Prof. Craven never hesitates to share his wisdom on all aspects of profession and has been unfailingly helpful all the time. But the greater part of the debt to him arises from his inspiring and encouraging personality itself, that he is always trying the best to keep his students motivated. His academic aesthetic as something grounded and substantial, (or borrowing John Mill's comment of Adam Smith that 'he gives that well-grounded feeling of command over the principles of the subject for purposes of practice'¹), sets up the path for me to follow. His meticulous and sophisticated style as a learned scholar, though, is something I can only admire but not even venture to imitate. The balance, between leaving a space for unscheduled intellectual creations and keeping the project checked with time and due progress, has been managed by him in a way that couldn't be better managed.

My parents deserve special mention here, as they provide me the most generous supports in every sense. This paper could not have been written without their encouragements. Therefore it is dedicated to them with love and gratitude.

Of the work itself, it is only necessary to say that its approach to its subject is that of intellectual history rather than that of doctrinal or critical legal studies. It also confines itself to the initial inquiry of how the public/private distinction has been reinvented by liberalism as the category to separate the state and the corporation, leaving the more significant question of the constitutive effect of the corporate form in formulating the modern idea of state to a later and more extensive work. While every effort has been made to properly cite and acknowledge copyright, I apologise for any accidental infringement if there is one.

¹ John Stuart Mill, *Principles of Political Economy* (John W Parker 1848) iv-v.

ABSTRACT

Current liberal discourse relies upon a fundamentally categorical distinction between the public and the private in both the practice and critique of democratic government. A separation of the public/private modes of social organization is quintessential: the state and the corporation are supposed to inhabit separate arenas and act exclusively in the public or private interest. On this premise, broadly based on *laissez-faire* doctrine, the public/private distinction further attempts to keep governmental regulation of corporations' activities to a minimum level in order to maximize national wealth and individual liberty. It is evident, however, that these ideas lost much of their practical significance over the course of the twentieth century, with the rise of the welfare entrepreneurial state, and later, the adoption of the neoliberal modes of governance that enacted particularly through privatization. A re-appraisal of the public/private distinction thus becomes necessary in order to bring it into correspondence with the increasing assimilation and cooperation between the state and the corporation in promoting and protecting the public interest.

Having juxtaposed the intellectual history of the public/private distinction with those of the state and the corporation in a chronological narrative, this thesis seeks to demonstrate that the state and the corporation was not separated by reference to the public/private distinction until the late eighteenth century. A key marker, it is argued, is to be found in the metropolitan public discourse surrounding the transformation of the East India Company into a local sovereign power in India. A significant segment of public opinion of that time, mostly exemplified in Edmund Burke's public speeches, held that the governance should be institutionally separated from the commerce to avoid the possible erosion of the public interest by the private interest. The public/private distinction thus turned into an artificial rubric for defining the separate roles and characteristics of the state and the corporation, which in turn served to obscure the complex social interlinkage and the inherent similarity between them. An alternative to this pseudo-distinction, as proposed in the end of this thesis, is to avail a nuanced version of individualism to reconceptualize the relationship between the state and the corporation.

I. INTRODUCTION

Is there a genus of which the state and the corporation are species? This thesis argues that, perhaps, there is, and redefining the public/private distinction might have a crucial role to play in recognizing this homogeneity between the state and the corporation. The term 'corporation' is used here to refer to a particular form of human association that stands beyond its individual members and has its own distinctive personality, which means it is recognized by law as capable of having its own rights and performing its own duties.² In current legal and political discourses, state activities are viewed as different from the activities of the corporation in the sense that they occur in separate realms with opposite aims and principles. While the state should perform the duty of governance strictly based on the public law in the clear-defined public realm exclusively for public welfare; the corporations are supposed to exercise in the rest sphere of private market, subject to the terms of the private law, and pursue their individual profits at their free wills. One of the key analytical markers that distinguish the state from the corporation, thus, is that the state is, by definition, 'public' and the corporation is 'private'.

This clear-cut distinction between the state and the corporation, or between the public and private modes of social organization, is fundamental to Western legal and political thought. In modern political theory, it directly relates to the answer to the most essential question of what constitutes the legitimate boundaries of state authority. In the field of law, the logical corollary of the public/private distinction is the

² See generally John Patterson Davis, *Corporations: A Study of the Origin and Development of Great Business Combinations and of Their Relation to the Authority of the State* (GP Putman's Sons 1905); Frederick Hallis, *Corporate Personality: A Study in Jurisprudence* (Oxford University Press 1930); Frederic William Maitland, *State, Trust and Corporation* (David Runciman and Magnus Ryan eds, Cambridge University Press 2003).

distinction between the public law and the private law, both in the common law system and the civil law system. Its content includes, on one side, as the product of modern political theory of sovereignty and constitutionalism, the recognition of the state as the sole reservoir of all political power and the imposition of the strict requirements on the state's actions, subjecting them to operate within the prescribed boundary of governance and to adhere to the tenets of public law. On the other side, the public/private distinction, based upon the liberal doctrine of *laissez faire*, provides the fundamental rationale for government regulations on market. *Laissez-faire* doctrine holds that the 'optimal environment' for corporation's activities to produce maximum national wealth is identical to keeping the state regulation of the market to the lowest/essential level to sustain a well-functioned free market. In this sense, the public/private distinction reflects the strong opposition to a paternalist governmental style, since it indicates that the proper role of government in relation to market should be a reluctant regulator and a cautious policy maker, serving to promote healthy competition and redistribute justice. It should never participate in the market itself as a private actor akin to the corporation. The public/private distinction thus works as a rubric for defining and separating the different characters of the state and the corporation, state administration and market economy, or generally, politics and economy.

However, it is apparent that since the twentieth century the public/private distinction no longer resonates with the political and practical realities. For one thing, the state has been deeply involved in the business of the market under the comfortable name of providing 'public goods'. Many new terms also emerged accordingly to describe this new state role-play, such as 'government engaged in a proprietary activity' and the 'entrepreneurial state' (state capitalism).³ Although the phenomenon of

³ *Entrepreneurial state* (state capitalism) is a term employed to describe the managerial and entrepreneurial role of the state in the private market: in order to achieve national

public enterprise has its deep roots historically in initiatives to control and exploit natural resources, it was only after World War II with the rise of welfare state that this phenomenon became a prevalent feature throughout the world, and the main hallmark is the processes of 'nationalization'.⁴ The central justification behind nationalization was a general political belief that collectivist economic policy would provoke a fundamental change in the distribution of power, engendering a new socioeconomic equilibrium and 'genuine' industrial democracy.⁵ Some economic theories also justified nationalization as a way to promote national economic growth.⁶ In terms of the legitimacy issues, the governments resorted to the notion of the 'public interest' in justifying their actions by reference to legislative authority.

Nationalization apparently liquidated the strict separation of private law and public law. From the private law viewpoint, it is the question of whether contract law and company law, which originally developed to regulate private corporations, should be applied equally to the public enterprise in market. From the public law viewpoint, since public enterprises generally have monopolies over certain activities or the provision of certain goods and services, it is reasonable to require that in exercising these monopolies, they should be subject to some extra 'public accountability' in addition to the general requirements of the private law.

economic growth, the state either operates nationalized industries or intervenes heavily in the operation of private firms.

⁴ See generally Pier Angelo Toninelli, 'The Rise and Fall of Public Enterprise: The Framework' in Pier Angelo Toninelli (ed), *The Rise and Fall of State-Owned Enterprise in the Western World* (Cambridge University Press 2000) 3-24.

⁵ Some social responsibilities of the state might be achieved as a result, including the guarantee of full employment, better working conditions, or an improvement in industrial relations. See *ibid*.

⁶ There are several types of economic theories that promote nationalization: (1) natural monopoly theory argues that a public enterprise of monopoly would produce cheaper without predatory measures to hold off potential market entrants; (2) the development theory argues that the public enterprise could make its decision on the basis of long-term considerations and foster modernization in the underdeveloped countries or regions; and (3) the theory of industry bailout suggests that through nationalization, the state could rescue private businesses affected by deep and irreversible economic crises and solve social issues such as employment. See *ibid*.

Yet nationalization should also be viewed as part of the general trend of government's extending of functions. Indeed, even predated nationalization, the government has already used its bargaining and contractual powers to achieve extraneous policy objectives.⁷ And a general shift has long been identified from governmental use of regulation, to governmental use of wealth to secure its policy objectives.⁸ These extended functions of government are also arguably responsible for obstructing the consistence of public law. As a consequence, there have emerged many individual areas of law that blend the elements of both public law and private law, such as those relating to public health, the highways, the social insurance, the education, and the provision of gas, water, and electricity. More significantly, the public/private distinction could no longer state its original credo that governmental interventions should be strictly limited, since almost all modern governments have adopted interventionist policies of one form or another. Here is the rub of the fundamental principle of public law in preventing the government from intervening in the market: inasmuch as the government could justify 'scientifically' that its policies and activities in the market are efficient and beneficial to the public, there seems no limit. To ensure these new governmental functions will not jeopardize democracy, legal controls might not be enough, parliamentary supervision and citizen participation through advisory committees are all essential.

The blurring of the public/private distinction has been intensified by the current prevalence of the neoliberal privatization movement, as the private corporation is now providing public services. The neoliberal privatization movement, which generally refers to the delegation to private businesses of fundamental tasks that traditionally associated with government, has gained a great momentum in the past decades.

⁷ JWF Allison, *A Continental Distinction in the Common Law: A Historical and Comparative Perspective on English Public Law* (Clarendon Press 1996) 85-86.

⁸ *ibid.* Also see PP Graig, *Public Law and Democracy in the United Kingdom and the United States of America* (Oxford University Press 1990).

Privatization, like other new modes of governance, such as the marketization of bureaucracy, the adoption of business models for public management, and the public-private partnerships (PPPs), represents an effort to reform the inefficient welfare state by introducing market mechanisms and incentives into governance in the hope for lower costs and better services.⁹ The basic ambition behind it is to transform the bureaucratic system of government into an entrepreneurial system, replacing the monopolistic control with the market control.¹⁰ It has been theoretically justified by neoliberalism, whose major theme is to 'discover how far and to what extent the formal principles of a market economy can index a general art of government'.¹¹ Neoliberalism also casts doubt upon the authority of centralized power: Hayekian theorization of the centralized power as redundant has provoked a renewed enthusiasm for private enterprises and market mechanism. Nonetheless, privatization does not necessarily mean the dying of the welfare state. As one American scholar has observed, 'Reagan didn't, and couldn't, kill the Nanny State. But he did replace our old familiar nanny with a commercial upstart, a nanny corporation as it were.'¹²

On the face of it, privatization seems to test the traditional boundary between the public sector and the private sector by creating a so-called 'Fourth Branch of Government'.¹³ But making public actions 'private' is not

⁹ These reforms have been bracketed under the name New Public Management (NPM), for a current literature review on the NPM, see JC Thomas, *Citizen, Customer, Partner: Engaging the Public in Public Management* (M. E. Sharpe 2012).

¹⁰ For the origination of this idea, see Alfred D Chandler and Herman Daems (eds), *Managerial Hierarchies: Comparative Perspectives on the Rise of the Modern Industrial Enterprise* (Harvard University Press 1980); David Osborne and Ted Gaebler, *Reinventing Government: How the Entrepreneurial Spirit is Transforming the Public Sector* (Perseus Books 1992).

¹¹ Michel Foucault, *The Birth of Biopolitics: Lectures at the Collège de France, 1978-1979* (Springer 2008) 129.

¹² Jon D Michaels, *Constitutional Coup: Privatization's Threat to the American Republic* (Harvard University Press 2017) 2-3.

¹³ The 'Fourth Branch' is now used to describe the private contractor in the privatization, though it is quite ironic that the term has originally used to refer to independent agencies that the President was trying to rein in. Paul R Verkuil, *Valuing Bureaucracy: The Case for Professional Government* (Cambridge University Press 2017) 12.

an *auto-dichotomous* choice, as the transfer of power to private hands often comes with specified strings attached, including procedural controls, oversight and accountability.¹⁴ The question of how to keep the public checks on the private agents that perform public functions now is a general concern. Failure to do so might cause the sacrifice of the democratic value for efficiency: this means that the privatization might encourage more 'rent-seeking' behaviors of the corporation, and that the corporation gains lucrative profit at the public expense.¹⁵ The full range of responsibilities that government faces in privatization and the degree and level of those delegations have not yet been fully understood and carefully clarified. Many of the benefits of privatization, especially in infrastructure sectors, could only be achieved as long as an appropriate regulatory framework has been established by the government and well enforced by the effective judiciary.¹⁶ But the existing legal patterns are obviously not enough in fulfilling this task, and there is the calling for creativity in designing more flexible means to hold the private actors accountable.

Nonetheless, privatization underscored once again the strong social influence of modern corporations, which has long been contributing to the controversy on the public/private distinction from another perspective. In the name of a wide array of concerns about 'public interest', the government has long been intervened heavily into the regulation of the market and the operation of the corporation: those include promoting the long-term sustainable investment in the corporation development, requiring the corporation to take responsibility for environmental issues,

¹⁴ Paul R Verkuil, *Outsourcing Sovereignty: Why Privatization of Government Functions Threatens Democracy and What We Can Do about It* (Cambridge University Press 2007) 80–81.

¹⁵ See Alfred C Aman, *The Democracy Deficit: Taming Globalization through Law Reform* (New York University Press 2004); Jody Freeman, 'Extending Public Law Norms Through Privatization' (2003) 116 *Harvard Law Review* 1285.

¹⁶ Mariana Mota Proda, 'Regulatory Choices in the Privatization of Infrastructure', in Simon Chesterman and Angelina Fisher (eds), *Private Security, Public Order: The Outsourcing of Public Services and Its Limits* (Oxford University Press 2009).

and holding the corporation accountable to public welfare. These concerns often prompt radical bills that require the corporation to both hold extensive social responsibilities externally and democratize its governance structure internally. They implicitly abandon the *laissez-faire* belief, the fundamental underpinning the public/private distinction.

The problematic of the corporation in association with the public/private distinction is even more complicated at international level, mostly reflected by those heated debates on the proper regulation of multinational corporations (MNCs). It has been argued that it is precisely the adoption of the liberal framework of the public/private distinction by international law that has resulted the current difficulty in subjecting multinational corporations (MNCs) directly to it.¹⁸ Specifically, the adoption of the public/private structure results international law treating a corporation as identical to a national of a state, and the sole subject of international law is the sovereign-state. MNCs are thus are 'invisible' in international law.¹⁹ However, as modern era of economic globalization is marked by the enormous political and economic power that have acquired by MNCs, they now have been regarded as a potential threat to the global political order: while having the ability to breach the fundamental norms of international law, they are only indirectly

¹⁸ Fleur E Johns, 'The Invisibility of the Transnational Corporation: an Analysis of International Law and Legal Theory' (1994) 19 *Melbourne University Law Review* 893; A Claire Cutler, 'Critical Reflections on the Westphalian Assumptions of International Law and Organization: A Crisis of Legitimacy' (2001) 27 *Review of International Studies* 133; A Claire Cutler, Virginia Haufler and Tony Potter (eds), *Private Authority and International Affairs* (State University of New York Press 1999). About the liberal foundation of international law in general, see Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press 2005); Fernando Teson, 'The Kantian Theory of International Law' (1992) 92 *Columbia Law Review* 53. For critics of this viewpoint, see Gerry J. Simpson, 'Imagined Consent: Democratic Liberalism in International Legal Theory', 15 (1994), 103; Anne-Marie Slaughter and Jose E. Alvarez, 'A Liberal Theory of International Law', *Proceedings of the Annual Meeting (American Society of International Law)*, 94 (2000), 240–53.

¹⁹ This view has been confirmed by *Barcelona Traction, Light and Power Co Ltd, Belgium v Spain* [1970] ICJ 3, para 70.

accountable to international law through the agent of the state.²⁰ More seriously, ethnographical studies have even revealed that some MNCs are exercising *de facto* sovereign power in the third countries: this is particularly with regard to many 'development projects' in the source-rich developing countries, where MNCs (who are originally based in developed countries or on behalf of them) are providing vital infrastructural services and security operations.²¹ MNCs also involve deeply into international human rights issues both as a good role and as a bad role. For example, they have been viewed as a major source of global environmental harm as well as a leading source of technology to combat environmental problems.²² In regarding these issues, many 'soft' responsibilities, and on rare occasion, 'hard' obligations have been imposed on MNCs, but the public/private distinction blocks any potentiality in renewing the subject doctrine to systematically accommodate MNCs within international law. International law thus is argued experiencing a legitimacy crisis.²³

It is therefore to be expected that, where the developments of nationalization, privatization and corporation have prompted new legal concerns and challenged the sufficiency and cogency of the traditional regime of public law and private law, legal thought should find itself in need of new construction of the public/private distinction. However, in

²⁰ Though the orthodox view is that the corporation is created by the state, gaining agency from the grant of the state, and the state thus should take full responsibility for its creation's behaviors at international level. However, if we reverse the perspective, viewing the state as the agent who constantly mediates between its corporation and the other country, it makes much sense.

²¹ Many such situations could be found in Africa, see Jean Francois Bayart, Stephen Ellis and Béatrice Hibou, *The Criminalization of the State in Africa* (James Currey Publishers 1999). But one of the most typical examples could be found in Iraq. During the post-war construction, almost all the state assets in Iraq were substantially sold out to multinational corporations under the Bush Administration. Even the task of privatization itself has also been privatized to a MNC, namely the KPMG Offshoot Baring Pint. These privatization processes received forceful local resistance.

²² Peter T Muchlinski, *Multinational Enterprises and the Law* (Oxford University Press 2007) 574.

²³ A Claire Cutler, 'Critical Reflections on the Westphalian Assumptions of International Law and Organization: A Crisis of Legitimacy' (2001) 27 *Review of International Studies* 133.

Anglo-American jurisprudence very little has changed even after the emergence of the welfare state. This 'stability', perhaps, could be contributed to the general adoption of Austinian doctrine in common law systems. Austinian jurisprudence has differentiated between *de jure* sovereign authority from *de facto* sovereign power to protect its juristically constructed conception of sovereignty from any disharmony with actual fact, in order to bring a unity and (hierarchical) order into the world of social difference. Dicey, too, regards the province of jurisprudence as exclusive and self-contained, separating from the political province. For him, if the problem is juristic, its solution must also be so, and thus the ultimate foundations of law must be sought within the province of purely legal judgment.

This divorce of law from political ideas, philosophy and social facts, has long been questioned by legal scholars in the most critical fashion with regard to the disharmony between the growing social force of corporations and their fictitious legal personality.²⁴ If the development of the new social facts cause new social concerns and prompt new political ideas, then the law should be responsible for a timely responding and a reconstruction if necessary, instead of just intentionally ignoring them for the sake of maintaining a superficial stability. As it has often been said, any system exhibiting a contradiction between its legitimating logic and its reality is set up for a moment of crisis. In current situation, continuingly applying the traditional conception of the public/private distinction to the new realities might considerably lessen the democratic values preserved by the public law, especially the democratic principles of accountability, transparency and due process that are associated with the issues of public interest. As a result, Austin's ruse – to divorce 'law' from the structures of social life in order to preserve the authority of the former in light of the vagaries of the latter - threatens to reverse itself.

²⁴ For example, see FW Maitland, 'Moral Personality and Legal Personality' (1905) 14 *The Journal of the Society for Comparative Legislation* 192; and Hallis (n 2).

Once it is argued that public law has lost its ability to preserve democratic values, or to ensure the delivery of a genuine public interest, its very authority is brought into question.

More problematically, in the center of the current debates on the public/private distinction, there is a perplexing philosophical question that needs to be confronted with: what is the difference between the state and the corporation? Or, to put this in another way, what implications does the emerging idea of businesslike government have for future political theory of the state? After all, if the government can outsource public functions based on the principle of efficiency and cost-effectiveness, just like the private corporations makes a classic make-or-buy decision on contracting out the previously in-house functions, then there seems no difference between them.²⁵ The state is traditionally thought to be distinguishable from the corporation by its size, its bureaucratic complexity, its monopoly over coercive power, and its responsibility in delivering public services and promoting public goods. The enormous expansion of government resulted in the creation of decentralized units of bureaucratization, each of which defines their own sub-goals, operating procedures and expertise. Thus, the government becomes functionally separated inside. This double-movement of government toward both decentralization and bureaucratization suggest an essential similarity and continuity with nongovernmental collective entities. It also poses questions not just over its unity but its uniqueness as well.²⁶ Obviously, the first two characteristics of the state, namely its sheer size and bureaucratic complexity, have not only been undermined by the trend of the disaggregation of the state, but have also come to resemble modern giant corporations. As such, it appears that the only remaining substantial

²⁵ Paul R Verkuil, 'Public Law Limitations on Privatization of Government Functions' (2005) *Cardozo Legal Studies Research Paper* No. 104.

²⁶ See generally Chandler and Daems (n 10).

differences between the state and the corporation are the state's monopoly over force and its functional goal for providing public goods.

Yet even these final markers of the state, as a visibly 'public' institution for 'public interest', appears to be in the process of being surrendered. This is why the privatization of state functions, especially in the domains of the military, prisons, policing and domestic security, have naturally drawn intensive attention from academics and policy-makers.²⁷ The concern is that privatization might be going too far when it involves governmental functions that are 'inherent in sovereignty', namely the acquisition of coercive power that had formerly been reserved to the sovereign. This has often been discussed under the heading of 'outsourcing sovereignty'. Perhaps the most dramatic recent example is the operation of private military corporations in Iraq. It has been argued that such practices will inevitably lead to a defensive military force paid for by energy corporations to protect their interests in third countries (such as Blackwater USA, a leading private service provider for battalions of troops to protect oil fields in Nigeria).²⁸

On second thought, conceiving the corporation and the state as of same genre is not as alien to modern consciousness as to the common sense of people in history. We might easily forget the fact that the form of the 'corporation', as suggested by its old name the 'body politic', was widespread in England from medieval times onwards as an economic-political compound for ecclesiastical, municipal, and educational purposes. The English legal historian, Maitland, once wrote a vivid enumeration of the application of the corporation in English history:

²⁷ See generally, Simon Chesterman and Chia Lehnardt (eds), *From Mercenaries to Market: The Rise and Regulation of Private Military Companies* (Oxford University Press 2007); Simon Chesterman and Angelina Fisher (eds), *Private Security, Public Order: The Outsourcing of Public Services and its Limits* (Oxford University Press 2009).

²⁸ See Paul R Verkuil, *Outsourcing Sovereignty: Why Privatization of Government Functions Threatens Democracy and What We Can Do about It* (Cambridge University Press 2007).

Within these bounds [of corporation] lie churches, and even the medieval church, one and catholic, religious houses, mendicant orders, non-conforming bodies, a Presbyterian system, universities old and new, the village community which Germanists revealed to us, the manor in its growth and decay, the township, the New England town, the counties and hundreds, the chartered boroughs, the gild in all its manifold varieties, the inns of court, the merchant adventurers, the militant 'companies' of English condottieri who returning home help to make the word 'company' popular among us, the trading companies, the companies that become colonies, the companies that made war, the friendly societies, the trade unions, the clubs, the group that meets at Lloyd's Coffee-house, the group that becomes the Stock Exchange, and so on even to the one-man-company, the Standard Oil Trust and the South Australian statutes for communistic villages.²⁹

There were two critical phases in emergent corporate thought and practice, one in the sixteenth and the seventeenth centuries, and the other, later phase, between 1780 and 1840. The first critical phase saw the corporation being transformed from an institution of local government to a trading corporation governing international commerce. The second critical phase witnessed a transformation in the functions and behavior of the corporation as they became much more detached from the management of state. The private corporation pure and simple, and as we regard it today, was in fact was a product of social, political and economic conditions largely peculiar to the nineteenth century in which emergent ideas of *laissez faire* and individualism were its foundations. Before that, the social function performed by corporations was always recognized as its primary role, and promoting the welfare of the public and of society was considered as its primary goal.

The social dimension of the corporate form has always been emphasized as promoting public welfare through private interest by affording to private interest a social mechanism through which to adequately and effectually to express itself in social activity. If it is indeed the case that the form of corporation prevailed because it was found to be the best

²⁹ FW Maitland, 'Translator's Introduction' in to Otto von Gierke, *Political Theories of the Middle Age* (Cambridge University Press 1900) xxvii.

form of business ownership for the large permanent investments under concentrated management, and the best form to reconcile the private motive and public purpose of the activity exercised within it, then the corporate character of the modern state, substantiated as the public enterprises, should not be an exception. In short, when the state are deeply involved in market, when contracting out to the corporation is an increasingly common way for states to carry out their public responsibilities, when the multinational corporation clearly exhibits an independent agency in international economic and political affairs, it is imperative to rethink the public/private distinction, especially by examining the history of its development, to bring it into correspondence with the current social and political changes. Before engaged in exploring the ways in which this task might be addressed, the thesis sets off by clarifying the definition of the public/private distinction and its association with the legal and political relationship between the state and the corporation.

1. Theoretical Foundation I: *The Multiple Meanings of the Public/Private Distinction*

This distinction between the public and the private has often been regarded as represented mostly of how liberalism approaches and categorizes the social world.³⁰ It connotes, foremost, the most common separation between the private firm and the public government agency, who are regarded as possessing different capacities, operating on

³⁰ For example, in *Theory of Justice*, Rawls writes that the public/private distinction 'presupposed that the social structure can be divided into two more or less distinct parts, the first principle applying to the one, the second to the other. They distinguish between those aspects of the social system that define and secure the equal liberties of citizenship and those that specify and establish social and economic inequalities.' See John Rawls, *A Theory of Justice* (Harvard University Press 1971) 61. See also, Alan Watson, 'The Structure of Blackstone's Commentaries' (1988) 97 *The Yale Law Journal* 795.

different principles and responding to different incentives. In the strictest sense, the distinction might only refer to a laissez-faire attitude of the government with regard to the economic activities occurred in the civil society, which is associated with how to secure individual liberty and maximize national wealth. In the broadest sense, it is one of the overarching themes for socialism and liberalism in debating a wide range of social policies in liberal democratic states.³¹ Thus, the public/private distinction is characterized as multifunctional. Its contents are also context-dependent: the conceptual binaries that it denotes include the state and the non-state, politics and economy, publicity and privacy, social life and family, and so on. These binaries are often bounded up with different underpinning ideological assumptions and commitments, driven by different political and judicial purposes. In other words, their operations are often analytically distinct within the specific field of discourse, though they are 'neither mutually reducible nor wholly unrelated'.³² Habermas once used the phrase 'the syndrome of meanings' to describe the ironic fact that those concurrent binaries that possessed by the public/private distinction might have fused into a 'clouded amalgam'.³³ As a result, as Habermas has argued, the plural meanings of the public/private distinction make it impossible to replace the traditional category of the public/private with more precise terms when applying the term to certain situation.

In an attempt to explain the reason behind the 'overlapping and intertwined' meanings of the public/private distinction, Weintraub looks

³¹ See generally, Jeff Weintraub and Krishan Kumar (eds), *Public and Private in Thought and Practice: Perspectives on a Grand Dichotomy* (University of Chicago Press 1997); Michael Walzer, 'Liberalism and the Art of Separation' (1984) 12 *Political Theory* 315; Norberto Bobbio, *Democracy and Dictatorship: the Nature and Limits of State Power* (Peter Kennealy tr, Polity 1989).

³² Jeff Weintraub, 'The Theory and Politics of the Public/Private Distinction' in Jeff Weintraub and Krishan Kumar (eds), *Public and Private in Thought and Practice: Perspectives on a Grand Dichotomy* (University of Chicago Press 1997).

³³ Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* (first published in Germany 1962, Thomas Burger and Frederick Lawrence tr, Polity 1989) 1-2.

back to the time when the Roman Empire was replacing the ancient Greco-Roman republic.³⁴ He argues that the Roman Empire inherited much of the political vocabularies of the republican Greeks but also projected new meanings into them. The term 'public' is one of these shaded vocabularies: on the one hand, it maintains the original meaning of the collective self-determination of citizenship as the legacy of ancient Greek republicanism (which was later rediscovered by the self-governing cities of the Middle Ages); on the other hand, it could also be interpreted as equivalent to the notion of a centralized, unified and omnipotent sovereignty as the legacy of Roman Empire (which was conveyed by Roman law and reasserted later by royal power in the early modern time). According to Weintraub, this dual register of the term 'public' was later weakened and almost disappeared by the liberal tendency to resolve everything into the market and its autonomy.

The historical explanation offered by Weintraub is, however, too remote to be confirmed, though the influence of the history in the current multiple meanings of the public/private distinction should not be ignored, as the distinction is one of few conceptual dichotomies that have a long and distinguished genesis. Before engaged deeply into its history, in the following, I would first try to briefly clarify the various meanings of the public/private distinction to avoid unnecessary complexity and ambiguity. Generally speaking, there are mainly three basic senses of the public/private distinction that have been employed by the current legal and political discourses.

Free trade

The most widely applied meaning of the public/private distinction in current legal and political discourses is the so-called liberal-economic version of the public/private distinction, which refers to the distinction

³⁴ Weintraub (n 32).

between government and market economy (or state and civil society). The establishment of this version of the public/private distinction was associated heavily with the rise of political economy, especially the work of Adam Smith, who first elaborated and celebrated how the price mechanism of the free market efficiently allocated resources in a society. Contemporary simplified formulation of his central argument can be briefly represented by Mitchell's syllogism:

First, every individual desires to increase his own wealth; second, every individual in his local situation can judge better than a distant statesman what use of his labor and capital is most profitable; third, the wealth of the nation is the aggregate of the wealth of its citizens; therefore, the wealth of the nation will increase most rapidly if every individual is left free to conduct his own affairs as he sees fit.³⁵

Adam Smith believed in the invisible hand of the free market to automatically guarantee the public good by relying on healthy competition. According to him, a free market would 'maximize efficiency as well as freedom, secure for each participant the largest yield from his resources to be had without injury to others, and achieve a just distribution, meaning a sharing of the social product in proportion to individual contributions'.³⁶ Leading by it, the individual exercise of self-interest is the best way to promote the the general welfare. Since the individual's search for 'the most advantageous employment for whatever capital he can command ... naturally, or rather necessarily leads him to prefer that employment which is most advantageous to the society.'³⁷ Adam Smith also believed that people are more prodigal with the wealth of others than with their own. Thus, public administration was, in his opinion, prone to be negligent and wasteful because public employees did not have a direct interest in the outcome of their actions. The best strategy for the state is to adopt a laissez-faire attitude, which meant the

³⁵ Wesley C Mitchell, 'The Backward Art of Spending Money' (1912) 2 *The American Economic Review* 269.

³⁶ Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (first published 1776, Oxford University Press 1998).

³⁷ *ibid.*

minimum and essential level of government regulation in the market, in order to let the market run itself freely by its own will. The authority of the state should only be used, when it can provide the public value that cannot be offered by the market itself.

The private sector (or the market) thus is 'a sphere of private autonomy which government is bound to respect',³⁸ and in this sector, 'it is not legitimate for the state to be paternalistic or highly regulatory'.³⁹ Since liberalism is basically the philosophy of civil society, the private sector could also be understood as identical to the domain of civil society (though the private sector now has often been extended to include the sphere of activities associated with domesticity, intimacy and privacy). Civil society is commonly defined as 'a social world of self-interested individualism, competition, impersonality, and contractual relationships', and it comes into existence in the specific historical circumstances of a developing market economy as the corollary of a depersonalized state authority.⁴⁰ Civil Society is governed by the rational, voluntary and contractual relations between individuals and private organizations. It is supposed to be self-sufficient, autonomous, and subject to a set of distinctive principles of jurisprudence, namely the private law, that is presumptively established on a scientific foundation and stripped of political ideology.

As for the public sector, it refers to state administration and government agency that are regulated by the public law, such as constitutional law, administrative law and international law. One of the central maxims in the public sector is 'limited government' that sets the strict boundary of government regulation in order to protect the private sector from the

³⁸ *Prune Yard Shopping Centre v Robbins* (1980) 447 US 74, 93 (Marshall J, concurring).

³⁹ Robert H Mnookin, 'The Public/Private Dichotomy: Political Disagreement and Academic Repudiation' (1982) 130 *University of Pennsylvania Law Review* 1429.

⁴⁰ Weintraub (n 32).

possible coercion of public force. It thus allows the market to flourish with maximum autonomy and safety.

Democracy

The second meaning of the public/private distinction relates closely to Jürgen Habermas' concept of the 'public sphere'. The contemporary worldwide fascination with the 'public sphere' began in the 1990s when the English translation of his book *The Structural Transformation of the Public Sphere* was published.⁴¹ The public sphere has been envisioned by Habermas and his proteges as the communicative engine of modern democratic politics. As a politically-charged term, it mainly refers to the active citizenship as participating in the process of collective decision-making within a democratic framework of fundamental equality. Before this republic-virtue version of the 'public' was conceptualized and popularized by Habermas as the 'public sphere',⁴² it had already been expressed by Arendt as the 'public space'⁴³ and far earlier, by Tocqueville

⁴¹ Though it was first published in Germany in 1962, it has only been translated into English in 1989 by Thomas Burger and Frederick Lawrence.

⁴² Habermas uses the term 'public sphere' as a shorthand reference to the concept of the 'bourgeois public sphere', where 'private people come together as a public', and through their public use of reason engage in a debate with the state authority over 'the general rules governing relations in the basically privatized but publicly relevant sphere of commodity exchange and social labour'. He later also defines it as 'a network for communicating information and points of view'. In his influential work, *The Structural Transformation of the Public Sphere*, Habermas provides a historical-sociological account of the formulation of the public sphere in England, France and Germany from the eighteenth century to the twentieth century. To a large extent, his account represents a liberal tale of modernity: he sees the public sphere as a conception unique to the historical development of 'civil society' in the European High Middle Ages, and it is the public sphere that gave rise to the 'revolutionary establishment of parliamentary and democratic regimes'. See Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* (Polity 1989). See also his other works on the public sphere, 'The Public Sphere' in Michael Schudson (ed), *Rethinking Popular Culture: Contemporary Perspectives in Cultural Studies* (Recording for the Blind & Dyslexic 2008); 'The Public Sphere: an Encyclopedia Article (1964)' in Jostein Gripsrud and others (eds), *The Idea of the Public Sphere: A Reader* (Lexington Books 2010) 114.

⁴³ See Hannah Arendt, *The Human Condition* (University of Chicago Press 1958).

as the 'political society'.⁴⁴ The public sphere is located within the civil society, it is an isolated and middle space exclusive for the discursive interaction between the absolutist state (the public sector) and civil society (the private realm). In this discursive and rational sphere, the chief operative force is reasoned argument: instead of sheer economic or political power, critical reasoning constitutes the sole authoritative steering force and the only valid base for any decision in changing law and state policy. In this way, state authority is publicly monitored and held accountable for its activities, especially with regard to those economic and controversial social issues. Consequently, state legislations are often achieved as a compromise between the will of sovereign power and the public opinion. A well-functioning public sphere perfectly embodies the normative ideals of civil society proposed by liberal democratic theory.

The current popularization of the concept of the public sphere was coincident with the revival of the idea of civil society, within which a well-functioning public sphere was commonly understood to be the essential discursive infrastructure. Citizens of democratic states see government not only as a complementary mechanism to the market, but also as a platform to achieve higher moral aspirations. While the public/private distinction in legal discourse mostly concerns the legal controls of governmental activities, in the political discourse, it has been often invoked as an effort to foster effective civic engagements in making political decisions.⁴⁵ Through the public sphere, political ideas and opinions on controversial issues of society and government can be openly expressed and discussed. Nevertheless, it is important to be aware that

⁴⁴ See Alexis de Tocqueville, *The Old Regime and the French Revolution* (first published 1856, Anchor 1955). In this book, he drew a tripartite distinction between the state, civil society and political society.

⁴⁵ See generally, Judith Rodin and Stephen P Steinberg (eds), *Public Discourse in America: Conversation and Community in the Twenty-First Century* (University of Pennsylvania Press 2011); and Jean L Cohen and Andrew Arato, *Civil Society and Political Theory* (MIT Press 1994).

this orthodox account of the public sphere by Habermas has also received several critics.⁴⁶ In its severest critic, it has been even argued that the public sphere is 'a conjuring trick' and public opinion is a 'sham', both of which are ideological façades that conceal the vast differences between reasoned debate and manipulation by spin doctors, and between universal participation and limited access.

Private life

The third meaning of the public/private distinction refers to the distinction between public life and private life. Led initially by French scholars working on the history of intimate family life,⁵⁰ over the course of the past century, there has been an intensified interest from many disciplines in studying the transformation of the modes of public life (or social life) and private life.⁵¹ The notion of 'public' here refers to everything that is open and accessible, which can be seen and heard by everybody. The term 'private', on the other hand, refers to the place of intimacy, domesticity and privacy, which include household and family, sexual identities and behaviors, intimate relationships and friendships, and so on.⁵² Some scholars also describe this sense of the public/private distinction in the following terms: 'the public is the world of duty, work, hard decision-making, frustration, social maneuvers and transactions, battle and Foucault's age of surveillance; the private is "heaven in a heartless world," place of rest, peace, contemplation, renewal—

⁴⁶ See Pierre Bourdieu, 'The Public Opinion Does Not Exist,' in Armand Mattelart and Seth Siegelaub (eds), *Communication and Class Struggle* (International General 1979); Walter Lippmann, *The Phantom Public* (Routledge 1927).

⁵⁰ The most famous work is by Philippe Aries and Georges Duby, *A History of Private Life*, 5 volumes (Arthur Goldhammer tr, Harvard University Press 1992).

⁵¹ See generally, Dena Goodman, 'Public Sphere and Private Life: Toward a Synthesis of Current Historiographical Approaches to the Old Regime' (1992) 31 *History and Theory* 1;

⁵² Some scholar also uses the public/private distinction for demarcating the boundaries between the inner privacy of the individual self and the 'interaction order' of the outer world.

sanctuary'.⁵³ In short, whereas the ethos of public life is impersonal and standardized, that of private life is personal and emotional.

Modernization is characterized by the sharpening polarization of these two divided lives.⁵⁴ On the one hand, there is the aggregation of the swamped public realm of the market, the bureaucratic government and other hierarchical social organizations, full of strife and striving. On the other hand, there is the concurrent intensification of the private realm of intimacy and emotion, where the growing significance of the nuclear family and romantic love has been cherished as the last peaceful refuge. It has been described that the family has an 'awareness of itself as a precious emotional unit that must be protected with privacy and isolation from outside intrusion'.⁵⁵ Private life has surprisingly become a pivotal subject in social science as 'the mass phenomenon of loneliness in modern society' might reach its 'most extreme and most antihuman form', and intimacy has been regarded as the fight against it.⁵⁶ Yet, what we generally take granted as private life or public life today might not necessarily been separated in the past, as this split of life 'becomes so compulsive a habit, that it is hardly perceived in consciousness'.⁵⁷

⁵³ Paula R Backscheider and Timothy Distal (eds), *The Intersections of the Public and Private Spheres in Early Modern England* (Frank Cass 1996) 1.

⁵⁴ See generally, Dario Castiglione and Lesley Sharpe (eds), *Shifting the Boundaries: Transformation of the Languages of Public and Private in the Eighteenth Century* (University of Exeter Press 1995).

⁵⁵ Edward Shorter, *The Making of the Modern Family* (Basic Books 1975) 227.

⁵⁶ Arendt (n 43).

⁵⁷ Norbert Elias, *The Civilizing Process: Sociogenetic and Psychogenetic Investigations* (Wiley 1939) 190.

2. Theoretical Foundation II: *The Debates on the Public/Private Distinction*

The fact that public/private distinction fails to be an organizing principle, clear of agreed definitions or consensus, has constantly been the subject of heated debates from as early as the late nineteenth century up to date. The effort to draw a clear line between the public and the private, became unproductive and lost much of its practical significance, once the nineteenth-century world of 'decentralized competitive capitalism'⁵⁸ and 'liberal legalism'⁵⁹ had gone, replaced by the unprecedented twentieth-century administrative government with its deep involvement in economic and social affairs.⁶⁰ Many intermediate institutions have also been developed and shared the characteristics of both the public sectors and the private realm.

Yet, for the past decades, in the wake of international trends towards extensive deregulation and privatization,⁶² a resurgence of interest in the

⁵⁸ Morton J Horwitz, 'The History of the Public /Private Distinction' (1982) 130 *University of Pennsylvania Law Review* 1423.

⁵⁹ Duncan Kennedy, 'Stages of the Decline of the Public/Private Distinction' (1981) 130 *University of Pennsylvania Law Review* 1349. Kennedy also argued that although the judiciary could still have the authority to decide whether an entity is public or private, this could not change the fact that the public/private distinction has already lost its 'all-or-nothing' and 'set-like' quality.

⁶⁰ In modern states, there are three main types of government intervention in the economy: income redistribution (transferring resources from one group to another, and compelling the citizens to consume 'merit goods', such as primary education, social insurance and health care), macroeconomic stabilization (sustaining satisfactory levels of economic growth and employment through fiscal and monetary policy, sometime also through labor market and industrial policy), and market regulation (aiming at correcting 'market failures', such as monopoly power, negative externalities, incomplete information and insufficient provision of public goods).

⁶² Though both privatization and deregulation both share a belief that the market will greatly improve the services that used to be provided by a monopolistic bureaucracy, their focuses are different. Whereas privatization only shifts the operations of government responsibility to private hands, deregulation shifts the fundamental government power of the decision-making. Deregulation often takes place in the form of relaxed controls on entry barriers and rates in certain sectors, such as airlines, natural gas, railroads, telephone companies, and financial institutions. In America, the Bush administration's version of an 'ownership society' best epitomizes the ideal of deregulation. The debates over whether social security and health care should be public

public/private distinction could be observed. The public/private distinction now has ventured beyond its traditional preoccupation with limiting the government's activities in market, and engaged itself with some new tasks: as private enterprise is widely regarded as a superior organizing principle to governmental monopoly (as championed by Hayek and his followers), the public sector now is forced to reassert itself, and it tries to do so by re-invoking the public/private distinction to defend the territory of public sector.⁶³ It is undeniable that the relationship of government to the private sector is very much in flux these days as there is no longer a criterion of moral and political homogeneity available to determine what should be subject to government intervention and what should be left to the society to decide by itself. This indeterminacy of the public/private distinction has often worked as an invitation to rhetorical abuse. As Smelzer has argued, 'the private-public distinction constitutes a political strategy in and of itself'.⁶⁴ Similarly, Verkuil concludes that 'the legal

functions are fueled precisely by the ideology of deregulation. For a discussion on the relationship between devolution and privatization, see Joel F Handler, *Down from Bureaucracy: The Ambiguity of Privatization and Empowerment* (Princeton University Press 1996).

⁶³ For *symposiums*, see Symposium, 'The Public/Private Distinction' (1982) 130 U Pa L Rev 1289; Meir Dan-Cohen, 'Mediating Institutions: Beyond the Public/Private Distinction' (1994) 61 U Chi L Rev 1213; Michel Rosenfeld, 'Rethinking the Boundaries of Public Law Between Private Law and Public Law' (2013) 11 Int'l J Const L 125; Symposium, 'Public/Private Beyond Distinction?' (2013) 15 Theoretical Inquiries L 1. For *books*, see Paul Fairfield, *Public/Private* (Rowman & Littlefield 2005); Martha Minow, *Partners, Not Rivals: Privatization and the Public Good* (Beacon Press 2002); Jeff Weintraub & Krishan Kumar (eds), *Public and Private in Thought and Practices: Perspectives on a Grand Dichotomy* (University of Chicago Press 1997); SI Benn and GF Gaus (eds), *Public and Private in Social Life* (Croom Helm 1983). For *articles*, see Robert H Mnookin, 'The Public/Private Dichotomy: Political Disagreement and Academic Repudiation' (1982) 130 University of Pennsylvania Law Review 1429; Thomas K McCraw, 'The Public and Private Spheres in Historical Perspectives' in Harvey Brooks, Lance Liebman and Corinne Schelling (eds), *Public-Private Partnership: New Opportunities for Meeting Social Needs* (Ballinger Publishing Company 1984); Alan Freeman and Elizabeth Mensch, 'The Public-Private Distinction in American Law and Life' (1987) 36 Buff L Rev 237; Christine Chinkin, 'A Critique of the Public/Private Dimension' (1999) 10 Eur J Int'l L 387; Paul R Verkuil, 'Public Law Limitations on Privatization of Government Functions' (2005) 84 North Carolina Law Review 397; Paul M Schoenhard, 'A Three-Dimensional Approach to the Public-Private Distinction' (2008) Utah Law Review 635; Harvard Law Review, 'Developments in the Law: State Action and the Public/Private Distinction' (2010) 123 Harvard Law Review 1248.

⁶⁴ Neil Smelzer, 'A Paradox of Public Discourse and Political Democracy' in Judith Rodin and Stephen P Steinberg (eds), *Public Discourse in America* (University of Pennsylvania Press 2003).

definition of private and public will ebb and flow based on the preferences of interest groups, the agendas of political parties, and the view of the judiciary'.⁶⁵

Nonetheless, the debate on the public/private distinction with regard to state intervention in economic affairs could still approximately boil down to differences within utilitarian liberalism between Adam Smith and Bentham. While Adam Smith believes in the 'natural' harmonization of selfish interests, or the 'invisible hand' of the market, Bentham calls for an active planning for the maximum social happiness. This is because, while Bentham's utilitarianism is compatible with many of the premises of the laissez-faire doctrine, it also includes the consideration of 'justice' and 'equity'. This explains why it has been cited later as a rationale for some of the earliest social policies in Britain with regard to the elimination of child labor, usury and prison abuse.⁶⁶

Beyond the utilitarian framework, the theory of *market failure* also proposes a strong government intervention when a structural flaw could be identified in the market. It argues that there are some tasks that cannot be organized through the market, when the prices of goods and services give false signals about their real value, confounding the communication between producers and consumers. In other words, the market fails when prices lie.⁶⁷ In addition to the false price, the efficiency of markets could also be undermined by other factors, such as monopoly or the inability of providers to avoid 'free riders' (which refer to those who

⁶⁵ Verkuil (n 28).

⁶⁶ Barry Bozeman, *Public Values and Public Interest: Counterbalancing Economic Individualism* (Georgetown University Press 2007).

⁶⁷ There is a voluminous amount of economic literature on market failure, including Paul Samuelson, 'The Pure Theory of Public Expenditure' (1954) 36 *Review of Economics and Statistics* 387; Francis Bator, 'The Anatomy of Market Failure' (1958) 72(3) *Quarterly Journal of Economics* 351; and Kenneth Arrow, 'The Organization of Economic Activity: Issues Pertinent to the Choice of Market versus Nonmarket Allocation' in Robert Haveman and Julius Margolis (eds), *Public Expenditure and Policy Analysis* (Boston, Houghton and Mifflin 1979) 59.

benefit from a good or service without paying for it).⁶⁸ Stokey and Zeckhauser have identified six causes of market failure that need state intervention.⁶⁹ Once the flaw in the market has been identified, several possible public actions will be proposed accordingly. In theory, the government should calculate the estimated costs and benefits of each proposals, and adopt the one that promise the maximum net benefits.

Last but not least, the private sector now not only includes the market but also includes family, intimacy and privacy, which have opened up many of the traditionally invisible moral and cultural issues to public scrutiny. But when it comes to state intervention in those issues, the level of confusion has increased as a consequence of the fact that the left and the right have switched their traditional sides on the public/private distinction.⁷⁰ The traditional patterns, namely the 'natural' affinity between the left and the public sphere and between the right and the private sphere,⁷¹ have been swapped. While most conservatives now generally expect government intervention on moral and cultural issues such as abortion, religion and sexuality to encourage the 'right' kinds of behavior, leftists in fact privilege privacy in those matters. Nevertheless, this left' preference for privacy itself has become inconsistent because it also argues that some private acts are not truly private if those acts embody the consolidation of oppression and discrimination. As Wolfe has commented, if this criterion is pursued far enough, it could eliminate the category of the private altogether.

⁶⁸ Mancur Olson has argued that rational actors will never engage in collective action due to the 'free-rider' problem unless subjected to coercion and selective incentives. See Mancur Olson, *The Logic of Collective Action* (Harvard University Press 2009).

⁶⁹ Edith Stokey and Richard Zeckhauser, *A Primer for Policy Analysis* (WW Norton 1978) 298.

⁷⁰ Alan Wolfe, 'Public and Private in Theory and Practice' in Jeff Weintraub and Krishan Kumar (eds) *Public and Private in Thought and Practice: Perspectives on a Grand Dichotomy* (University of Chicago Press 1997).

⁷¹ The primary concern of the left is excessive privatism (the concentrations of private power) with the preference for public policy. The left commonly believes that what is carried out in private is illegitimate. As to the right, it emphasizes a defense of private decisions, both familial and economic, in favor of the private.

The real entity theory

The earliest debate on the public/private distinction began in the late nineteenth century in the form of challenging the fiction theory of corporate personality. The socialism of the nineteenth century defined itself as state-socialism, since it was believed that the best way of ensuring the individual liberty from the powerful capitalists was to increase the power of the state.⁷² On the other hand, the nineteenth century also witnessed the appearance of a great variety of corporations that embodied both the public and the private characters. These corporations, including trade-unions (and trade guilds), professional associations and the giant trading corporations, took on some of the responsibilities of the state, controlled the means of public services, and thus rivalled the state both in social influence and in organizational sophistication. These intermediate institutions mainly provided three kinds of mediation between the private individual and the public state. The first kind was a form of negative mediation, which tried to protect individuals from the power of state by providing them with a shelter or fulcrum for resistance. The second kind is positive mediation that offered people a chance of a collective life, from which people might derive indispensable spiritual and moral sustenance to flourish.⁷⁴ The third kind facilitates the well-function of democracy and the promotion of social welfare, and it includes private standard setting bodies, professional associations and charities. These have come to engage in public decision-making, providing public services and delivering benefits in myriad ways.⁷⁵ Many new loyalties have thus cut across the relation of the individual to the state, lying on these intermediate corporations.

⁷² Frederick Hallis, *Corporate Personality: A Study in Jurisprudence* (Oxford University Press 1930).

⁷⁴ Meir Dan-Cohen, 'Between Selves and Collectivities: Toward a Jurisprudence of Identity' (1994) 61 *The University of Chicago Law Review* 1213.

⁷⁵ Jody Freeman, 'The Private Role in the Public Governance' (2000) 75 *NYU L Rev* 543.

The public character of these intermediate corporations, or the decentralization of political authority, produced a demand for a new type of political theory to re-construct the relationship between the state and these social organizations. It has been claimed that the orthodox theories of state-sovereignty were out of date, and the state should no longer be the reservoir of all political power. The pressure of new social forces (the so-called syndicalist forces of trade-unions and other associations) stimulated a new kind of legal discourse, namely an emergent criticism of the traditional fiction theory of corporate personality. These modern social associations, especially trade-unions and professional associations, claim to have their distinguish spheres of social influence over which the state has no right of control. Far from admitting that their powers are conceded by and derived from the state, as the traditional 'fictional' theory always asserted, they argued that their power inhered in their nature as living social organizations. Their legal personalities are not fictitious, but real, which no state should deny.

The real legal personality of the corporation was first systematically theorized by German jurist Otto von Gierke in his 'real entity' theory (or the 'natural entity' theory) in the late nineteenth century. This theory holds that each corporate entity (including the state, since this theory also holds that the state and the corporate group are of the same genus) is a pre-legal entity, something already there, and the law is bound to 'see' its personality rather than inventing it. The real entity theory is chronologically the last-emerging theory of corporate personality. Before it were the 'fiction' theory and the 'contract' theory. The fiction theory suggests that the personality of the group is a mere legal artefact and the formation of its existence is exclusively left in the hands of the state. The contract theory holds that groups became legal entities by voluntary and consensual partnerships of individual members, which has a constitutive

status-creating consequence in law.⁷⁷ Both the fiction theory and the contract theory have a hard time explaining the social force that was acquired by corporations and other social organizations beyond the state's control and the existence of '*de factor* corporations'.⁷⁸ Gierke's proposal of the real entity theory constituted the most essential part of his ardent criticism of Savigny's adoption of the individualism of Roman law. In drafting of the German Civil Code, Gierke and his followers were trying to preserve the tradition of indigenous German law in order to prevent a purely Romanist codification which was being promoted by Savigny's theories of the systematic and historical character of law.⁷⁹ According to Gierke, the collectivist character of indigenous German law was best represented by its unique understanding of group association: as contrasting to the fiction theory of corporate personality that originated from Roman Law, the ontological speculation about the 'real group personality' is that the existence of German collective groups is something beyond the mere realm of law.

The real entity theory was first spread outside the German world by Frederic William Maitland's 1900 translation of Gierke's *Political Theories of the Middle Age*, which was identified as 'the beginning of the Anglo-American controversy over paradigms of the corporation'.⁸⁰ As the founding father of English legal history, Maitland is undoubtedly one of the dominant figures in nineteenth-century British intellectual thought. After a failure to gain a Fellowship in Moral and Mental Science at Trinity College, Cambridge, Maitland gave up his initial ambition to be a scholar

⁷⁷ Michael J Phillips, 'Reappraising the Real Entity Theory of the Corporation' (1994) 21 Fla St U L Rev 1061.

⁷⁸ For the idea of '*de facto* corporations', see Henry Osborn Taylor, *A Treatise on the Law of Private Corporations* (Kay & Brother 1884) 145; Victor Morawetz, *A Treatise on the Law of Private Corporations* (Boston, Little, Brown and Co 1886) 735.

⁷⁹ On the Romanist-Germanist interplay in legal scholarship in nineteenth-century Germany, see Mathias Reimann, 'Nineteenth Century German Legal Science' (1990) 31 BCL Rev 837.

⁸⁰ Mark H Hager, 'Bodies Politic: The Progressive History of Organizational "Real Entity" Theory' (1989) 50 U Pitt L Rev 575.

and moved to London, becoming a barrister specializing in conveyancing. In 1884, he returned to Cambridge and became a Reader in English Law. By utilizing the untouched resources of the Public Record Office, he started his renowned legal historical research.⁸¹ Having earned his fame through his works, such as *The History of English Law up to the Time of Edward I*,⁸² in the later years of his life Maitland's interest seemed to turn from a purely technical account of legal history to the intersection between law and politics. It is widely acknowledged that his late works were heavily influenced by Otto von Gierke. Maitland appears to have been first drawn to Gierke's work in his research on the legal history of *persona ficta*, but he soon became fascinated by Gierke's political theory of real entity. Maitland himself was also the key proponent of the real entity theory in Britain: in his late life, he published five papers in an attempt to substantiate the real entity theory with the local legal practice of England.⁸⁴ The real entity theory was seen as a liberation from the laissez-faire and individualist jurisprudence that represented by contemporary common law, and Maitland's argument was later taken up enthusiastically by the English political pluralists who were against the theory of state sovereignty.

The prevalence of the real entity theory in England resonated profoundly with one of the most important political features of that time, namely 'the attack on the state'. During this period the state had in many respects become a discredited institution and the parliamentary government in England was falling into cynical disfavor. Maitland's promotion of real entity theory was also launched by his attack on the traditional legal concept of the state in common law, namely the Crown as 'corporation

⁸¹ See generally HAL Fisher, *Frederick William Maitland, Downing Professor of the Laws of England: A Biographical Sketch* (Cambridge University Press 2013).

⁸² Although this book was co-written with Sir Frederick Pollock, Maitland is said to have undertaken most of the work.

⁸⁴ Those five articles are all collected in David Runciman and Magnus Ryan (eds), *Frederic William Maitland: State, Trust, and Corporation* (Cambridge University Press 2003).

sole'. Relying on Gierke's real entity theory, Maitland argued that the Crown as a corporation sole caused the long divorce of legal thought and political thought. This long-existing inconsistency between legal thought and political thought perhaps resulted from the fact that the English jurists, unlike the German or French jurists, neither needed to tackle certain philosophical difficulties nor required political thought for their solution. English jurisprudence was a 'well-marked-out science', a dialectical machinery with its own autonomy. The later dominance of the Austinian view of sovereignty as a unitary juridical organization only aggravated the division as it reiterated that the province of jurisprudence was exclusive and self-determined, and no extra-legal interpretation would be needed for the purposes of giving it authority.

As to America, in the nineteenth century, the fiction theory continued to be dominant, and the clear affirmation could be found in the famous *Dartmouth College* case.⁸⁵ Ironically, it was also in the case of *Dartmouth College* that for the first time a clear-defined differentiation between the public corporation and the private corporation has been launched, which freed the business corporation from state regulation and thus gave rise to its tremendous proliferation in the late nineteenth century. This development of the private corporation in turn triggered widespread intellectual debates as to whether the corporation could enjoy the protection of various rights as a natural person under the Constitution and the Bill of Rights. When the application of constitutional protection of individuals has been extended to the private corporations by the court, it was generally believed this was because Freund published *The Legal Nature of Corporations*⁸⁶ and introduced real entity theory into the United States, which has been implicitly applied in the case (some scholars,

⁸⁵ Chief Justice Marshall stated in *Dartmouth College*: 'A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence.' *Trustees of Dartmouth College v Woodward* (1819) 17 US 518, 636.

⁸⁶ Ernst Freund, *The Legal Nature of Corporations* (University of Chicago Press 1897).

though, hold that the Supreme Court's decision to advance the application of constitutional rights to corporations was based on the contract theory).⁸⁷ The real entity theory thus became one of the most centered legal discussions in the early-twentieth-century America. Writing in the heat of the debate in 1911, Machen has observed that any American lawyer writing upon the subject of corporations was not permitted to treat this global controversy with indifference and he had to choose on which side to stand.⁸⁸ Yet Machen also argued that the followers of real entity theory 'strive to exaggerate the importance of those questions, in order to pose as great reformers engaged in the gigantic task of emancipating the legal world from the thralldom of mediaeval superstition'.⁹⁴

After more than two decades of intense debate on corporation personality in America, Dewey's article in 1926 muzzled any further argument by arguing convincingly that there was no fixed linkage between the particular political doctrine and the particular theory of corporate personality.⁹⁵ He suggested that any given theory of corporate personality could be manipulated to yield different and even contradictory political conclusions. This sharp critique took the wind out of the debate, and the nature of his critique exemplified the trending outlook of legal realism of that time. As Hager has observed later, 'to Dewey's pragmatic mind, such controversies represented an enormous philosophical error, a preoccupation with abstract concepts, rather than concrete things, of which all the disputing parties were equally culpable'.⁹⁶ The debates

⁸⁷ See *Hale v Henkel* 201 US 43 (1906).

⁸⁸ See Arthur Machen Jr, 'Corporate Personality' (1911) 24 Harv L Rev 253; Morton J Horwitz, 'Santa Clara Revisited: The Development of Corporate Theory' (1985-1986) 88 W Va L Rev 173, and the case *Santa Clara County v Southern Pacific Railroad Co* 118 US 394 (1886); Morton J Horwitz, *The Transformation of American Law 1870-1960: The Crisis of Legal Orthodoxy* (Oxford University Press 1992) 72;

⁹⁴ Machen, *ibid*.

⁹⁵ John Dewey, 'The Historic Background of Corporate Legal Personality' (1926) 35 Yale LJ 655.

⁹⁶ Hager (n 80).

surrounding the real entity theory thus abruptly subsided, 'leaving only traces for historians to follow'.⁹⁷ Contemporary scholars generally accept Dewey's idea that corporate personhood can be easily manipulated to arrive at varying conclusions based on different political agendas.⁹⁸ For example, Hager has observed that, in the dissents of the contemporary American constitutional case of *Bellotti*,⁹⁹ a contemporary version of the fiction theory is used in a pro-regulatory fashion, presenting a striking contrast to early twentieth-century legal discourse which viewed the fiction theory as anti-regulatory and the real entity theory as pro-regulatory.¹⁰⁰ Similarly, in his research on the 'migration' of the legal discourse of corporate personality from Germany to the Anglo-American world, Harris also found that sometimes one corporate personality theory can be utilized for conflicting purposes and sometimes different theories can be utilized for the same purpose. He concludes that each personality theory 'became embedded in certain meanings when it functioned in concrete historical and spatial discourse settings'.¹⁰¹

⁹⁷ Ron Harris, 'The Transplantation of the Legal Discourse' (2006) 63 Wash & Lee L Rev 1421.

⁹⁸ Hager (n 80).

⁹⁹ *First National Bank of Boston v Bellotti* (1978) 435 US 765, 809-10 (J White dissenting).

¹⁰⁰ This refers to *First National Bank* (ibid) which concerned the Massachusetts statute. The Massachusetts statute arose due to the concern that the huge concentrations of private capital might influence politics, posing a serious threat to the democratic mechanism of voting and decision-making. The statute forbade corporations from spending money to influence public referenda which did not directly affect their business interests. However, it was struck down by the Supreme Court in *First National Bank*. The Court held that such a statute violates first amendment speech rights, which corporations enjoy along with natural persons. The dissenting justice insisted that corporate personhood must be understood as merely fictional, created solely by the state through its grant of incorporation and for the purpose of certain economic goals, since corporate personhood is in no sense on a par with a 'natural person'. It is therefore reasonable that a corporation should be afforded lower first amendment protection than a natural person.

¹⁰¹ Harris (n 97).

The welfare state

Over the course of the twentieth century, the complex social and economic situations associated with modernity called out for a more interventionist government, which became known as the modern bureaucratic administrative state.¹⁰² This fundamentally changed the relationship between the state and the market, and accordingly the relationship between the public and the private. Strong interventionist government especially took place in countries that are often regarded as second-comers to industrialization, such as Belgium, France, Germany and the United States, who shared the belief that the state should perform a primary role in economy in order to catch up with the then-industrialized Great Britain.¹⁰³ This belief gave rise to two different patterns of state behavior in economy: one was the continental pattern, known as the 'entrepreneurial' state, which involved massive government intervention in the market, and it was epitomized by the Weimar period of Germany; and the other was the American pattern, known as the 'regulative' state, which was characterized by a limited involvement in production but a greater reliance on state regulation of the market, and it was epitomized by Roosevelt's New Deal. The period after World War II also witnessed the apogee of public enterprise and nationalization in Great Britain and France. Governments worldwide had never been so extensively involved in social, economic and domestic affairs as they were at that stage. The states shaped virtually every sector of the economy either through macroeconomic planning, welfare programs, or public infrastructure and services

¹⁰² This period is called the period of *pax administrativa* that is characterized by 'a large, wide-reaching, and meaningfully public State bureaucratic infrastructure, thick legal webs constraining and guiding administrative exercises of State power, and broad popular support'. Jon D Michaels, *Constitutional Coup: Privatization's Threat to the American Republic* (Harvard University Press 2017) 40.

¹⁰³ See generally, Pier Angelo Toninelli and Pierangelo Maria Toninelli, *The Rise and Fall of State-Owned Enterprise in the Western World* (Cambridge University Press 2000).

Unsurprisingly, both the growing state-owned enterprises, and the explosion of government agencies that perform a combination of executive, legislative and adjudicative functions, have foreclosed the discussion of the public/private distinction.¹⁰⁴ It is no longer meaningful to apply the public/private distinction to limit state activities, since in these situations it makes no difference whether categorized them as public or private. There were concurrent declines of other conceptual dichotomies, such as the dichotomies of state/society, property/sovereignty, individual/group, and so on. In together, they indicate the decay of the liberal way of demarcating the social world.¹⁰⁵ The prevalence of the critical legal studies and the public choice theory further has strengthened the view that there was no longer a purely private realm or a purely public one. Governance should be understood as a set of negotiated relationships between different political powers and public opinions.

In addition, how to keep a state competitive also becomes one of the primary responsibilities of the modern state in the era of globalization. This responsibility again emphasizes state's interventionist role in economic affairs. It manifests mostly in the popularity of the concept of 'competition state', which has come to the fore in the 1980s when Thurow developed a zero-sum view of the role of government from a global perspective.¹⁰⁶ He argued that the state must stimulate investment by using public funds in order to keep competitive on a global basis.

¹⁰⁴ In this context, administrative law scholarship has attempted to defend the administrative state against accusations of illegitimacy by promoting mechanisms, such as legislative and executive oversight and judicial review, to render government agencies *indirectly* accountable to the public (*Direct* political accountability often refers to the notion that citizens could punish or reward decision-makers by voting them in or out of office), see generally Kathleen Bawn, 'Choosing Strategies to Control the Bureaucracy: Statutory Constraints, Oversight, and the Committee System' (1997) 13 *The Journal of Law, Economics, and Organization* 101.

¹⁰⁵ See generally, David Kairys, *The Politics Of Law: A Progressive Critique* (Basic Books 1998).

¹⁰⁶ Lester Carl Thurow, *The Zero-Sum Society: Distribution and the Possibilities for Economic Change* (Basic Books 1980).

Cerny later identified the different modes of state economic intervention in adaptation to economic and political globalization. He also predicted that they all would finally homogenize into one orthodox mode.¹⁰⁷ Ronen Palan further delineated three elements that comprised the competition state: the belief in national competitiveness as the means for generating economic growth, the shift from demand-side measures to supply-side measures, and the disappearance of the distinction between national and international policies as they both integrated into an overall national competitive strategy.¹⁰⁸

Privatization

In a way, our society has come full circle: from an early time when civil society struggled to emerge, to a period when the liberal state established separate realms of public and private, to the time when government became virtually indispensable, to the present when many things government does have devolved to the private sector.¹⁰⁹

While the corporation is growing into a new social power, the welfare government increasingly fell into public disfavor and turn into something cynically discredited, which finally resulted in the public demands for the devolution of governmental power. There were mounting questionings over the public 'accountability' of the government. While a wide-reaching bureaucratic government might demonstrate a greater ability to deliver 'public goods' and promote the 'public interest', it simultaneously became vulnerable to the countervailing principle of democracy and accountability.

¹⁰⁷ See Philip G Cerny, 'Paradoxes of the Competition State: the Dynamics of Political Globalization' (1997) 32 *Government and Opposition* 251; 'Restructuring the Political Arena: Globalization and the Paradoxes of the Competition State' in Randall D Germain (ed), *Globalization and its Critics: Perspectives from Political Economy* (Macmillan 2000) 117; 'Political Globalization and the Competition State' in Richard Stubbs and Geoffrey RD Underhill (eds), *Political Economy and the Changing Global Order* (Oxford University Press 2005) 376.

¹⁰⁸ See Ronen Palan 'Luring Buffaloes and the Game of Industrial Subsidies: A Critique of National Competitive Policies in the Era of the Competition State' (1998) 12 *Global Society* 326.

¹⁰⁹ Paul R Verkuil, 'Public Law Limitations on Privatization of Government Functions' (2005) 84 *North Carolina Law Review* 397.

This has often been viewed as the constitutional crisis of the twentieth century. Specifically, according to the conventional theory of the democratic society, the political and bureaucratic model of accountability would allow the public, as a collective, to define through established processes what it would like the government to provide (this collectively desired output is the so-called 'public value'); to keep pressure on government agencies to ensure good performance;¹¹⁰ and to develop the technical means for determining to what extent these purposes have been achieved.¹¹¹ However, in the past several decades, there are increasing doubts about both the capabilities of the collective institutions and the government agencies in forming a genuine public will and in practically achieving the original public goals, instead of turning into a tool for advancing the economic interests and policy ideas of the special groups. This loss of confidence in government again convinced the public to keep as little as possible to these collective institutions and governmental agencies, and to leave as much as possible to market mechanisms.¹¹² In this sense, this view of government has little difference from a view of *commercialism* or the radical idea of 'individualism'.

¹¹⁰ The public could demand and review information about government performance, complain to elected representatives, make suggestions in administrative hearings, and file suits in courts. It might be helped by outsiders such as the media and professionals.

¹¹¹ According to Mark Moore, the success this assessment of satisfaction depends on three things: (1) the ability to form a coherent collective aspiration that reflects many voices and ambitions, and to help make those who are disappointed understand why they have been disappointed; (2) the ability to measure activity and results in ways that assure us that goals we collectively agreed upon were reached; and (3) the capacity to provide incentives for those who are doing the inventing, the managing, and the working—incentives both to work hard and to remain creative and adaptable. In other words, it is the flexibility to allow government agencies to recognize differences in the client population and to experiment with alternative ways of achieving the public goals. See Mark H Moore, 'Introduction' (2003) 116(5) *Harvard Law Review* 1212.

¹¹² In addition to the doubts about government's capacity to deliver public goods and services, there are other possible explanations for why citizens in the US have lost confidence in their government. See generally, Joseph S Nye, Jr, Philip D Zelikow and David C King, *Why People Don't Trust Government* (Harvard University Press 1997).

The cynical view of government has further been deeply entrenched by the neoliberal theory. Neoliberalism was born in America to support a state-reduction project that directed against the New Deal regulatory architecture of the welfare state. It holds that society is so complex that no comprehensive or omnipotent public authority can guide all actors to their appropriate destinations. On this premise, it is better to allow individuals to make personal decisions, in the faith of that the market will guide those decisions toward an unplanned but harmonious equilibrium. The promotion of decentralized decision-making, as opposed to central planning (that proposed by socialism and totalitarianism), is in the center of neoliberal argumentation. The best society is believed to be the one that allows the maximum number of private choices. Driven by market competition, private contractors can provide higher-quality and lower-cost services than government in some governmental tasks.

This view once again repeats the liberal fetish for 'the market' as the best mechanism to advance efficiency, effectiveness and material prosperity. However, what is new this time is a belief that such advances can be made without the re-occurrence of the deleterious economic, social and political consequences of the past, and seems to underscore both the success of the Corporate Social Responsibility movement and the current enthusiasm for social enterprise and social entrepreneurship.¹¹³ Doubts continue to be cast upon the behavior of government officials and the trustworthiness of their intentions. Attention has focused on the need for increased accountability and transparency of their actions. To this end, numerous toolkits have been added, such as regulatory guidance, 'best practice', the preferred prescription by regular monitoring, and regulation to ensure conformity and answerability. The reduced autonomy of government officials has arguably allowed them to manage processes but

¹¹³ See Mark H Moore, 'Creating Public Value through Private/Public Partnerships' (conference paper 2005).

not to shape the implementation of public policy, or neutered their capacity to think and respond imaginatively and with reflexivity to the challenges. The proliferation of market-based governance mechanisms has naturally promoted ideas such as the businesslike state (or the market state) and the privatized military, which generate complex and heated debates.¹¹⁴ It seems now that the task of the public/private distinction has shifted from protecting the private sphere to defending the public sphere: it is worth asking whether the public/private distinction can be helpful in setting some objective boundary for government activities, both as a general idea and as a concrete proposal, especially when countless debates about market-and-morality issues surround us in the age of globalization.¹¹⁵

In reality, a major wave of disenchantment with state intervention in the economy did sweep through the industrial nations since the 1980s when state-owned enterprises began to decline due to the poor performance of economies. A form of political consensus has been reached in both the United States and Britain that the welfare state should to be reformed. The economic role of the state has been reappraised and the anti-state climate has gained greater prominence, both of which have cleared the way for a massive dismantling of public undertakings. The privatization movement, which generally refers to the delegation to private businesses of fundamental tasks traditionally associated with governance, has gained great momentum. This has been done in the hope of shaking up the

¹¹⁴ The current Donald Trump presidency epitomizes perfectly the trend of the businesslike state. One of Trump's 'shadow advisers' is the Blackwater founder Erik Prince who champions a private military alternative to a recommitment of uniformed personnel in Afghanistan. It has also been revealed recently that Prince is pitching the idea of privatizing functions of the CIA to the White House as a means of countering 'deep state' enemies in the intelligence community seeking to undermine Trump's presidency.

¹¹⁵ The two most powerful converging forces currently affecting the world economy and global politics are the forces of privatization and globalization. Although it is ironic that the very moment that the nation-state is called upon to fight against the unprecedented concentration of global capital, its size is shrinking and its capacity is squeezed by the privatization movement and the political demands for devolution of power.

current governmental bureaucracies and increasing efficiency, innovation and responsiveness.¹¹⁶ It began in Britain when Margaret Thatcher took office in 1979 and engaged in a sweeping privatization agenda.¹¹⁷ Throughout the 1980s, the Thatcher government shed major assets and responsibilities.¹¹⁸ In America, as early as 1955 the former *Bureau of the Budget* issued a directive that discouraged federal agencies from producing for themselves any 'product or service [which] can be procured from private enterprise through ordinary business channels'.¹¹⁹ However, it was during the Reagan administration that the privatization movement officially began.¹²⁰ It is noteworthy that there is a major difference between privatization in these two countries because historically fewer assets have been state-owned in the United States. America has never had as many public enterprises and assets as Britain has had, especially considering its entirely private telecommunications, steel and oil industries, and the overwhelmingly private rail, gas and electricity industries. In this sense, while privatization has been mostly a matter of selling off public enterprises in Britain (such as British Gas and British Telecom), in America it just means enlisting private energies to improve the performance of governmental tasks.¹²¹

¹¹⁶ There is another kind of government transformation associated with privatization, namely the so-called 'marketization of the bureaucracy'. Government agencies radically overhaul their in-house employment practices in accordance with the private sector: hundreds of thousands of tenured civil servants have been reclassified as at-will employees to make sure they internalized the pressures, demands, and incentives of the competitive private labor market. See Jon D Michaels, *Constitutional Coup: Privatization's Threat to the American Republic* (Harvard University Press 2017).

¹¹⁷ See generally Madsen Pirie, *Dismantling the State* (National Center for Policy Analysis 1985); Peter Young and Stuart Butler, *Privatization: Lessons from British Success Stories* (International Briefing No 15, The Heritage Foundation, 1987).

¹¹⁸ It sold British Gas, British Telecom, Jaguar, British Airways, the Sealink ferry service, all or part of its stakes in British Sugar, British Aerospace, British Petroleum and British Steel, as well as nearly one million public housing units and various public utilities.

¹¹⁹ Bureau of the Budget, Bulletin 55-4, 1955. This policy was reformulated by the successor agency, the Office of Management and Budget, as Circular A-76 in the late 1960s, which later became the label for federal-level privatization.

¹²⁰ See generally, Peter Young, *Privatization around the Globe: Lessons for the Reagan Administration* (National Center for Policy Analysis 1986); Stuart Butler, 'How Reagan Can Put Privatization Back on Track' (December 1986).

¹²¹ With respect to privatization in America, see generally Emanuel S Savas, *Privatizing the Public Sector: How to Shrink Government* (Chatham House 1985).

This difference can be understood more easily by differentiating between, on the one hand, the privatization of the 'producing' agents (i.e. shifting the production of public goods and services to private providers) and the privatization of the means of 'financing' (i.e. shifting the financing of public goods and services from using public fiscal resources to charging individual consumers directly, often in infrastructure sectors though occasionally with government subsidies) on the other hand.¹²² Obviously, the latter is more radical in the sense that it represents a shift from a 'collective' decision-making process (the political procedure) to an 'individual' decision-making process (the market mechanism), and significantly shrinks the government – as long as government's size is measured not by the number of its employees but by the proportion of the nation's resources gathered under the government to achieve collective goals. In addition, though the privatization movement has often gone hand in hand with the deregulation movement, they are not identical. Deregulation challenges the economic role of government over the economy based on the idea that government regulation is overzealous and needs to be reined in. The deregulation movement seeks to end government regulatory programmes that are unnecessary, inefficient or counterproductive.

Privatization poses the question of what can private agencies do for government and what the government should be doing for itself. It is true that efficiency and accountability need not to be in opposition to one another, but when efficiency dominates, as in the case of privatization, it might clash with accountability and so undermine democratic values.¹²³ By reviving the concept of the public/private distinction, public law scholars suggest using this concept to reserve the 'inherent public

¹²² John D Donahue, *The Privatization Decision: Public Ends, Private Means* (Basic Books 1989) 131.

¹²³ See generally, Alfred C Aman, *The Democracy Deficit: Taming Globalization Through Law Reform* (NYU Press 2004).

functions' in the hands of government. Verkuil has argued that, although long-standing practices assume that contracting-out 'inherent government functions' is not permitted, the pro-privatization environment has eroded whatever limits that phrase implies. He suggests the national legal system can put a limit on privatization and retain a core of activities as inherently public (such as in the Israeli Supreme Court case regarding prisons).¹²⁴

Perhaps, the challenge for the market economy and governance of the twenty-first century is to continuously invent some new public-private hybrid to accommodate the new reality. The increased reliance on public-private partnerships (PPPs) to help struggling governments in their efforts to achieve social goals perhaps indicates a compromise approach to privatization, offering a 'third way' to view government and regulation. However, the idea of PPPs is hardly a new one. PPPs have been used in urban economic development for at least a century and have been used in the Western exploration and development of trade with both the New World and the Far East for at least four centuries. The very concept of the joint-stock corporation grew out of the combination of state authority (the power of various monopolies) with private economic pursuits as early as the sixteenth century, though concerns have been constantly expressed that the public side of PPPs are routinely overmatched by the private side.

¹²⁴ Verkuil (n 109).

3. Theoretical Foundation III: *The Distinction between Public Law and Private Law*

In both civil law and common law systems, the laws that are applied to the government and those that are applied to the corporation and the individual, are subject to different legal regimes with different principles and inner values. A division of labor is involved here: while the responsibility of public law is to control the government by both limiting and regulating it to duly perform its basic duties, the responsibility of private law is to provide the corporation and the individual with a fair starting point and a safe environment in the pursuit of their individual ends using their own resources.¹²⁵ This is also based on the belief that since public officials and agencies have special privileges, either the legitimate exercise of coercive power over citizens or the monopoly in certain fields, they should bear special responsibilities and duties for their activities, such as the duty of procedural fairness and so on, and thus subject to a set of special regime of law, namely the public law.

Public law concerns the Constitution and the maintenance and regulation of a centralized, distinct and identifiable governmental authority. Its main constituent elements are constitutional law, administrative law, criminal law and sometimes international law.¹²⁶ The inner values of public law

¹²⁵ See generally Ronald Dworkin, *Law's Empire* (Harvard University Press 1986); John Rawls, *Political Liberalism* (Columbia University Press 2005); Arthur Ripstein, *Force and Freedom* (Harvard University Press 2010); Ernest J Weinrib, *Corrective Justice* (Oxford University Press 2012).

¹²⁶ In the UK, as there is no codified Constitution, the distinction between constitutional law and administrative law is more or less artificial. Generally speaking, whereas administrative law focuses on 'public administration' (a term that is identical to 'bureaucracy', referring to both individual officials and corporate agencies), constitutional law is concerned more broadly with the whole range of public institutions and public functions. In terms of the traditional tripartite division of public functions into legislative, executive and judicial, administrative law focuses primarily on the executive function, whereas constitutional law is equally concerned with all three functions and the

generally include accountability, transparency, due process and participation. It deals primarily with relations between citizens and the government. Given the state is believed to have a propensity to be irresponsible, abusive and discriminatory, the most pressing goal for public law is to subject governmental administration strictly to a distinct body of law.¹²⁷ Private law, on the other hand, is concerned with regulating interpersonal relationships between free and equal individuals and corporations. It encompasses foremostly, amongst other things, tort law, contract law and property law. The ultimate goal of private law is to fulfill human needs; in other words, to 'maximize the total satisfactions of valid human wants'.¹²⁸

If the liberal public/private distinction is mainly about both limiting the regulation of the state in the market and guaranteeing the protection of the rights and interests of private parties, then it is the presence of 'public law' that instantiates the fundamental ideology of a 'democratic, rule of law-bound state'.¹²⁹ Public law, grounded on the profound distrust of government, not only sets the boundary of government activities in order to create a free space for civil society to flourish, but also specifies the responsibilities of the government in order to guarantee the well-function of the market and civil society. The private sphere of social relations and the economy is governed by private law in a self-sufficient and autonomous manner as private law is presumptively established on a scientific foundation stripped of political ideology. Currently, in many areas of American legal scholarship, such as bankruptcy, contracts and commercial law, the so-called scientific foundation of private law is almost

institutions that perform them. See Peter Cane, *Administrative Law* (Oxford University Press 2011) 3-4.

¹²⁷ Having said this, it has been argued that public law's preoccupation with discretion is not practically fruitful. See Christopher Edley, *Administrative Law: Rethinking Judicial Control of Bureaucracy* (Yale University Press 1990).

¹²⁸ Henry Melvin Hart and others, *The Legal Process: Basic Problems in the Making and Application of Law* (Foundation Press 1994) 114.

¹²⁹ See generally Adam Tomkins, *Public Law* (Oxford University Press 2003). It describes the development of English public law.

identical to the employment of economic approach to design the most efficient legal institution, most of which are founded on rational choice theory.

Civil law tradition

The distinction between public law and private law has its roots in ancient Roman Law, and the earliest clear definition could be found in Justinian's *Digest*. According to Ulpian's description,

There are two branches of legal study: public and private law. Public law is that which respects the establishment of the Roman commonwealth, private that which respects individuals' interests, some matters being of public and others of private interest.¹³⁰

The distinction between public law and private law reappeared during the renaissance of Roman law in the late Middle Ages, but it lacked institutional significance for a long time as it was not compatible with the feudal setting. But the distinction was still preserved superficially. The compilers of Justinian's *Institutes* simply adopted the Roman classification of private law into persons, actions, and things, which placing obligations illogically under things (though they included titles on criminal law and the office of the judge).¹³¹ The revival of Roman law in the twelfth century did not develop public law very much. As the compilers declared that all law concerns either persons, actions or things, leaving public law as 'an indeterminate residue rather than as a residual category'.¹³² Nevertheless, one important source, under the heading *De statu hominum* in Justinian's *Digest* stated that 'since all law is established for the sake of human beings, we first need to consider the *status* of such

¹³⁰ The Digest of Justinian, Vol I, extract from Ulpian's Institutes, D. 1.1.1.2.

¹³¹ PG Stein, 'The Development of the Institutional System' in PG Stein, Joseph Anthony Charles Thomas and ADE Lewis (eds), *Studies in Justinian's Institutes: In Memory of J.A.C. Thomas* (Sweet & Maxwell 1983) 151.

¹³² JWF Allison, *A Continental Distinction in the Common Law: A Historical and Comparative Perspective on English Public Law* (Oxford University Press 1996) 111.

persons, before we consider anything else'.¹³³ The word *status* came to designate the legal standing of all sorts and conditions of men, in which the ruler's status was described as enjoying a distinctive 'estate royal'. As a result, whenever a legal question about the ruler was raised, it has been emphasized as an issue about a state of majesty and a high estate. This formula could be observed in chronicles and official documents throughout the latter half of the fourteenth century in the well-established monarchies of France and England.

In the late sixteenth century, absolutist monarchy achieved administration centralization, and the modern concept of government began to crystallize.¹³⁴ In the eighteenth century, the separation between the executive power and the judicial power emerged.¹³⁵ It was only until the nineteenth century that the distinction between public law and private law acquired some significance in continental jurisprudence, especially in French law. Napoleon held the firm conviction that judges must never be allowed to impede the actions of the government. He did this by reconstituting two sets of courts: one was ordinary judicial courts dealing with private and criminal cases, and the other was administrative courts that connected with the government administration. It was these administrative courts that developed the distinctive *droit administrative* in France law. The nature of French *droit administrative* was composed of two main ideas: (1) relations between the government (and its officials) and private citizens must be regulated by a distinctive body of laws, which may differ considerably from the laws that governed relations between private persons; (2) ordinary judicial tribunals that determined

¹³³ The Digest of Justinian I, 5.2: 35.

¹³⁴ The concept of modern government was first described in Bodin's work *The Six Books of a Commonweale* (1583). Also see Quentin Skinner, 'The State' in Terence Ball, James Farr and Russell L Hanson (eds), *Political Innovation and Conceptual Change* (Cambridge University Press 1989) 349.

¹³⁵ Montesquieu's analysis in *The Spirit of the Laws* (*Esprit des Lois*, 1748) Book XI, ch 6 was a pivotal attempt to conceptualize this separation. See generally MJC Vile, *Constitutionalism and the Separation of Powers* (Liberty Fund 1998).

ordinary questions, either civil or criminal, must have no concern with matters between a private person and the state.¹³⁶

French Revolution seemed to be a destructive example of what could be done in the name of the general will (as promoted by Jean-Jacques Rousseau's notion of an infallible general will). Benjamin Constant criticized Rousseau for establishing the unlimited sovereignty of the people without clarifying a workable relationship between it and government. Unlike Rousseau, he was reconciled to the idea of the representative government and justified the legal control over such government, either through individual rights of surveillance or through legal control over governmental administration.¹³⁷ Later, the Doctrinaire Liberals and Tocqueville focused upon how *administrative centralization* became the outcome of the Revolutionary history of France. The perception of a centralized, distinct and identifiable administration rendered it possible to subject the government administration to a distinct body of public law. The prominence of the distinction between public law and private law culminated in the establishment of a separate system of courts for resolving public-law disputes in nineteenth-century France: the establishment of the *Tribunal des Conflits*, as the extended jurisdiction of the *Conseil d'Etat*, marked the first declaration of the formal autonomy of public law.¹³⁸ The public law thus has been continually developed by the *Conseil d'Etat*.

¹³⁶ AV Dicey, *Introduction to the Study of the Law of the Constitution* (first published 1885, Liberty Fund 1982) 221-222.

¹³⁷ See Benjamin Constant, 'The Liberty of the Ancients Compared with that of the Moderns' (the idea was first articulated as a lecture to the Athénée Royal of Paris in 1819); Stephen Holmes, *Benjamin Constant and the Making of Modern Liberalism* (Yale University Press 1984).

¹³⁸ Allison (n 132). For French administrative law, see generally, Charles John Hamson, *Executive Discretion and Judicial Control: An Aspect of the French Conseil D'Etat* (Hyperion Press 1979); for an interesting interpretation, see Bruno Latour, *The Making of Law: An Ethnography of the Conseil d'Etat* (Alain Pottage tr, John Wiley & Sons 2013).

Adoption by common law

The distinction between public law and private law was little known in England before the twentieth century. The relative success of the institutional changes of the seventeenth century meant that the institutions of British public life in the early twentieth century had never been under sufficient 'strain' to raise these phenomenological questions about laws on government in a pressing form.¹³⁹ While the economic troubles of the seventeenth-century resulted in an extensive *administrative* centralization in France, the similar economic problems gave rise to *legislative* and *judicial* centralization in England. This meant that unlike the alliance between the Crown and the bourgeoisie against the feudal nobility in France, in England there was an alliance between the nobility and the bourgeoisie in the destruction of royal bureaucracy.¹⁴⁰ This precluded England the development of a theory of popular sovereignty conducive to administrative centralization, but promoted, instead, the parliamentary sovereignty and the supremacy of the common-law courts.¹⁴¹

In the nineteenth century, despite the fact that the English administrative system began the process of centralization, the legal concepts of the state and the constitution were still left theoretically unelaborated due to the general insularity from political theory and political reality of legal scholars and practicing lawyers. The rationale of the administrative role of the government was expressed obscurely by a prescriptive *laissez-faire* theory of the time. Or, perhaps, there is something especially 'un-English' about public law, as there was not no separation between the 'office-holder' and the 'office'. English law traditionally used the concept of the

¹³⁹ FW Maitland, 'Translator's Introduction' in Otto von Gierke, *Political Theories of the Middle Age* (Cambridge University Press 1900) xliii.

¹⁴⁰ See generally Allison (n 132).

¹⁴¹ See generally L Siedentop, 'Two Liberal Traditions' in A Ryan (ed), *The Idea of Freedom* (Oxford University Press 1979); Kenneth HF Dyson, *The State Tradition in Western Europe* (Oxford University Press 1980).

Crown as corporation sole and the concept of the person as the individual official to deal with the affairs of the state and the government. As Barker has identified, the state barely existed in English law, and Hale, Blackstone, and Austin all dealt with public issues under the law of person. In this sense, Barker concluded that 'our State is on its executive side a bundle of officials, individually responsible for their acts, and only united by a mysterious Crown which is responsible for nothing and serves chiefly as a bracket to unite an indefinite series of 1+1+1'.¹⁴² Indeed, the modern British legal history could be said to be based precisely upon a rejection of the idea of public law.¹⁴³ Thanks to the Victorian jurist AV Dicey, this rejection is perfectly justified. Popularizing Tocqueville's theoretical criticism of the *Conseil d'Etat*, Dicey argued that French public law essentially privileged and protected public officials, especially when compared to the English legal system that subjected public officials equally to the general law in a uniform way with citizens. He differentiated the meaning of 'independence of the judges' in England from that in France. As he argued, in France:

... while the ordinary judges ought to be irremovable and thus independent of the executive, the government and its officials ought (whilst acting officially) to be independent of and to a great extent free from the jurisdiction of the ordinary Courts.¹⁴⁴

In contrast, in England:

... the idea of legal equality, or of the universal subjection of all classes to one law administered by the ordinary courts, has been pushed to its utmost limit. With us every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen.¹⁴⁵

This normative commitment to the equality between government official and citizen eliminates any possible exemption of officials 'from the duty of

¹⁴² Ernest Barker, 'The Discredited State: Thoughts on Politics before the War' (1915) 2 Political Quarterly 113.

¹⁴³ Martin Loughlin, *The Idea of Public Law* (Oxford University Press 2004).

¹⁴⁴ Dicey (n 136) 219.

¹⁴⁵ *ibid* 193.

obedience to the law which governs other citizens', nor 'from the jurisdiction of the ordinary tribunals'.¹⁴⁶ By arguing that 'rule of law' admits no separation between public law and private law, Dicey thus concludes that there can nothing in England really corresponding both to the 'administrative law' (*droit administrative*) or the 'administrative tribunals' (*tribunaux administratifs*) of France.¹⁴⁷

Needless to say, the distinction between public law and private law has apparently been adopted (at least on the surface) by English law since the twentieth century, especially in relation to the reformed application for judicial review.¹⁴⁸ But it has still been the subject of ongoing debate.¹⁴⁹ It appears that Dicey's 'rule of law' argument continues to be relevant, and in fact has been further developed. For example, in case *Regina v Somerset County Council ex parte Fewings*, Justice Laws states:

¹⁴⁶ *ibid* 202-203.

¹⁴⁷ *ibid* 202-203.

¹⁴⁸ The adoption of the distinction is also the result of other developments, including Britain's membership of the EU; changes in public administration (privatization of public enterprises and contracting-out of public functions, and the enactment of the Human Rights Act 1998. A clear indication of the on-going practical significance of the distinction between public law and private law is provided in *British Steel plc v Customs and Excise Commissioners* [1996] 1 All ER 1002, 1012-3. The controversial cases include *R v Panel on Take-overs and Merges, ex parte Datafin plc* [1987] QB 815; and *R v Disciplinary Committee of the Jockey Club, ex parte Aga Khan* [1993] 1 WLR 909.

¹⁴⁹ See generally, Carol Harlow, "Public" and "Private" Law: Definition without Distinction' (1980) 43(3) *Modern Law Review* 241, and Carol Harlow, 'Why Public Law is Private Law' in AAS Zuckerman and Ross Cranston, *Reform of Civil Procedure* (Oxford University Press 1996); Geoffrey Samuel, 'Public and Private Law: A Private Lawyer's Response' (1983) 46(5) *Modern Law Review* 558; AE Tay and E Kamenka, 'Public Law—Private Law', and P Finn, 'Public Function—Private Action: A Common Law Dilemma' in SI Benn and GF Gaus (eds), *Public and Private in Social Life* (St Martin's Press 1983); Sandra Fredman and Gillian Morris, 'Public or Private? State Employees and Judicial Review' (1991) 107 *LQR* 298, and 'The Costs of Exclusivity: Public and Private Re-examined' (1994) *PL* 69; JWF Allison, *A Continental Distinction in the Common Law* (Oxford University Press 1996); Nicholas Bamforth, 'The Public Law-Private Law Distinction: A Comparative and Philosophical Approach' in Peter Leyland and Terry Woods, *Administrative Law Facing the Future: Old Constraints and New Horizons* (Oxford University Press 1997); Dawn Oliver, *Common Values and the Public-Private Divide* (Butterworths 1999); P Cane, 'Accountability and the Public/Private Distinction' in Nicholas Bamforth and Peter Leyland (eds), *Public Law in a Multi-Layered Constitution* (Hart 2003); Mark Freedland, 'The Evolving Approach to the Public/Private Distinction in English Law' in Mark R Freedland and Jean-Bernard Auby, *The Public Law/Private Law Divide* (Hart 2006); Dawn Oliver, 'What, if Any, Public-Private Divides Exist in English Law?' in Matthias Ruffert (ed), *The Public-Private Divide: Potential for Transformation?* (BIICL 2009).

Public bodies and private persons are both subject to the rule of law ... But the principles which govern their relationship with the law are wholly different. For private persons, the rule is that you may do anything you choose which the law does not prohibit. It means that the freedoms of the private citizen are not conditional upon some distinct and affirmative justification for which he must burrow in the law books ... But for public bodies the rule is opposite, and so of another character altogether. It is that any action to be taken must be justified by positive law. A public body has no heritage of legal rights which it enjoys for its own sake; at every turn, all of its dealings constitute the fulfilment of duties which it owes to others; indeed, it exists for no other purpose.¹⁵⁰

The focal point is still on whether creating an autonomous body of public law would in fact protect the officials or limit them. As Freedland has observed, for English lawyers 'the drawing of the distinction between public law and private law has become a wonderfully intricate mixture of taxonomy and ideology, as the drawing of the distinction between Common Law and Equity used to be, and perhaps for not wholly dissimilar reasons'.¹⁵¹

Modern Skepticism

In the contemporary context, while traditional private law still retains a prominent position on the European continent, American law has clearly shifted its focus from substantive private law to a legal regime centered on public and procedural law. This was stimulated by the emergence of the American Legal Realist movement of the 1920s and 1930s.¹⁵² The conventional distinction between public law and private law thus has been tremendously challenged. It was argued that when private law was examined from a functional perspective, its assumed neutrality was

¹⁵⁰ *Regina v Somerset County Council ex parte Fewings and Others* [1995] 1 ALL ER 513, 524.

¹⁵¹ Mark Freedland, 'The Evolving Approach to the Public/Private Distinction in English Law' in Mark R Freedland and Jean-Bernard Auby, *The Public Law/Private Law Divide* (Hart 2006)

¹⁵² For an authoritative collection of readings on legal realism, see Dennis Hutchinson, *History of American Legal Thought II: The American 'Legal Realists'* (University of Chicago Press 1984).

totally debunked by its hidden public nature and the political distributive effects.¹⁵³ For example, Cohen argues that because both property rights and contract rights were enforced by the state, the 'rights' should be conceived as delegated public powers subject to the rules of public accountability.¹⁵⁴ In a similar sense, Hale points out that the use of force to guarantee private property (property itself determining the distribution of income) implied that the free market was an artifact of public violence.¹⁵⁵ The implication of this kind of viewpoint is that private law, which seems satisfied with ostensible independence and formal equality of human relationships, should not be immunized from a genuine liberal commitment to self-determination and substantive equality. As Horwitz concludes, 'by 1940, it was a sign of legal sophistication to understand the arbitrariness of the division of law into public and private realm'.¹⁵⁶

Nevertheless, by the 1950s, as most of the changes that advocated by legal realists had been adopted, it was widely believed that private law had been restored to a position of political neutrality.¹⁵⁷ The 'scientific' nature of private law is understood as generated from its economic approach to produce complex and sophisticated analyses of the incentive effects of different liability rules and social policies.¹⁵⁸ Still, both critical legal studies and public choice theory have contributed to the pervasiveness of the view that there is no purely private realm and no purely public one. Kelsen's argument is widely quoted when discussing the unwieldiness of the distinction: 'the distinction between public and

¹⁵³ The functional view of law is epitomized by Holmes' argument that law is a tool for achieving social ends so in order to understand law requires an understanding of social conditions. See Oliver Wendell Holmes, *The Common Law* (Little, Brown and Co 1881).

¹⁵⁴ See Morris Cohen, *Law and the Social Order* (New Transaction 1993).

¹⁵⁵ See Robert Hale, 'Coercion and Distribution in a Supposedly Non-Coercive State' (Academy of Political Science 1923).

¹⁵⁶ See Morton J Horwitz, 'The History of the Public/Private Distinction' (1982) 130 U Penn LR 1423.

¹⁵⁷ Many of the leading realists were also co-opted into mainstream legal activities, such as joining the judiciary and law-drafting. See Richard A Posner, 'The Decline of Law as an Autonomous Discipline: 1962-1987' (1987) 100 Harv LR 761.

¹⁵⁸ See Ernest J Weinrib, *The Idea of Private Law* (Oxford University Press 2012) section 1.2.

private law thus varies in meaning upon whether it is criminal law or administrative law that one wishes to separate from private law. The distinction is useless as a common foundation for a general systematization of law.’¹⁵⁹ Verkuil has expressed a similar idea in metaphor in stating that: ‘if the law is a jealous mistress, then the public-private distinction is like a dysfunctional spouse—you can’t live with it and you can’t live without it. It has been around forever, but it continues to fail as an organizing principle.’¹⁶⁰

The confusion somehow intensifies once the distinction between public law and private law goes international. It has been argued that the traditional public/private distinction only acts as an effective ‘stabilizer’ by projecting given values to the international level, recreating a ‘familiar’ legal regime beyond the state.¹⁶¹ But this projection can be problematic: since the state is not only a subject but also the source of international law, there is no guarantee that the values and mechanisms behind the public/private distinction will remain the same. In fact, once the public/private distinction transcends their contexts of origin into the ‘multipolar’ global legal space, public law and private law begin to imitate each other, adopting and replicating the mechanisms and instruments from the other side, to move toward ‘a genuine global law’. Casini borrows Lewis Carroll’s ‘rabbit-hole’ to describe this hybrid public-private global law and treats it as an opportunity for public law and private law to

¹⁵⁹ Hans Kelsen, *General Theory of Law and State* (Lawbook Exchange 1999) 207.

¹⁶⁰ Paul R Verkuil, *Outsourcing Sovereignty: Why Privatization of Government Function Threatens Democracy and What We Can Do about It* (Cambridge University Press 2007).

¹⁶¹ Lorenzo Casini, ‘“Down the rabbit-hole”: The Projection of the Public/Private Distinction beyond the State’ (2014) 12(2) *International Journal of Constitutional Law* 402; see also, ‘Hybrid Public-Private Organizations and Private Bodies Exercising Public Functions’, in Sabino Cassese and others, *Global Administrative Law: The Casebook* (3rd edn, IRPA 2012) and Jeroen Van Der Heijden, ‘Friends, Enemies, or Strangers? On Relationships between Public and Private Sector Service Providers in Hybrid Forms of Governance’ (2011) 33 *Law & Pol’y* 367. For international investment law, see Alex Mills, ‘Antinomies of Public and Private at the Foundations of International Investment Law and Arbitration’ (2011) 14 *J Int’l Econ L* 469 and Gus Van Harten, ‘The Public-Private Distinction in the International Arbitration of Individual Claims Against the States’ (2007) 56 *Int’l Comp L Q* 371; for cultural property, see Francesco Francioni, ‘Public and Private in the International Protection of Global Cultural Goods’ (2012) 23 *Eur J Int’l L* 719.

move from their long-standing mutual indifference and collaborate with each other. This interbreeding process, argued by Casini, would better suit the contemporary social practices, which characterized by multitude fragmentation and thus could no longer be analyzed by a single binary distinction between the public and the private.

Furthermore, since the early twentieth century, feminist legal scholarship has provided the most trenchant and systematic criticism of the public/private distinction in the legal field, which continues to date. Through the lens of power, feminism has exposed the dark side of the public/private distinction as a legal technique to obscure the regressive features of private law and to improperly shield it from critical scrutiny and possible government intervention. It is argued that the public/private distinction is not so much an innocent analytic category that was naturally formulated according to the social fact, but rather a discursive artefact that serves a very strong ideological function of hiding the hand of the state in maintaining the hierarchical structure of the private sphere. Various dominations (patriarchal, class, racial and so on) are obscured by the propagation of a public/private dichotomy, pretending that social and economic life are outside government and law, and whose arrangements have simply arisen from individual decisions and choices.¹⁶² Such criticism is so powerful that Weintraub even claims that the public/private distinction has now literally moved from the 'liberal-economistic' formulation to the 'Marxist-feminist' one.¹⁶³

For feminists themselves, the public/private distinction provides them with a certain language of analysis that 'promises to confer a unity upon the investigations of the diverse social, legal and economic practices

¹⁶² Nikolas Rose, 'Beyond the Public/Private Division: Law, Power and the Family' in *Law and Families* (Routledge 2017).

¹⁶³ Jeff Weintraub, 'The Theory and Politics of the Public/Private Distinction' in Jeff Weintraub and Krishan Kumar (eds), *Public and Private in Thought and Practice: Perspectives on a Grand Dichotomy* (University of Chicago Press 1997).

within which women are subordinated'.¹⁶⁴ Without such a central organizing theme, feminists previously could only tie up concrete instances of oppression and domination with either general networks of social power or specific and immediate strategies for reform. Now, each of the contingent and local cases can be understood in terms of the division and opposition of public and private spheres. No wonder Pateman declared that 'it [the public/private distinction] is, ultimately, what the feminist movement is about'.¹⁶⁵

The normative dimensions of the feminist critique are perfectly encapsulated in the maxim that 'the personal is the political'.¹⁶⁶ Feminists argue for a 'double separation of the public/private distinction', namely a sub-separation between the private and the public within civil society itself. The private sphere within the civil society is the domain of the family, the household, or the domestic (sometimes also intimacy), the 'forgotten' area for liberal theorists. Reviving this forgotten area is important because on the one hand it is impossible to detach individual economic activity of civil society from domestic life since the worker (invariably taken to be a man) can only concentrate on his work when his wife performs (unpaid) all the 'natural' activities, such as providing food, washing and cleaning, and taking care of the children.¹⁶⁷ On the other hand, it helps us realize that the social life of women in this area should not be conceived as a matter of individual ability but as public factors structured by laws and by policies. As Benhabib has argued, any issues should become matters of public-political dispute if they are reflexively

¹⁶⁴ Rose (n 162).

¹⁶⁵ Carole Pateman, *The Disorder of Women: Democracy, Feminism, and Political Theory* (Stanford University Press 1989) chapter 'Feminist Critiques of the Public/Private Dichotomy'.

¹⁶⁶ See generally, Jean Bethke Elshtain, *Public Man, Private Woman: Women in Social and Political Thought* (Princeton University Press 1981).

¹⁶⁷ Pateman (n 165).

challenged 'from the standpoint of the asymmetrical power relations governing them'.¹⁶⁸

Public Interest

The legal concept of the 'public interest' deserves some special examination here, as it has played a fundamental/contentious role in legitimating the invasion of public power into the private sphere in common law systems, especially during the New Deal period in America. After all, based on liberal ideology, in a democratic society, all government actions are presumptively based on, and justified by reference to, the concept of the 'public interest'.¹⁶⁹ And "one commonly held distinction between government and market organizations is that government should work in the 'public interests'."¹⁷⁰ In the name of public interest, the governmental interventions mainly occur in the areas of health care, housing, education and in providing other 'essential' services such as electricity gas, water, transport and oil. The common law has used the notion of 'public interest' in both a negative sense and a positive sense. In terms of negative, the courts have used this term to deny some private rights and duties arising in the agreements and activities of individuals and corporations. For example, the courts will not enforce a duty of secrecy if the disclosure of the secret is the public interest. For the positive sense, the common law goes beyond the prohibitory usage and employs public interest as a justification for governmental imposition of obligations upon individuals and corporations. It is this positive sense of public interest that this section is mainly concerned with.

¹⁶⁸ Seyla Benhabib, 'Feminist Theory and Hannah Arendt's Concept of Public Space' (1993) 6 *History of the Human Sciences* 97.

¹⁶⁹ Paul R Verkuil, 'Understanding the "Public Interest" Justification for Government Actions' (1998) 39 *Acta Juridica Hungarica* 141; See also David Faulkner, *Public Services, Citizenship and the State: the British Experience 1967-97*, in Mark Freedland and Silvana Sciarra (eds) *Public Services and Citizenship in European Law: Public and Labour Law Perspectives* (Oxford University Press 1998).

¹⁷⁰ Barry Bozeman, *Public Values and Public Interest: Counterbalancing Economic Individualism* (Georgetown University Press 2007) 83.

Historically, English judges, in the absence of a division between private law and public law, have particularly focused their attention on the conception of public interest to protect 'the specific interest of the state or the community to which private interests may sometimes have to give away'.¹⁷³ As early as medieval time, the common law has already used 'public interest' to subjected 'common carriers', whose labors or services were made available to the public, to absolute liability when they exercised their economic powers to raise prices and restrict output. These regulations included: 'a common laborer was obliged to serve whomsoever sought and retained him; common hostellers and common victuallers had to sell their food at market price; the common gaoler had definite duties in relation to the reception and care of prisoners.'¹⁷⁴ These common callings also had a uniform 'public duty' to serve all comers to the extent of their particular calling and could only charge reasonable rates for their services. At least since the middle of the seventeenth century, the public interest regulation has been furnished with a new theory by the common law to limit private enterprise: the public interest regulation could also be invoked 'if an individual or corporation is given a charter or franchise by the Crown or by Parliament to provide service to the public generally, and if the effect of that charter or franchise is to give that individual etc. a legal or *de facto* monopoly in that service.'¹⁷⁵ Yet, these two paralleled applications of the public interest regulation slowly gave way to the idea of liberalism. It not only led to a contraction of the types of the common callings and finally limited them to only three types, namely the innkeeper, the common carrier and the ferryman. But the courts also became increasingly reluctant to apply the public interest

¹⁷³ Alice Erh-Soon Tay and Eugene Kamenka, 'Public Law—Private Law' in Stanley I Benn and Gerald F Gaus, *Public and Private in Social Life* (Croom Helm 1983) 79.

¹⁷⁴ Paul Finn, 'Public Function—Private Action: A Common Law Dilemma', in Stanley I Benn and Gerald F Gaus (eds), *Public and Private in Social Life* (Croom Helm 1983). Also see generally A.W. B. Simpson, *A History of the Common Law of Contract* (1975) 229-233.

¹⁷⁵ Finn, *ibid.*

regulation on private service: in the courts' view, if the activities of service corporations were to be regulated, it was for Parliament and Parliament alone to effect such regulation.¹⁷⁶

While the public interest encountered a total abdication in England, it somehow revived in America. In the case *Munn v. Illinois*, the U. S. Supreme Court has applied the public interest regulation to the situation of monopoly power and declared that it has been subjected to state control since the earliest times.¹⁷⁷ By referring to Lord Chief Justice Hale's treatise, the court argued that when private property is 'affected with a public interest', it ceases to be *juris privati only*. This revival of the public interest regulation endowed the states substantive regulatory power over private entities, and after the *Munn* decision, the regulation of monopoly had later been developed into statutory status in the form of the Sherman Act.¹⁷⁸ The case *Munn v. Illinois* was thus a watershed in the struggle for public regulation of the private enterprise, though, as some scholar has commented, trying to apply the fact of 'common carriers' to the 'shifting sands' of monopoly power made no economic sense.¹⁷⁹

More significantly, during the New Deal period, the term 'public interest' was consistently employed in the Congresses' delegations of legislative authority to the expanded administrative agencies of the federal government. Motivated by the redistributive goals of remedying market failure and of solving problems of non-transactional costs, New Dealers interpreted the public interest as the utilitarian concept of the greatest good for the greatest number. Admonished to act in 'the public interest,

¹⁷⁶ *ibid.*

¹⁷⁷ *Munn v. Illinois* (1876) 94 U. S. 113, 123-25. The case concerned with a legislation of the state of Illinois that regulated the charges for the services of grain elevators. This legislation had been challenged as violating the Fourteenth Amendment of the Constitution. Also see Martin Loughlin, *The Idea of Public Law* (Reprinted, Oxford University Press 2004) 77-80.

¹⁷⁸ The Sherman Antitrust Act 1890. Also see William E Nelson, *The Roots of American Bureaucracy* (Harvard University Press 1982) 130-33.

¹⁷⁹ Paul R Verkuil, 'Privatizing Due Process' (2005) 57 *Administrative Law Review* 963.

convenience and necessity', a phalanx of agencies was created by Congress, equipped with legislative, executive, and judicial powers.¹⁸⁰ New Deal leaders approached the regulatory state with a great optimism. Believed in the 'science of administration' and the value of expertise, they argued that the delegation of complicated decisions to talented regulators overseen by the courts would produce the genuine public interest, and legislature should have a free hand in making the social choices inherent in the regulatory state. The courts also supported this commitment of New Deal leaders. During the New Deal period, the concept of public interest was first explored by Justice Brandeis in *Muller v. Oregon*.¹⁸¹ Influenced heavily by Gerald Henderson, who was then a public law scholar and the architect for the science of administration, Justice Brandeis constructed the idea of the public interest through the tools of economic analysis, financial acumen, and an inherent sense of fair play.¹⁸² Later in the case *National Broadcasting Co. v. United States*, Justice Frankfurter established the utilitarian concept of the 'public interest' by equating it with securing 'the maximum benefits of ratio to all the people of the United States'.¹⁸³

4. Methodology: *The Cambridge School and Contextualization*

In examining the genealogy of the distinction between the public state and the private corporation, one method that this study has heavily relied upon is that of contextualization. As early as the 1960s, Quentin Skinner

¹⁸⁰ This was stated in statutes of the New Deal period. For statutory references, see Kristin E Hickman and Richard J Pierce, *Administrative Law Treatise* (Aspen Law & Business 2016) 2.6.

¹⁸¹ *Muller v. State of Oregon* (1908) 208 U. S. 412.

¹⁸² See Louis Dembitz Brandeis, *The Unpublished Opinions of Mr. Justice Brandeis: The Supreme Court at Work* (Belknap Press of Harvard University Press 1957) 152-153, 220-225.

¹⁸³ (1943) 319 U.S. 190, 1010.

has already emphasized the importance of contextualization in studying intellectual history by problematizing the traditional paradigm of direct interpretation.¹⁸⁴ According to him, in the center of the traditional paradigm there is a set of perennial 'fundamental concepts', on which the scholars relied to analyse the 'classic texts'. Those concepts are the category we used to classify the unfamiliar, unintelligible and heterogeneous 'text' into our familiar, intelligible and homogeneous modern discourse. However, the moment we try to define those concepts in order to conduct our research, we have already established the frame of reference and preconceptions about what we expect to find. In other words, these preconceptions will 'act as determinants of what we think or perceive'. As Skinner has argued, this is simply the old and familiar epistemological dilemma that 'by our past experience we are sent to perceive details in a certain way', 'the process is one of being prepared to perceive or react in a certain way'.¹⁸⁵

Skinner's discussion of contextualization is an essential part of the so-called 'linguistic turn' in intellectual history, of which John Pocock and John Dunn are also important. The product is the establishment of the Cambridge School of Political Thought. This concern, in fact, was coincidence with the 'representation crisis' in the discipline of anthropology, which literally changed the whole discourse of anthropology. The reflexive interaction and distance 'between the things' we study and 'the frame we used to study them', between 'ourselves' and 'our objects of our study' are a constant methodological starting point.¹⁸⁶ The typical method for overcoming the traditional paradigm is to contextualize the writer's work both with the material reality and the common sense system of his time, aiming to locate the specific question that the writer

¹⁸⁴ Quentin Skinner, 'Meaning and Understanding in the History of Ideas' (1969) 8 *History and Theory* 3.

¹⁸⁵ *ibid.*

¹⁸⁶ Clifford Geertz, 'Common Sense as a Cultural System', *Local knowledge: further essays in interpretive anthropology* (Basic Books 1983).

was responding to. The material reality refers to the social, political and economic environment, and the common sense system refers to something like the ideological principles. According to Clifford Geertz, the contextualizing process should be conducted in a manner of a 'continuous dialectical tracking' back and forth between the abstract and the concrete, between the whole and the parts. The abstract ideology principle motivates, makes sense of each concrete symbol part; the each symbol part actualizes, substantiates and in turn proves the existence the abstract whole.¹⁸⁷

In recent years, the influence of the Cambridge School has extended to other academic disciplines, such as the history of international law and international relationships. Consequently, there is a so-called 'colonial turn' of the Cambridge School, which aims at exposing the 'dark side of rights theories'. Specifically, there is a growing suspicion that the natural right theories of Locke and Grotius might have been served to justify Western imperialism and colonialism in the early modern period.¹⁸⁸ Within this field of intellectual history, the most distinctive achievement perhaps is Richard Tuck's re-interpretation of the Dutch jurist Hugo Grotius' work.¹⁸⁹ Tuck points out that the theory of property rights outlined by Grotius was expedient to the Dutch opposition to the claimed Portuguese monopoly over the East Indies trade. The same is true with one of Grotius' 'extreme original' believes that sovereignty over the sea required countries to concede the right of innocent passage. In addition, according to Tuck, Grotius's support of the robust view of natural punishment, which allowed private persons to punish transgressors based on natural law in the absence of an independent and effective judge, also proved to

¹⁸⁷ *ibid.*

¹⁸⁸ See generally David Armitage, *The Ideological Origins of the British Empire* (Cambridge University Press 2000).

¹⁸⁹ See generally Richard Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (Oxford University Press 1999); *Natural Rights Theories: Their Origin and Development* (Cambridge University Press 1979); and *Philosophy and Government, 1572-1651* (Cambridge University Press 1993).

be beneficial to the Dutch and English East India Companies against the oppositions of Iberia and India. He even argues that Grotius altered his position later in order to legitimize the post-1619 Dutch practice of forcibly annexing native territory.

Following this line of suspicion set by Tuck, Van Ittersum has signified the practical purposes for Grotius to develop his right and contract theories through reading the text in the context of his personal political aspiration and his collaboration with the directors of the Dutch East India Company (VOC). He argues that Grotius' theory was a line-by-line response to a set of practical problems faced by the VOC.¹⁹⁰ Similarly, exploring the ideological origins of the British Empire, David Armitage shows that Locke wrote chapter five of *Second Treatise of Government* in the summer of 1682, when he was revising the *Fundamental Constitutions of Carolina*, a colonial project that he engaged to support his patron, the Earl of Shaftesbury. The sufficient similarity between these two suggests that it was not a coincidence. In chapter five, Locke adopted an essentially Grotian theory of private property, which led to the conclusion that the natives of North America did not deserve the ownership of their land because they only occupied it as hunter-gatherers.¹⁹¹

Rich in historical and contextual detail, this claimed colonial turn of the Cambridge School was undoubtedly novel, and does present a prolific approach in reinvigorating the study of Grotius and his era of positivism. But to what extent it actually sticks to the intertextual approach that represented by the Cambridge School is questionable. The contextualization method that promoted by the Cambridge School not only requires an interpretation of the text from the perspective of its material reality, that is the social, political and economic environment in

¹⁹⁰ Martine Julia Van Ittersum, *Profit and Principle: Hugo Grotius, Natural Rights Theories and the Rise of Dutch Power in the East Indies, 1595-1615* (Brill 2006).

¹⁹¹ David Armitage, *The Ideological Origins of the British Empire* (Cambridge University Press 2000).

which the text was produced, but also emphasis on locating the text within the symbol system it inhabited. It is this second layer of contextualization that features the 'contextualist methodology' of the Cambridge School. There is the effort to read the work of earlier scholars within the intellectual milieu within which they found themselves, or the restoration of the *intellectual debates* that those canonical figures of Western philosophy engaged themselves in. In other words, in order to avoid the danger of ascribing the thoughts of an earlier period to some later concepts that unknown to them. The Cambridge School engages in exploring the original usage of the terminology at issue, especially by cross-examining the usages in the dominant thoughts by reference to their contemporary texts from the unrepresentative writers. The inevitable consequence of this kind of contextualization is to bring into prominence the opponents of these canonical figures, who unfortunately ended up on the wrong side of history. They either have been totally forgot, or recognized as 'second-rate' pamphleteers and polemicists in the intellectual history. For example, in *Machiavellian Moment*, John Pocock has demonstrated that James Harrington's *Oceana* (1656), as one of the most important republican theorists in England in the seventeenth century, which overshadowed by Hobbes' *Leviathan*.¹⁹² Another famous example is Locke's defense of the right of resistance in fact first worked as a denunciation of Robert Filmer's *Patriarcha* (1630), an overlooked religious justification of monarchical government and of the divine right of the king.¹⁹³

Overall, the Cambridge School set a very much high expectation for a proper research of the intellectual history: it requires not only the in-depth reading of the original works, but also the thorough research into a large record of the past texts. Though this study uses an amalgam of

¹⁹² JGA Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (first published 1975, Princeton University Press 2016).

¹⁹³ John Dunn, *The Political Thought of John Locke: An Historical Account of the Argument of the 'Two Treatises of Government'* (Cambridge University Press 1982).

sources, it has very little claim to this dignity. It nevertheless tries to contextualize the text with the social, economic and political environment. It also aware of the 'opponent' of the writer, for example, how Maitland despised Austin and his doctrine of sovereignty.¹⁹⁴ Considering the long span of time and the broad range of history it attempts to cover, it reluctantly chooses to base mostly on the reading of the (preeminent) secondary accounts of the historiography, and only limitedly on primary source. Such an approach is inevitably conditional and leaves this study open to criticism of many kinds. It also needs to address that when considered the success of any canonical figures to become the 'mainstream' narrative, they should not be explained as the mere effect of social forces by a crude form of determinism. This means that the certain ideology became predominant only because it speculatively favored the interest of the dominant social group (class).

In terms of the epistemological standpoint of this study, when enduring and vexed question that whether it is possible to truly penetrate into other people's modes of thoughts (whether they are from other culture or they were in history) and represent them haunts almost all the social science and humanities, this study takes an stance from Clifford Geertz:

Cultural analysis is (or should be) guessing at meanings, assessing the guesses, and drawing explanatory conclusions from the better guesses, not discovering the Continent of Meaning and mapping out its bodiless landscape.¹⁹⁵

The historical interpretation offered by this thesis is also in nature a guessing. Or, in a more advanced anthropological language, the interpretation is the product of a collaborative interaction between the interpreter (that is me) and the 'text'. Yet, the analysis of legal history was different from cultural analysis in the sense that law and legal

¹⁹⁴ Maitland once said Austin equals zero, he also argued that the sovereignty doctrine lectured by Austin appears to Gierke as a state in the long past.

¹⁹⁵ Clifford Geertz, 'Thick Description: Towards an Interpretive Theory of Culture' in *The Interpretation of Cultures: Selected Essays* (Basic Books 1973) 20.

discourse has a rather strong constitutive effect in reality and a rather tight definition in history. It is still a guessing but more approximate to the truth.

5. About this Thesis

In tracing the history of the public/private distinction, this thesis chooses to particularly focus on English experience. England enjoys an incomparable situation in modern history as the first country to initiate the industrial revolution of the eighteenth century, which often serves as the starting-point of modern capitalism. This is the reason for Marx to use England as the chief illustration in the development of his theoretical ideas. Yet, many historians have recently highlighted, England was generally exceptional within Europe since the origin of modern, in terms of the great liberty that enjoyed by the individual.¹⁹⁶ When Montesquieu arrived in England in 1729 to study the political and social system here, he suggested that the English have progressed the farthest of all peoples of the world in three important things: in piety (Protestantism), in commerce (trade), and in freedom (liberty). As he said, 'I am here in a country which hardly resembles the rest of Europe,' he excitedly wrote, talking about how the English were 'independent' 'free people' that were passionately fond of 'liberty' with a peculiar anti-authoritarian spirit.¹⁹⁷ Since the defining character of the liberal public/private distinction is premised on the very idea of economic freedom and individual liberty, the way in which the public/private distinction has been evolved in England is worthy examining.

¹⁹⁶ See Alan Macfarlane, *The Origins of English Individualism: The Family, Property and Social Transition* (Blackwell 1978).

¹⁹⁷ Quoted by Alan Macfarlane, *The Riddle of the Modern World* (Macmillan 2000) 16.

Value

This thesis addresses one of the most discussed political and legal conceptions at the moment, namely the public/private distinction by providing a coherent narrative of its historical genealogy. Secondly, this study would be of historic interest because it commits to an in-depth examination of several specific historical inquiries, including how the form of municipal corporation evolved from the traditional institution of franchise in common law, how the idea of the state transformed from the king's mystical body to an abstract public entity, and why the late-nineteenth-century legal controversy over whether personifying the colonial governments as corporation was more than a mere legal technique issue, but should be read in context of the social, political and economic environment of that period. General speaking, it contributes to the intellectual history by juxtaposing the history of the idea of the public/private distinction, with those of the state and the corporation. Last but not least, this study would offer much the practical interest in terms of yielding some insights into various legal and political issues that associate with the problematic of the public/private distinction, such as how to rationalize the relationship between the welfare state and its citizens, how to keep privatization in democratic check, how to directly subject MNCs to international law.

Structure

This thesis is structured in seven chapters. The first chapter of *Introduction* situates the problematic of the public/private dichotomy in the current political and legal discourses. It explains its constitutive role in liberal legal and political thought, and delineates its developments since the twentieth century up to date. From Chapter II to Chapter VI, the paper has been arranged in a chronological order in telling the paralleled but closely-related intellectual histories of the state, the

corporation and the public/private distinction. *Chapter II* traces the origin of the public/private distinction to Aristotle's articulation of the distinction between the *polis* and the household, the origin of the state in the medieval theology of the king's two bodies, and the origin of corporation in the legal doctrine of franchise. *Chapter III* focuses on the early modern period and situates the inauguration of the modern distinction between the public state and the private property owner in the course of the nobility's enduring struggle against the king's arbitrary power. *Chapter IV* discusses the role that the emerging public sphere of the late-eighteenth-century has played in questioning the East India Company's sovereignty in India. *Chapter V* focuses on Edmund Burke's public speeches in criticizing the East India Company and in impeaching Warren Hastings, which epitomized then public opinion requiring the public interest to be institutionally separated from the private interest. *Chapter VI* looks at the aftermath evolution of the public/private distinction in the nineteenth century. It discusses how Adam Smith's laissez-faire doctrine finalized the public/private distinction into current liberal version, accompanied by the evidence found in American and English legal histories. The *Conclusion* chapter looks at the difference and the similarity between the state and the corporation by examining the ideology of individualism, the real entity theory of corporate personality, and Maitland's study of township. It shows how the focal points in rethinking the public/private distinction should be located on a renovated understanding of the complex interaction between the individual, the corporation and the state. Thus, the thesis of the genealogy of the public/private distinction has come full circle to link up its historical evolution to its present predicament from the perspective of the relationship between the state and the corporation.

II. THE PRE-MODERN PHASE

The public/private distinction is a conceptual category of 'Greek origin transmitted to us bearing a Roman stamp'.¹⁹⁸ As is the case with many other long-lasting concepts, the current liberal interpretation of the public/private distinction has made use of the category that was inherited from earlier times. This chapter thus starts with examining the origin of the idea of the public/private distinction in the time of classical antiquity, and then moves on to discussing the dissolution of this distinction in the Middle Ages. Meanwhile, both the ideas of the state and the corporation inaugurated in medieval England in their antiquated forms, and at that time they were conceived neither as purely public, nor as purely private. Specifically, the earliest idea of picturing the state as 'body politic' might be originated from the theological concept of 'the King's two bodies', which was institutionalized in the common law by Tudor lawyers through personifying the Crown as 'corporation sole'. As to the prototype of the self-governing corporation in common law, it made use of the legal theory concerning the king's alienable prerogative right, known as franchise. In other words, the doctrine of franchise has been innovatively applied in the juristic conceptualization of the medieval township, whose modern version is the municipal corporation that are prevalent in America.

¹⁹⁸ Jürgen Habermas, *The Structural Transformation of the Public Sphere* (first published in Germany 1962, Thomas Burger tr, Polity 1992) 3.

6. The Origin of the Public/Private Distinction

The earliest articulation of the public/private distinction could be traced back to Aristotle. In his *Politics*, Aristotle identified a division between the political association of *polis*, and the private association of household and family (*oikos*).¹⁹⁹ In the public sphere of *polis*, two human activities happened: one was *Action (praxis)*, such as waging war and athletic competition, and the other was *Speech (lexis)*, such as the consultation of and hearing the court of law.²⁰⁰ Action and Speech, had long been considered as the two highest human capacities and the only two activities that were considered as political activities. Political life in the *polis* had been considered to be the higher life by Aristotle, as it fulfilled the nature of man as a prior polis-animal.²⁰¹ As to the private sphere of the household, each individual lived in his own domain, where 'the reproduction of life, the labor of the slaves, and the service of the women went on under the aegis of the master's domination'.²⁰² The generally hostile or contemptuous attitude towards traders and merchants in the thought of antiquity reduced the economic life only to *the necessity of life*, which was sustained by the operation of the household.²⁰³

¹⁹⁹ Aristotle (384-322 BC), *Politics* (Ernest Barker tr, OUP 1995). For Aristotle, the sphere of *oikos* comprises both the family and 'economic' life, since he views the household as the main institution to organize production and distribution.

²⁰⁰ Hannah Arendt, 'The Public and the Private Realm' in *The Human Condition* (Chicago UP 1959) ch II.

²⁰¹ Arendt argues that there is a general misunderstanding of Aristotle's definition of man as 'political animal' or 'social animal'. As Arendt has argued, Aristotle only used the term to describe the political life of man. As to the definition of man or the highest capacity of man, it is the capacity of *contemplation*, not speech or reason, which defined human being as such by Aristotle. And the chief characteristic of contemplation is exactly that its content cannot be rendered in speech. *ibid*.

²⁰² Habermas (n 198) 3.

²⁰³ Aristotle admitted that wealth was essential for nobility, but he was only talking about the inherited wealth. Wealth was also important for the state, but Aristotle believed that it should be obtained by piracy or brigandage, and by war for the conquest of slaves, and should be maintained by slave-workers. See Jacob Viner, *Essays*, p.39.

For many scholars, especially Hannah Arendt and her followers, Aristotle's *polis*/family opposition represents the ancient origin of the modern public/private distinction.²⁰⁴ Others, however, argue that Arendt might oversimplify Aristotle's public/private construction by collapsing all household relationships into that of the despotism and by ignoring the intensive integration between the public *polis* and the private household.²⁰⁵ Specifically, the need for the lifelong practice of virtue (*agathos*), which was crucial for citizens in the *polis*, should be developed earlier by the children in the household. In addition, Aristotle has carefully classified the art of household management into three types, namely slavery, parenthood and marriage, and has compared them with the relationships in the public realm. As he said, 'the relation of the male to the female is permanently that in which the statesman stands to his fellow citizens. Paternal rule over children, on the other hand, is like that a king over his subjects.'²⁰⁶ Nevertheless, the Hellenocentric separation between the *polis* and the household is still generally regarded as the origin of the public/private distinction. So does Arendt's interpretation of Aristotle have a wide currency in modern scholarship.

The democratic *polis*

Graeco-Roman Antiquity, including the early Hellenic *polis* and the later Roman *res publica*, represented the zenith of urban polity by its sophisticated city civilization.²⁰⁷ Rather than being sustained by a corresponding urban economy, prosperous cities were the 'urban congeries of agrarian proprietors', who relied overwhelmingly on the material wealth that drawn from rural agriculture (mainly corn, oil and

²⁰⁴ Arendt (n 200).

²⁰⁵ Cynthia B. Patterson, 'Public and Private in early Hellenistic Athens' in *The Family in Greek History* (Harvard UP 1998) 182. See also D. Brendan Nagle, *The Household as the Foundation of Aristotle's Polis* (Cambridge University Press 2006).

²⁰⁶ Aristotle (n 199) 1259 a37.

²⁰⁷ This is usually refers to Greece in the fifth and fourth centuries B.C. and Rome from the second century B.C. to the second century A. D.

wine).²⁰⁸ Absolute in form and dominant in extent, the unprecedented predominance of slave-labor juxtaposed itself against the new Hellenic idea of liberty as and free citizenship.²⁰⁹ The patrimonial slave economy and free citizenship were indivisible, as each was the structural condition of the other. As Anderson has concluded, 'it was precisely the formation of a limpidly demarcated slave subpopulation that conversely lifted the citizenry of the Greek cities to hitherto unknown heights of conscious juridical freedom.'²¹⁰

The prosperity of the city-state in ancient Greece brought every free citizen a sort of 'second life' besides his private life, namely a public life (*bios politikos*). The public life was in the market (*agora*). The status of the citizen in the *polis* was premised upon his status as the unlimited master of the family. Being a master of the household meant a particular attachment to the certain house (the house was referring to its real physical form), and any exile, expropriation, or the destruction of the house would amount to the loss of his status in the *polis*. The control over moveable wealth and labor power was also necessary, as poverty and a lack of slaves would in themselves prevent the admission to the *polis*.

The sphere of *polis* was considered much superior to that of the household not only because it represented the virtue of immortality, but because it was also a sphere of freedom without subordination, violence and force. Only in the *polis* that driven by the pursuit of virtue, freedom, transparency and permanence were possible. As Habermas wrote, 'the virtues, whose catalogue was codified by Aristotle, were ones whose test lies in the public sphere and there alone receive recognition.'²¹¹ The *polis* provided 'an open field for honorable distinction': everything here became

²⁰⁸ Perry Anderson, *Passages from Antiquity to Feudalism* (Verso 1978) 19.

²⁰⁹ The estimated ratio of slaves to free citizens in Athens might be 3:2. *ibid* 22-23.

²¹⁰ *ibid* 23.

²¹¹ Habermas (n 198) 3.

visible to all equal citizens, who engaged in the competition for the best excellence, and gained their essence, which was the immortality of fame.²¹² People in the *polis* neither ruled nor were subjected to being ruled, and they dealt only with their peers. The central concern of all citizens in the *polis* was to talk with each other, as everything was decided through words and persuasion instead of through force and violence.²¹³ Speech and only speech made sense here.²¹⁴

On the other hand, the driving force of the household were *the necessities of life*, the provision of wealth and health. It was an obscure sphere, as birth, life and death 'shamefully' immersed themselves in the shadows. While the sphere of the *polis* represented the sphere of 'freedom', meaning to be free not only from the necessity of life (by the wealth and health that provided by the household), but also from the command of another. Life in the household, on the contrast, was characterized by its *pre-political* (as essentially barbarian) way of life, a life in which people might be forced by violence, or commanded rather than being persuaded. This was because that while in the *polis* there were 'equal' relationships between citizens, the household was the center of the inequality with regard to the relationships between master and slave, parent and child, husband and wife. The household head was entitled to uncontested and despotic powers ruling in the sphere of household. This is the very reason why political life in the barbarian empires of Asia was frequently likened to the organization of the household.²¹⁵

²¹² *ibid.*

²¹³ Arendt (n 200) 27.

²¹⁴ *ibid.*, 25. Arendt argues that, contrary to the modern understanding, which views the importance of action and speech result from the information provided, or the act of communication, or, of the great thoughts they may convey. Instead, it is the capacity of 'great words' to 'eventually teach thought' that makes the speech and action the foremost of human activities. In this sense, thought was secondary to speech and action.

²¹⁵ *ibid.* 27.

From explicating Aristotle's public/private distinction, Arendt further challenged contemporary political theories. For one thing, she argued that the idea of rulership that was prevalent in seventeenth-century political thought in fact originated from the private sphere instead of the public sphere as commonly assumed.²¹⁶ This was because both rulership and government (especially in Hobbes's model) were essentially concerned with a monopoly of power and of violence, which was regarded as the only means for men to escape from the chaotic 'state of nature'. It was precisely the monopoly and violent nature of government, argued by Arendt, indicated that both government and power are by nature *pre-political* and belong to the private sphere. The same applied to the term 'political economy'. Arendt pointed out that the modern term '*political economy*' is a self-contradictory term, since "whatever was 'economic,' related to the life of the individual and the survival of the species, was a non-political, household affair by definition."²¹⁷ In this sense, she pointed out that the function of the 'social economy' was a mode of social housekeeping consisting of a collective subject of economic activity with a common purpose and values. Indeed, both Adam Smith and James Mill have also explicitly developed the analogy between how the individual runs his own household and how society operates.²¹⁸

It is important to be aware of that Aristotle's articulation of the public/private distinction was assumed to be a response to Plato's de-householding plan. Although Plato and Aristotle are usually spoken of almost in one breath as the primary expounders of classical political theory, they were in fact divided on their views of the public/private

²¹⁶ One of the central arguments of Arendt is that the profound misunderstanding and equating the political with social realms were originated from the translation of Greek terms into Latin and their adaption to Roman-Christian thought. See *ibid* 22-78.

²¹⁷ Arendt (n 200) 29.

²¹⁸ However, after John Stuart Mill's criticism, this analogy was less emphasized and replaced by the distinction between practical and theoretical political economy, due to the totally devouring of the family unit by society.

distinction. To Plato, his contemporary Greek city was marked by selfishness and ignorant inefficiency, dissolved by the 'privatization of pleasures and pains'.²¹⁹ The best-governed city, according to Plato, should be like one person: all citizens rejoice and are pained by the same successes and failures, and people say the words 'mine' and 'not mine' about the same things in the same way.²²⁰ People 'will think of the same things as their own, aim at the same goal, and, as far as possible, feel pleasure and pain in unison.'²²¹ However, it was the very existence of the private family that created exclusiveness. As Plato wrote,

One would drag into his own house whatever he could separate from the others, and another would drag things into a different house to a different wife and children, and this would make for private pleasures and pains at private things.²²²

In the worst case, a man even seize another man's property or seduce another man's wife. As a result, people would too busy wasting away their energies to fulfill the necessities of life, and would occupy themselves with material care and children. They have no time to think of the real life, the nobler life, which is the life of the spirit.²²³ 'Pull down the walls,' Plato thus exclaimed, 'they shelter at best a restricted family feeling; they harbor at the worst avarice and ignorance.' Plato's political plan for diminishing the individual household may be seen as a radically communal remedy to the deficiency of democracy, which eccentrically 'foresaw...an extension of the public sphere to the point of annihilation of private life altogether.'²²⁴

²¹⁹ Plato, *Republic* (It is thought that the *Republic* was written in 380 B. C., tran G. M. A. Grube, 1992) 462b.

²²⁰ *ibid* 462c.

²²¹ *ibid* 464b.

²²² *ibid*.

²²³ Ernest Barker, *The Political Thought of Plato and Aristotle* (Dover Publications 1959) 144.

²²⁴ Arendt (n 200) 30.

Roman Law

The *polis* for the Greeks was the *res publica* for the Romans. Unlike the Greeks, the Roman people never sacrificed the private life to the public life, although the private sphere was still viewed as a substitute for the public sphere. Taking slavery as an example: Roman slaves played a much more significant role in Roman culture and in the economic life of Roman people than in Greece. A Roman writer even believed that for slaves the household of the master was what the *res publica* was to citizens. Yet, a study of Roman later civilization would clearly show that it had abandoned the democratic ideals that embodied in the institution of *polis*. Montesquieu has demonstrated how the very successful predatory expansion of Roman Empire inevitable transformed itself from a republic into a despotic absolutism.²²⁵ As Montesquieu wrote, it was 'the natural property of small states to be governed as republic, of middling ones to be subject to a monarchy, and of large empires to be swayed by a despotic prince..'²²⁶ This famous summarization of the relationship between 'the volume of the society' and the according political systems later has been signified by Durkheim.²²⁷

Nevertheless, to some extent the distinction between the public and the private has been preserved by Roman Law. It stood at forefront of both Justinian's *Institutes*²²⁸ and *Digest*²²⁹ as the didactic distinction in the famous passages of the *Corpus Iuris Civilis*: '[h]uius studii duae sunt positiones, publicum et privatum. publicum ius est quod ad statum rei Romanae spectat, privatum quod ad singulorum utilitatem.' ([t]his study has two aspects, public and private. Public law is that which concerns the Roman state, private that which concerns the well-being of individuals.)

²²⁵ See generally Montesquieu, *Considerations on the Decline of the Romans* (1734).

²²⁶ Montesquieu, *The Spirit of the Laws*, vol. I, 122.

²²⁷ Émile Durkheim, *Montesquieu: His Contribution to the Establishment of Political Science* (Berghahn Books 1997).

²²⁸ I. 1. 1. 4

²²⁹ D. 1. 1. 1. 2.

However, this initiation was not of any technical significance to Roman lawyers, as there was nothing that provided, for example, for the immunity of magistrates or to the exemption of state from the rules of conveyancing.²³⁰

This practical insignificance of the public/private distinction might be attributed to two features of the Roman law: for one thing, the casuistic and pragmatic Roman jurists were not minded to approach law systematically, nor to conceive of law as a whole, therefore they did not try to develop criteria through which to use the distinction effectively; for another, preoccupied with the private-law problems of inheritance, ownership, and obligations as a law of nature, the Roman jurists seem to avoid problems relating to the public ownership of law or public-law limitations on land ownership, which they regarded as time-bound, particular and thus unworthy of scholarly treatment.²³¹ In addition, public-law problems of magistrates were generally controlled through the senate and criminal prosecutions. For example, with reference to the example of Q. Scaevola, who had refused to give legal opinions on issues of public law, Cicero stressed that such opinions should be sought from practitioners – imperial administrators—rather than jurists.²³²

Medieval Christianity

If the public/private distinction was only formally visible in Roman Law, it lost even this last visibility during the Middle Ages. Arendt has claimed that during this time the private realm 'devoured' the public realm in that the well-known antagonism of early Christianity towards the public realm

²³⁰ Ernst Kantorowicz, *The King's Two Bodies: A Study in Mediaeval Political Theory* (Princeton University Press 1957) 4.

²³¹ JWF Allison, *A Continental Distinction in the Common Law: A Historical and Comparative Perspective on English Public Law* (Oxford University Press 1996) 110-11. Also see F. Schulz, *Principles of Roman Law* (Oxford University Press 1936) ch 3; and E. Levy, 'Natural Law in Roman Thought' (1949) 15 *Studia et documenta Historiae et iuris* 1.

²³² Cicero, *Pro Balbo*, 19. 45.

had reduced the significance of political activities from the pursuit of higher human ends to an unfavorable public burden.²³³ Arendt has pointed out that after the downfall of the Roman Empire, it was the Catholic Church that supplanted the municipal government to offer men a substitute for citizenship. This was an attempt to recreate the imperial system of Rome under the patronage of Catholic Church, and thereby to unify and centralize the fragmented states of Western Christendom in a new Holy Roman Empire. Though it seems that the religious sphere replaced the *polis* as the new public sphere, there was a major difference between them: the medieval concept of the 'common good', instead of implying the idea of public discussion or political community, only indicated the acknowledgment that private individuals have some shared material and spiritual interests that required the designation of someone to take care of. The otherworldliness of Christianity entailed a tendency to lead a life removed from the public realm as far as possible. Christian morality insisted that everybody should mind his own business and that political responsibility was regarded as an extra burden that cannot get rid of. At this point, the significance of public life was almost consciously weakened to the point of extinction.

Habermas, on the other hand, has argued that the private realm and the public realm were simply fused together into one single unified authority, which was inseparable from the land in the feudal context.²³⁴ The manorial authority known as private dominion (*dominium*), according to him, was comparable to the domestic authority of the household head, as they were only lower and higher 'sovereignties' with eminent and less eminent prerogatives. According to him, the contrast between private dominion (*dominium*) and public autonomy (*imperium*) had not been developed until the eighteenth century, when manorial authority has been transformed into private landed property. The secular realm under the

²³³ Arendt (n 200) 34.

²³⁴ Habermas (n 198) 5-6.

rule of the feudalism was exactly what the private sphere of the household had been in the time of classical antiquity. The place of lands, as 'fiefs', was the focal point in feudal lord-vassal relationship (as the cell form of political rule): they were granted by a lord to the vassal on limited tenure in return for their military services. The vassal exploited these tenures economically through the labor of a dependent peasantry, who was tied to the land and required to give their labor services, rents and dues in money and kind. Therefore, the vast population of the peasantry, which was at the base of the whole pyramid of feudalism, was only the object of rule and never the subject of any political relationship. The only significant difference between the feudal lord in medieval time and the master of the household in classical antiquity, perhaps, was that the feudal lord could render justice whereas the ancient household head didn't, even though he might exert a milder or harsher rule from time to time.

Almost all secular activities were absorbed into the household sphere bearing only private significance. This related closely to the fact that the feudal system of production was centered in the household, for at its base, each individual household formed an independent center of production for itself. As Marx has described, Medieval England was basically a 'natural economy', which meant that production is mainly for direct use rather than for exchange. In this basically subsistence and non-monetized society, a 'peasant family' produced for its own use, not 'commodities' services and payment, when they were made to the lords, they were *in kind*. In fact, the modeling of all human relationships upon the example of the household reached so far that even medieval professional organizations in the cities, such as the guilds, *confreries*, *compagnons*, and the early business companies, were all molded on 'the original joint household'.²³⁵

²³⁵ Arendt (n 200) 35.

7. The Origin of the State: *From 'Body Politic' to the Crown as Corporation Sole*

The origin of the idea of the state has been constantly contested and brought about in a circular debate. Hobbes' Leviathan has been most mentioned with respect to the idea of conceiving the state as a 'body politic' (*corpus politicum*), and the inauguration of this idea was certainly inseparable from both the early corporation doctrine and the revival of Aristotle (owing to Aristotle, the state was not only interpreted as a 'body politic', but also was also qualified as a 'moral' or 'ethical' body). But it has also been argued that the earliest conceptualization of the state as body politic might have originated in the medieval theology of the king's two bodies.²³⁶ Specifically, during the early stage of forming the secular idea of the state, the idea of the Church as the 'mystical body of Christ' (*corpus Chriti mysticum*) was inflated with secular idea of the state, transforming the latter one into the 'mystical body' of the King. The state as the 'mystical body of the King' was later conceptualized by Tudor lawyers as the legal institution of 'the Crown as corporation sole' to designate the earliest legal personality of the state in the common law.

The state as 'body politic'

The origin of the idea of 'body politic' could be traced back to the notion of the *corpus mysticum*, which defined the church as the 'mystical body of Christ' in the medieval ecclesiology.²³⁷ It not only signified the fact that

²³⁶ See generally Ernst H Kantorowicz, *The King's Two Bodies: A Study in Medieval Political Theology* (first published 1957, Princeton University Press 2016).

²³⁷ The notion of the *corpus mysticum* served after the twelfth century to describe the body politic of the Church. It was part of the corporation, non-christological concept of the Two Bodies of Christ: one, a body natural, individual, and personal (*corpus naturale, verum, personale*); the other, a super-individual body politic and collective, the *corpus mysticum*, interpreted as a *persona mystica*. *ibid* 206.

the church embodied transcendental and eternal values, but also underscored the totality of the Christian society as a 'body' composed of both the head and the members. It was this organological/corporeal aspect of the church that later acquired certain legal connotations: the church has been endowed a corporate character to signify it as a 'fictitious' or 'juristic' person. In fact, Aquinas had already used the term *persona mystica* as an alternative to the *corpus mysticum*, which hardly differed from the *persona ficta* of the jurists.²³⁸ The notion of 'body politic' became popular during the thirteenth century.

The English idea of the secular state as body politic was uniquely formulated analogously to ecclesiastical church as 'mystical body' (*corpus mysticum*).²³⁹ England's greatest jurist of the Lancastrian period, Sir John Fortescue has used the terms of *corpus mysticum* and body politic without discrimination in his famous *De laudibus legume Angliae*. Fortescu further argued that in this sense, the kingdom in England was ruled 'politically' by the whole body politic of the realm, which was opposed to the kingdom in France that ruled 'regally' by the king alone. This eventually resulted in Fortescue's famous definition of England as a *dominium regale et politicum*: it implied a kind of government in which not the king alone but the king and the polity together bore the responsibility for the commonweal. Fortescue used the customary analogy between the social and the human body to support his argument. As he said,

Just as the physical body grows out of the embryo, regulated by one head, so does there issue from the people the kingdom, which exists as a corpus mysticum governed by one man as head...for just as the body is held together by the nerves, so is the corpus mysticum [of the people/joined together and united into one by the Law.

²³⁸ *ibid* 223.

²³⁹ Much content of this paragraph is based on Kantorowicz's reading of Fortescu. *ibid* 223-27.

Corporation sole

This political idea of the secular state as a 'body politic' was later institutionalized in the common law by the Tudor lawyers, who personified the Crown as 'corporation sole'. In examining the legal history of the corporation sole, English legal historian F. W. Maitland argued that the creation of this legal institution was just an expedient solution to conceptualize, and account for, the parson's right to the glebe.²⁴⁰ The parson's relation to the glebe had become a controversial legal issue when the ownership of the glebe became complicated after the twelfth century. It was hard to find an ordinary 'niche' within the existing system of tenancies to fit the property relation of the parson to the glebe, as the ownership of the glebe had been split between the parson, the patron, and the ordinary. As Maitland has described, 'at least with the consent of patron and ordinary, the parson can do much that a tenant for life cannot do; and, on the other hand, he cannot do all that can be done by a tenant in fee simple.'²⁴¹

As a result, the parson and his glebe, as a whole, was reconstructed as a legal personality of 'corporation sole', on which the full fee simple of the glebe have been reposed. Whilst the practical issue was temporarily solved by the creation of the 'corporation sole', it left a serious theoretical pitfall. According to Maitland, this 'corporation sole' was not a *persona ficta*, because when the only member - the parson - died, the ownership of the property fell into abeyance until the next successor was appointed to fill the vacancy, indicating that the corporation sole did not exist in the interval. This countermanded any suggestion that the fundamental character of the corporation sole was a *persona ficta*, whose two essential features are the corporateness of an organized group and the permanent existence in law regardless of the birth, the death and the

²⁴⁰ FW Maitland, 'Corporation Sole' (1900) 16 LQ Rev. 335.

²⁴¹ *ibid.*

change of its members. The corporation sole thus failed to achieve the basic tasks of constructing a permanent legal subject with a plural nature. In short, there was simply no plural members, no permanence, and thus no corporateness.²⁴²

As Maitland wrote, "I ventured to say that this corporation sole has shown itself to be no 'juristic person', but is either a natural man or a juristic abortion".²⁴³ Maitland thus does not share the view of his predecessor Blackstone, who speaks of 'corporation sole' admiringly as the unique and genius refinement in English Law of the inherited Roman fiction theory.²⁴⁴ Quite the opposite, Maitland called the 'corporation sole' the 'curious freak of English law', the 'miserable being' and the 'mere ghost of a fiction'.²⁴⁵ According to him, the 'corporation sole' failed to provide '...the first service that we should require at the hands of any reasonably useful *persona ficta*' and 'if our corporation sole really were an artificial person created by the policy of man we ought to marvel at its incompetence'.²⁴⁶

The Crown as corporation sole

In the sixteenth century the Crown of England was classified by the English common law alongside the parish parson of the ecclesiastical law. The Crown, accordingly, has been endowed a legal personality of the corporation sole.²⁴⁷ Although Maitland did acknowledge the long political tradition of making an analogy between the king and the parson, he

²⁴² Contrasting to Maitland's argument, Kantorowicz has identified that within the corporation sole there are a 'vertical' plural members consisting of all the 'dead' predecessors and the current 'living' office-holder. The plural of the corporation sole thus is quite different the plural of the corporation aggregate, which is formed by the 'horizontal' multiple members. The element of *time* is crucial here. See Kantorowicz (n 236) ch VI, 'On Continuity and Corporations'.

²⁴³ *ibid.*

²⁴⁴ See generally BL Comm.

²⁴⁵ Maitland (n 240).

²⁴⁶ FW Maitland, 'Crown as Corporation' (1901) 17 LQ Rev. 131.

²⁴⁷ *ibid.*

nevertheless contended that applying the corporation sole to the King resulted in a worse consequence than applying it to the parson. In his words, 'the attempt to play the same trick with king seems to me still more abortive and infinitely more mischievous'.²⁴⁸ This was because this legal construction, apart from juristically continuing the political discourse of the 'king's two bodies', refused to do 'any real work in the cause of jurisprudence'.²⁴⁹ It didn't result in any clear separation of the money and land between what is owned by the king as natural person and what is owned by the King as 'corporation sole'. Nor did it solve the problems associated with the renewal of delegations or litigation that might accompany the demise of the Crown. Instead, all the constitutional changes had to be worked through each individual statutes.

The worst consequence, however, was the failure of the State to be recognized as a legal subject to have private rights. Maitland wrote 'what we see in England, ..., is, not that the State is personified or that the State's personality is openly acknowledged, but that the king is "parsonified"'.²⁵⁰ For Maitland, it was vital that the state be represented as a legal person. People cannot live a life without state. And the state, besides being 'the wielder of public power', will inevitable become a legal subject in order to borrow money, own property and make contracts. The 'business' side of the state and the private duties and rights of it are something that cannot be ignored by law. Instead of turning a blind eye to this issue, law should recognize this fact by attributing to it a substantial legal personality. As Maitland said, 'since the feat was performed, we have been, more or less explicitly trying to persuade ourselves that our law does not recognize the personality or corporate character of the State or Nation or Commonwealth...'²⁵¹

²⁴⁸ *ibid.*

²⁴⁹ *ibid.*

²⁵⁰ *ibid.*

²⁵¹ *ibid.*

Personifying the Crown as corporation sole also represented the point of departure from which English law divorced itself from its political ideology that had continued since the medieval time, which conceiving the State as 'body politic' and the king as its head.²⁵² The notion of 'the Crown' used to present the whole 'body politic' of the State. However, when the Tudor lawyers re-constructed the Crown as 'corporation sole', they replaced the 'body politic' of the State with the 'body politic' of the King, resulting a division between the People and the King in common law. "It is true that 'The people' exists, and 'the liberties of the People' must be set over against 'the prerogatives of the King'; but just because the King is not part of the People, the People cannot be the State or Commonwealth"²⁵³ For Maitland, and for many modern legal historians, the legal institution of the Crown as corporation sole was to be blamed for blocking the common law the chance to naturally evolved into a modern model of sovereign state as 'corporation aggregate'.²⁵⁴

Maitland's critics of corporation sole has also been understood as his attempt to substantiate the German-Gierkian real entity theory of the corporation with the English practice.²⁵⁵ Maitland was often regarded as the first English writer that contributed to the movement of political pluralism in political thought.²⁵⁶ But even for Maitland this commitment to the ontological speculation of group personality was a new territory, since up to this point he had not ventured beyond the 'legal plain' into the 'philosophical summits'.²⁵⁷ As a legal historian, Maitland had always

²⁵² *ibid*; also see Kantorowicz (n 236).

²⁵³ *ibid*.

²⁵⁴ For example, see Martin Loughlin, 'The State, the Crown and the Law' in M. Sunkin and S. Payne (eds) *The Nature of the Crown* (Oxford University Press 1999); and Terence Daintith and Alan C. Page, *The Executive in the Constitution: Structure, Autonomy, and Internal Control* (Oxford University Press 1999).

²⁵⁵ See David Runciman, *Pluralism and the Personality of the State* (Cambridge University Press 1997) especially ch 5.

²⁵⁶ These seven writers include Thomas Hobbes, Otto von Gierke, F.W. Maitland, J.N. Figgis, Ernest Barker, G.D. H. Cole and Harold Laski.

²⁵⁷ FW Maitland, 'Moral Personality and Legal Personality' (1905) 6 *Journal of the Society of Comparative Legislation* 192.

confined himself to the specific doctrinal legal research: he self-consciously denied his intention of inquiring to any philosophical question related to 'the very nature of things and the very nature of persons' and refused to speculate or express any views beyond his expertise.²⁵⁸

But Maitland did explicitly express his approval of the 'real group personality' in a lecture he delivered, the title of which is 'Moral Personality and Legal Personality'. In this lecture, Maitland also quoted A.V. Dicey that 'when a body of twenty, or two thousand, or two hundred thousand men bind themselves together to act in a particular way for some common purpose, they create a body, which by no fiction of law, but by the very nature of things, differs from the individuals of whom it is constituted.'²⁵⁹ He deliberately emphasized twice the last part of this quotation: 'not by fiction of law, but by the very nature of things'. Maitland also indicates this idea in his study of the corporation sole. For example, when he talked of the common law denying the existence of colonies as juristic persons, he said 'but can we—do we really and not merely in words—avoid an admission that the Colony of New Zealand is a person?' In this sense, the critique of the 'corporation sole' is expected from Maitland if he has ever intended the theory of real group personality to be accepted in Britain. As Maitland himself acknowledged, the 'corporation sole' supposes the personification of offices and thus 'prejudice' English people in favor of the fiction theory, which was the opposite to 'real group personality' theory.

²⁵⁸ *ibid.*

²⁵⁹ *ibid.*

8. The Corporation: *Franchises, Townships, Municipal Corporations and Corporate Colonies*

A corporation is a particular form of human association, which stands separated from its individual members and has a distinct identity of its own. It is essentially a legal concept that allows such an association to have its own rights and perform its own duties. Legal historians generally trace the origins of the corporation back to the *universitas* in classical Roman texts, and it was codified in *Corpus Juris Civilis* during the sixth century. However, some argue that the concept of the corporation was in fact foreign to the Roman jurists and was fabricated by the fourteenth century commentators, who used liberal interpretative methods to read into the Roman texts. The importance of the church context has also been stressed in tracing the origin of corporation, as the name 'corporation' was only adopted after the fifteenth century to replace a number of ecclesiastical names including *universitas*, *societas*, *collegium*, *civitas*, *populous*, *respublica* and a whole series of *con*- and *com*- terms, such as *congregation*, *conventus*, *communitas*, *confraternitas*, *concilium* and *conjuratio*.²⁶⁰

Indeed, to some extent, the entire Christian world operated through corporate entities, for the form of corporation has been applied to bishops, deans, chapters, abbots, convents and other ecclesiastical bodies. Sinibald Fieschi, who became Pope Innocent IV in 1243, was the first to proclaim that *universitas* is *persona ficta*. In the fifteenth century,

²⁶⁰ Edward Cavanagh, 'Corporations and Business Associations from the Commercial Revolution to the Age of Discovery: Trade, Jurisdiction and the State, 1200–1600' (2016) 14 *History Compass* 493; also see generally JP Canning, 'Law, Sovereignty and Corporation Theory, 1300–1450' in JH Burns (ed), *The Cambridge History of Medieval Political Thought* (Cambridge University Press 1998) 454, and 'The Corporation in the Political Thought of the Italian Jurists of the Thirteenth and Fourteenth Centuries' (1980) 1 *History of Political Thought* 9.

a clear distinction between the borough community and the village community was evident from expressions by canonists. They included a sentence in the *Digest*, which sharply distinguished between the debts due to or from the *universitas* and the debts due to or from the *singuli* and formulated a theory that the corporate body is a 'fictitious person' and owes its personality to some act of sovereign power. It was naturally followed by the idea that incorporation must be the outcome of royal charter. The royal charters that were granted to the towns began to use definitely creative words by the King, who constituted and erected a 'body corporate and politic'.²⁶¹

As to English legal history, since the right to incorporate was regarded as a kind of royal prerogative and any royal prerogative was categorized under the bracket of 'franchise', the earliest legal institution of corporation thus was always associated with franchise. In the 1642 edition of *Termes de la ley*, a franchise was defined as 'a French word and signifies in our Law an Immunity or Exemption from ordinary Jurisdiction; as for a Corporation to hold Pleas within themselves to such a value, and the like.'²⁶² In the *Prerogatives the King*, dated between 1640 and 1660, Hale referred to franchises exclusively as the meanings of boroughs, counties and corporations. However, he did state that the franchises, in the wider sense, encompass the subjects of jurisdictionum (jurisdictions), potestatum (powers), liberatum (liberties), franchises, privileges, and exemptions of all sorts.²⁶³

²⁶¹ FW Maitland, *Township and Borough: The Ford Lectures 1897: With an Appendix of Notes Relating to the History of Cambridge* (Cambridge University Press 2011) 18.

²⁶² *Termes de la ley* is a legal treatise written by John Rastell in French, first translated into English in 1527.

²⁶³ Hale PC.

The theory of franchise

The word 'franchise' was adapted from the French word *franchise*. Bracton first theorized the doctrine of franchise in the thirteenth century.²⁶⁴ Since his treatise was written in Latin, it is commonly agreed that what he had called '*libertatibus*' (liberties) were synonymous with '*franchise*'. In 1628, Edward Coke stated that liberties had three significations. The first was 'the Laws of the Realme'. The second was 'the freedoms, that the Subjects of England have'. The third signification was: '...the franchises, and privileges, which the Subjects have of the gift of the King, as the goods and Chattels of felons, outlawes, and the like, or which the Subject claim by prescription, as wreck, waife, straie, and the like.'²⁶⁵ In 1766, William Blackstone confirmed that 'franchise and liberty are used as synonymous terms: and their definition is, a royal privilege, or branch of the king's prerogative, subsisting in the hands of a subject.'²⁶⁶

Legal historians nowadays often distinguish between feudal jurisdiction and franchisal jurisdiction (private jurisdiction) in the Middle Ages.²⁶⁷ The rights of private jurisdiction had long existed outside of the feudal ruler system, apart from a few ancient ecclesiastical franchises in the south and east (such as Beverly, Westminster and Glastonbury). The greatest franchises were located in the north and west, whose franchises derived originally from either pre-Conquest or pre-feudal custom. This meant that their privileges were not tenurial in character, but were the consequence of an express royal grant of prescriptive right.²⁶⁸ The rights of private jurisdiction were often conveyed by a charter that written in unclear

²⁶⁴ Bracton.

²⁶⁵ Co Inst 47.

²⁶⁶ BI Comm 205.

²⁶⁷ Holdsworth, A *History of English Law* vol. 1 (first 1903, 1971) 17. Some scholars also argue that such distinction is unjustified, for example see Helen M. Cam, 'The Evolution of the Mediaeval English Franchise' (1957) 32 *Speculum*.

²⁶⁸ See Helen M Cam, *Liberties and Communities in Medieval England* (Cambridge University Press 1944) 210-11.

terms such as '*sacu and scor*', '*toll and team*' and '*infangenethof*'.²⁶⁹ However, these traditional franchises were often associated with irresponsibility, abusive authority and other notorious assertions toward their administrations, mostly claimed by the enfranchised commons within the territories. It has often been argued that not only were murder, treason and robbery left unpunished but that the right of franchise was also abused by offering permanent asylum to fugitive criminals. In some most serious cases, it has even been argued the franchise threatened the authority of the monarchy, as it became a refuge for political offenders who were pardoned treason.

In the thirteenth century, Bracton formulated a clear-cut legal doctrine of franchise to tackle these problems. He distinguished the *regalia* rights of the Crown in matters of peace and justice from rights that arose out of the contractual relationship of a lord to his tenants. According to him, matters of justice and of peace belong exclusively to the crown and the royal dignity. They cannot be separated from the crown since they make the crown what it is. Such rights and jurisdictions cannot be transferred to persons or lands, unless this has been granted as a delegated jurisdiction. Furthermore, they can only be delegated in such a way that the ordinary jurisdiction remains with the king. Based on Bracton's theory, Edward I established *Quo Warranto* proceedings, or enquiries by justices in eyre. *Quo Warranto* constituted a form of proceeding against those who exercised any public franchise without the king's grant.²⁷⁰ Edward I insisted that such rights could only arise naturally from royal license,

²⁶⁹ Opinions differ on whether the grants in these terms conveyed a right of actual court-keeping, or merely a right to receive or share in the profits of species of jurisdiction exercised elsewhere than in a private court.

²⁷⁰ In the reign of Queen Anne, the famous remedial statute on the subject of *informations* was on the nature of a *quo warranto*, in cases of *usurpations or intrusions into the offices and franchises of municipal corporations*, was passed. In substance, this statute has been very generally re-enacted in America. It may be considered as settled that where any public trust or franchise is exercised without authority, an information will be granted for usurping it, whether it be a prior franchise of the crown or one under an Act of Parliament, see John Dillon, *Municipal Corporation* (1901) vol. 4, p.2727.

whether explicit in a charter or implicit in long-tolerated exercise. The objective was merely to insist that these franchises were not held absolutely, but conditionally, to prevent future usurpation and to fix responsibilities for the due performance of public duties. Edward I's *Quo Warranto* policy was a response to petitions from the commoners within franchises, who asserted that criminals went unpunished in their franchises, and the king's writ did not run there. If the responsibility of the franchise were not duly kept by the franchise-holder, then the king could take back the privilege and fulfill the responsibility himself. The legal basis of title to franchise was further restricted under Henry VII. His interpretation of the law of *Quo Warranto* was far stricter than that of Edward I's or Edward II's justices and in fact the very existence of the franchises had come to be threatened well before Henry VIII and Cromwell launched their direct attack upon franchises in parliament.

In fact, what Bracton did was transformed the franchise into a kind of royal prerogative. He created a new generic term, *palatinate*, with reference to the independence of the county of Chester. It was in the writ of 1351, granted by Edward III in creating the county palatine of Lancaster for his cousin Henry of Lancaster, that the term was officially established. This appears to be the first deliberate creation of a private chancery. New franchisal privileges were developed, corresponding to the new powers and functions of the monarchy. The purchase of them from kings willing to supplement their revenues, and the registration of them in the royal archives, secured the protection of rights, both judicially and administratively, for their holders. The king's government became both the mentor and the supporter behind the liberty enjoyed by the franchise. The franchise holder were growingly integrated within the royal system of government.

The sixteenth century witnessed the creation of an effective Crown monopoly over incorporation following the strengthening of the

centralized government and the royal court. An explicit and direct authorization by the Crown was the only mode of incorporation. This authorization was normally given in the form of charter (or letters patent), and occasionally by way of an Act of Parliament bearing the King's explicit consent or a combination of an act and a charter. By the late Tudor period, the grant of incorporation was firmly established as an essential component of the King's exclusive and voluntary prerogative, and could not be acquired by long usage or prescription. The law of the corporation was classified by contemporaries as part of the law of the King, the core of the English Constitution. The employment of franchises in general, and specifically corporations, was still subject to judicial review by the prerogative writs of *Quo Warranto* and *Scire Facias*. Unauthorized corporations could be dissolved, and abused charters could be forfeited by the court through these prerogative judicial writs. The legal relationship between the corporation and the Crown was thus constructed by the franchise theory since then and maintained in place for a long time.

Medieval townships

The existence of township with its independent exercises of local jurisdiction could be traced as early as to the ancient republics of Greece. Although these ancient cities might bear some similarities to medieval towns in terms of their civil and political institutions, there was one major difference between them: whereas the inhabitants of the ancient republics were chiefly composed of the proprietors of land, the inhabitants of the medieval towns were mainly inhabited by tradesmen and mechanics, who were in servile condition. This essential difference made any attempted comparison hard to have any practical value or insight. Indeed, the inhabitants of the medieval towns seem to have been 'a very poor, mean set of people, who used to travel about with their

goods from place to place'.²⁷¹ In England, taxes used to be levied upon them when they carried their goods through certain manors, going over bridges, entering into a fair, and building a stall. These different taxes were known as passage, pontage, lastage, and stallage. When they were exempted from such taxes by paying their protector (a king or a great lord), a sort of annual poll-tax, they became what were called free-traders.

Britain, when subjected to Roman rule (and for a relative long period after the withdrawal of the Roman power), was divided into thirty-three townships with a certain degree of local self-government and *quasi* municipal institutions. At the time of the Norman Conquest, these towns and boroughs were dependent upon the uncertain protection of the king or lord by paying them annual tax. Since these tradesmen possessed no political and few civil rights, the towns and boroughs were not incorporated, nor considered as a constituted body politics at that time. None of them enjoyed the right of representation in the council of the nation, or the right of self-government. The establishment of the feudal system significantly changed the condition of towns, as the towns were enclosed within the fief of the proprietors and were subject to their arbitrary oppression. But the germs of liberty had long been sown in these towns. As the towns gradually prospered, many of them went into insurrection, sometimes with the aid of the king. When successful, the town would normally acquire a charter of the burghers from the Crown, which conferring it extensive municipal immunities and rights to relieve it from oppression of the feudal lord. These charters were in nature the 'treaties of peace' between the commons and their lords and the 'bills of rights' for the people. It has been said that it was the institution of

²⁷¹ Adam Smith, *The Wealth of Nations* (first published 1776, J. M. Dent & Sons Ltd 1950) vol 1, Book III, ch III, 352.

municipal corporations that conduced, more than any other circumstance, the emancipation of Europe from the thralldom of the feudal system.²⁷²

These exceptional free trading and manufacturing towns brought order, rational and wealth to an agrarian landscape, which otherwise would be characterized solely by the predatory feudal system. Maitland has described the towns as 'a photograph of English life as it was early in the thirteenth century in its most vital parts—the system of local government and police, the organization of county, hundred and township.'²⁷³ Having managed to escape the tension between the King and his feudal nobles, those towns were gradually erected into a commonality or corporation. They were generally bestowed by the Kings, the privileges of having magistrates and a town-council of their own, of making bye-laws for their own government and local affairs, of building walls for their own defense, and that of ruling all of their inhabitants under a sort of military discipline by obliging them to watch and ward (that is to guard and defend those walls against all attackers by day and night).²⁷⁴ As the 'islands in the sea of feudalism', those independent towns, filled with a large and wealthy merchant class, skilled craftsmen, artisans and wage-earning laborers, marked the entrance of a third political force into the shifting equilibrium between the territorial ruler and his feudatories. The feudal lord despised the burghers, whom they considered almost as of a different species from themselves. The wealth of the burghers never failed to provoke their envy and indignation and they plundered them on every possible occasion without mercy or remorse.²⁷⁵ But it was the interest of the king to render the burghers, who were the enemies of his enemies, all means of security and independency of the barons.

²⁷² John William Willcock, *The Law of Municipal Corporations* (1827) 1.

²⁷³ Quoted in Helen M. Cam's 'Introduction' in F.W. Maitland, *Selected Historical Essays of FW Maitland* (Cambridge University Press 1957).

²⁷⁴ Smith (n 271) 354

²⁷⁵ *ibid* 355.

The towns typically asserted themselves an institutional novelty in the sense that they involved the creations (or reactivations) of 'centers of solidary action by singly powerless individuals', which meant that they were constituted collectivist and attached to individuals only by virtue of their membership and ability to operate as a unitary entity.²⁷⁶ As Maitland has described, 'these old county towns do not pass through the manorial phase, [their] king was their lord, but not their manorial lord; in the eleventh century hardly their landlord; the land on which they stood was not *Terra Regis*.'²⁷⁷ Since feudalism was the chief force at that time, the primary concern of the townsmen was to create a distinctive juridical space 'immune' from the ruling system of feudalism, especially from the jurisdiction of the feudal courts. Above all, the juridical status of free men was granted to all townsmen, including those who were free slaves, who had left their masters and lived in these towns without being claimed.²⁷⁸ In England, this meant that they were generally exempted from suit to the hundred and county courts. All pleas that arose among them, except for the pleas of the crown, were left to the decision of their own magistrates. The novelty of township as a corporate body and its political independence, however, could be reconciled at that time with the legal institution of *franchise*. Based on their corporate nature, they claimed prerogatives of rule (as a matter of 'immunity') as *franchises*.

The township in Europe could be further differentiated into three types, according to whether the concession of the franchise was before the formation of a collective consciousness. The first type concerns the formation of a collective consciousness and precedes chronologically the concession of the franchises. The second concerns the 'new towns', which are founded and chartered with the express intent of attracting a

²⁷⁶ Gianfranco Poggi, *The State: Its Nature, Development and Prospects* (John Wiley & Sons 2013) 37.

²⁷⁷ FW Maitland, *Township and Borough* (first published 1897, Cambridge University Press 1964) 98.

²⁷⁸ Poggi (n 276) 40.

population by promising it certain privileges. Here the privilege itself serves largely as the basis for the development of collective consciousness, since the concession to the town dwellers of a distinctive legal status marked them out from the outlying rural environment. In the third type, probably the most frequent type, the inhabitants evolved a collective consciousness on the basis of shared interests. That consciousness was presupposed by the concession of franchises, though it could also be strengthened by it.²⁷⁹ Such a development was amazing for Smith, as it was hard to imagine that the sovereigns voluntarily erected a sort of independent republic in the heart of their own dominions.²⁸⁰

The institutional feat of creating a collective township through voluntary agreement had to be backed by military might. The towns generally disposed of two significant military resources: city walls and other fortifications, and the urban militia. The former were purely defensive, the latter could be used for either defensive or offensive purposes. Both of them were sustained by the towns' growing economic strength.²⁸¹ But the typical member of a town militia was not a professional soldier, just as the typical townsman who was involved in the political administration of township did not regard it as his identity. The focus of the townsman was always the commercial and productive pursuits. This constituted a further novelty in the township with respect to the territorial rulers in a feudal context, for whom, the leadership, the exercise of rule, and the practice of governance always constituted their original vocation, the focus of their identity and of their mode of life. But the townsmen, on the other hand, demanded the right to rule no one but themselves, and their requirement for safeguarding always revolved around their productive pursuits, never the practice of leadership and the experience of war. They

²⁷⁹ J. Dondt, *L'alto medioevo* (Milan, 1970) 335-36, cited in Poggi (n 270) 37-38

²⁸⁰ Smith (n 271) 423.

²⁸¹ Poggi (n 276) 39.

were just chiefly constructing a context of rule and a juridical environment that would make their profitable autonomy and military self-sufficiency possible.

Economically, the main reason for the existence of the towns was the division of labor. This was not only a characteristic of the towns' internal economy, but also the wider division of labor between town and countryside. There was also a further division of labor between the different towns, as traffic flowed not just between each town and its countryside, but also between towns. The towns developed as 'ecologically distinctive settings', the 'dense settlements of people attending to specifically urban productive and commercial pursuits'.²⁸² They proved to be extremely important to the growth of national wealth and later the development of capitalism. The fact that the king could impose no tax upon them without their own consent gave rise to the greater security of the towns' industry and the accumulated stock. Thus 'order and good government, and along with the liberty and security of individuals, were, in this manner, established in cities, at a time when the occupiers of land in the country were exposed to every sort of violence.'²⁸³

The danger to the existence of these townships, however, was that sometimes they might go too far for their independence and lose the allegiance with their original ruler, that was the king. As a result, they might prosper for a while but in the long run they were too small to be viable and were finally crushed by foreign invaders. This is exactly what happened in Italy and Switzerland, where the cities generally became independent republics, and they conquered all the nobility in their neighborhood, obliging them to pull down their castles in the country and

²⁸² *ibid* 37.

²⁸³ Smith (n 271) 426.

to live in the city. But in France and England, however, the cities had no opportunity to become entirely independent.

Municipal corporations

The municipal corporation is the township in a modern sense. It could be defined as 'the body politic and corporate' constituted by the incorporation of the inhabitants of a city or town for the purposes of local government.²⁸⁴ This kind of corporation has a natural existence: its unity has a geographical character, which is based upon the local dwelling and the ownership of land. In an attempt to explore the nature of the municipal corporation, English legal historian Maitland started from examining a 'not very high-value' case, where the lordship over some 1,200 acres of land went a-begging.²⁸⁵ In this case, there were five claimants, including the municipal corporation of Cambridge, the Merton College of Oxford, the Jesus College and the St John's College of Cambridge, and Sir Charles Cotton, the squire of a village called Madingley. The municipal corporation of Cambridge was successful in

²⁸⁴ Some of the content of this section and last section is derived from Justice John Dillon's book, *Commentaries on the Law of Municipal Corporations* (Little, Brown & Co 1911) vol 1. However, it should be noted that in 1868 Justice Dillon had affirmed a narrow interpretation of a local government's authority, holding that municipalities maintain a subordinate status within the state, subject to state legislative control (See *City of Clinton v. Cedar Rapids & Mo. R. R.*, 24 Iowa 455, 475). This view became known as *Dillon's Rule*. In contrast, in 1871, Judge Thomas Cooley of the Michigan Supreme Court challenged Dillon's Rule, holding that municipalities possess inherent rights to local self-governance (See *People ex rel. Leroy v. Hurlbut*, 24 Mich. 44, 109). Taking a more populist view, Judge Cooley reasoned that 'local governments ... are either simultaneous with, or precede, the more central authority' and that, if Dillon's Rule were publicly asserted, it 'would be somewhat startling to our people.' Nevertheless, the Cooley view of local government power as an absolute right never gained much acceptance and was, in fact, discredited by the United States Supreme Court. In 1903 and again in 1923, the Court upheld Dillon's Rule, which continues to be the mainstream of American judicial and academic sentiment and has been fully implemented in the overwhelming majority of states. Other works on the legal history of the municipal corporation, see Albert Shaw, *Municipal Government in Great-Britain* (1895) and *Municipal Government in Continental Europe* (1990); Eugene McQuillin, *The Law of Municipal Corporations* (Callaghan & Company 1945); Gerald E Frug, 'The City as a Legal Concept' in Lloyd Rodwin and Robert M Hollister (eds), *Cities of the Mind: Images and Themes of the City in the Social Sciences* (Springer US 1984).

²⁸⁵ FW Maitland, *Township and Borough: The Ford Lectures 1897* (Cambridge University Press 2011).

claiming the land, which, however, opened up a large question: 'What did King John mean, or rather, what did he really do when he granted the town of Cambridge to the burgesses of Cambridge and their heirs forever? Did he mean to place upon the community of the burgesses the feudal ladder of land-tenure, as the owner of the tenanted land? Or, the community merely to step into the sheriff's shoes as collector and farmer of certain royal revenues, house rents, land rents, market tolls and the profits of mills and courts?' Maitland believes that the king did not mean to abandon his hold upon the land in the first place, but there was slowly emerging the idea since the middle of the fourteenth century that the Town is the lord of all the houses within.²⁸⁶ And at the beginning of the sixteenth century the corporation obtained an important recognition of its lordship.

This transition from 'community' to corporation has been accomplished naturally, as Maitland wrote:

The Town which has rights and duties, the Town which owes and is owed money, the Town which can make a contract even with one of the townsmen, the Town which can be landlord or tenant, the Town with which the treasurer can keep an account, slowly struggles into life. If we are to understand the process we must study at close quarters the methods in which the affairs of the borough are conducted, the growth and expenditure of a revenue, the incidence of profit and loss. We must watch carefully for the first appearance of the common chest, for the appearance of a treasurer, and for the appearance of a council that administers property beside or in the stead of the old moot that deemed dooms. What I may call the business side of municipal life must come by its rights. Political and constitutional history will thereby gain a new reality. If we fail to see this, it is because we carry our methods of business into an age which knew them not and our thoughts in to an age which did not and could not think them.²⁸⁷

In addition to the common chest, a treasurer, and a council, the communal element of the township could also be found in the community's power of forcing a man to serve a bailiff. Furthermore, if the

²⁸⁶ *ibid* 84-85.

²⁸⁷ *ibid* 80-81.

bailiff made a profit, the money was to be spent for the public good of the town. And, in the days without free libraries and electric lighting, there was but one obvious way of spending it, that is a banquet, or at least a small drinking, for all townsfolds.²⁸⁸

One of the most essential legal features that distinguishes municipal corporation from the state is that municipal corporation is subject to private law relations. On the one hand, it is in need of property, and the opportunity for the acquisition of property; on the other hand, it could be arraigned before a court of justice for violation of contract. The creation of the modern municipal corporation is based on the belief that, in respect of local affairs, it would be better to be dealt by the people concerned than by the distant central power. The power of local self-governing, including the powers to levy taxes and to expend taxes in projects that are necessary for the common interests, such as projects of health, welfare, safety, and convenience of the inhabitants, is the most distinguishing feature that differentiates the municipal corporation from the general corporations that created for pursuing business interest.

The concept of the municipal corporation was familiar to Roman Law under the bracket of *Juristic Person*. There might be strikingly close analogy and even identity between the concept of Roman Corporations and modern municipal corporations.²⁸⁹ But to conceive of ancient Rome as the capital of Italy in the same sense as London is the capital of England would be a great mistake. This is because the ancient city of Rome was a great corporate body, holding sovereignty over the whole of Italy. The Roman government divided civic communities into three types: municipal towns, prefectures, and colonies. Only municipal towns received the full Roman franchise right of self-government. Having been

²⁸⁸ *ibid* 78-79.

²⁸⁹ See generally Friedrich Karl von Savigny and William Henry Rattigan, *Jural Relations: Or, The Roman Law of Persons as Subjects of Jural Relations: Being a Translation of the Second Book of Savigny's System of Modern Roman Law* (Hyperion Press 1884).

conquered by the Romans, the colonies were obliged to erect cities, called *municipia*. In *municipia*, the Romans established fixed governments and imparted their arts, sciences, languages, and civilization to their new subjects. The Roman world was a vast congeries of municipalities bound together by the central power of Rome. Therefore, observations have often been made that the history of the conquest of the world by Rome is the history of the establishment of a vast number of cities.

The city of London perhaps could be considered as the oldest municipal corporation in England. Henry I. has granted to London the original charter conferring many municipal privileges, including the right to choose some of its own officers, such as sheriff, justice, and so on. But it was not until the time of John that the right of local self-government was officially conferred upon English towns and boroughs. The political power acquired by boroughs and cities rendered them generally exempt from suits to the hundred and country courts, except for the pleas of the crown. All remaining pleas were left to the decisions of their own magistrates. In this sense, Maitland's claim should be justified when he challenged the common assumption that the fields of the boroughs had some manorial lords in the first place, whose proprietary rights should be compensated by the boroughs. Maitland argued that 'these old county towns do not pass through the manorial phase, their king was their lord, but not their manorial lord; in the eleventh century hardly their landlord; the land on which they stood was not *Terra Regis*.'²⁹⁰

Edward I was the first to grant the boroughs the right to elect represented members of parliament. This was generally regarded as the most significant democratic feature of borough in England, since previously the commonalty of England had no voice or part in the legislature, which was vested entirely in the king and the council,

²⁹⁰ Maitland (n 277) 98.

constituted of the spiritual and lay peerage. Edward I granted this unprecedented privilege was, of course, out of the fiscal consideration. This wise and politic prince was greatly distressed for money. Instead of attempting to raise it by the levy of taxes, which were submitted to with murmurs and yielded sparingly, he enjoyed the fact that large sums of money were being voluntarily sent to him, with less trouble than in the former way, by issuing writs on about hundred and twenty cities and boroughs. As the experiment proved successful, the practice was continued. This was the definite commencement of popular representation, and of the House of Commons itself.

The Crown, as a check upon the nobles, began to encourage popular elections in municipal corporations. However, in the course of time, these representatives of the municipal corporations were proved to be more formidable adversaries to the crown than the nobility to it. In Elizabeth's reign, the judges decided that, although the right of election was, by the original constitution or charter, in the whole assembly, a by-law may be presumed giving the right of election to a select class instead of the whole body (this selected class was more readily controlled by the crown). Later, to further increase the power of the Crown, James incorporated towns or boroughs, endowing them with the parliamentary franchise, but confining the exercise of the right to vote to select classes. Ironically, the immense power of popular representation in municipal corporations turned out to be a most active agency in the overthrow of Charles I.

At Restoration, Charles II found the principal opposition to the court came from the cities and boroughs. He therefore reconstructed the corporations by filling them with his own judges, who aided him to acquire absolute control over these corporations. Started from London, which was then the largest and most influential municipal corporation, a *quo warranto* was issued in 1683 to abrogate the charter of this city. As a condition of its restoration, it was provided that the mayor, sheriff and

clerk, should not exercise their office without the king's consent, and that if the king twice disapproved of the officers elected by the corporation, he might himself appoint others. This meant that the city of London was deprived of the right to choose its own officers and was made to dependent upon the Crown. Such also was the fate of most of the large municipal corporations in England. The whole power was therefore centered in the hand of the crown. This was not confined to England. In 1683, writs of *quo warranto* and *scire facias* were issued for the purpose of abrogating the charter of Massachusetts. Patriotism and religion combined in their defence, but in vain. In 1684, one year after the judgment against the city of London, the charter of Massachusetts was conditionally forfeited. The charter government was displaced, and the popular representation was superseded by a commission. In 1687 similar writs were issued against the charter of Rhode Island and Connecticut, when the people of the latter colony unsuccessfully tried to preserve the charter by concealing it in the Charter Oak. Yet, these colonies, as a result of the Glorious Revolution of 1688, had their charters restored.

It is said that no political institution can endure forever, although it may exist long after it ought to cease. But 'if ever an institution outlived its usefulness—lived long after it became a positive evil—it was the municipal corporations of England, prior to the reform act of 1835.'²⁹¹ The abuses in the corporations arising out of selected bodies continued after the revolution of 1688, and until act of parliament in 1835. During the time of Elizabeth, the controlling power of corporations was virtually vested in 'selected bodies'. The system of municipal corporations no longer committed itself to self-government and economic prosperity. In many places, the principal function of the corporation was to elect members of parliament, and the number of their corporators ranged from as low as ten to thirty. No longer representing the public will of the burgesses, the

²⁹¹ Dillon (n 270).

councils of the municipal corporations were frequently controlled by a single party. There was no check upon maladministration. The property of the municipal corporation was wasted, but the expenditure of the money was extravagant. Officers were elected by the councils for their devotion to the party. In a large majority of the municipalities, the corporations were close to each other, which meant that the governing body had the power to determine who should be admitted to freedom or membership. Lord Henry Brougham devoted himself faithfully to the promotion of the reform of the municipal corporations and to the passing of the Reform Act. He proposed abolishing the current self-elected and perpetual councils of the municipal corporations, and replacing them with a short and fixed-period council that was selected by the votes of the burgesses.²⁹² John William Willcock, in concluding his treatise on Municipal Corporation recommended a similar reform, but it took ten years for this to become reality.²⁹³

The 1835 Reform Act allowed Parliament to take the municipal corporations in hand and to ensure their revenues were to be expended for the public benefit of the inhabitants of the towns. 'The public, *not the common*, benefit', wrote Maitland. To Maitland, this change indicated the decline of the township in England and it seemed disgraceful to him. The commons were 'drained': the green commons were apparently 'utterly neglected' and 'everybody turned out what beasts he pleased, taking the risk of having to drag them from a dismal swamp'.²⁹⁴ 'Morally the Town loses its personality; for it loses the sense of duty', Maitland disappointedly concluded.²⁹⁵ According to him, this meant that the corporation of medieval burgesses became a 'masquerade', a *persona ficta*, instead of a *real* moral body politic. By entrusting the communal

²⁹² Henry Brougham Baron Brougham, *Speech of Henry Lord Brougham: In Defence of the Absent Commissioners, on the English Municipal Corporation Reform Bill, August 12, 1835* (Ridgeway & Son 1835).

²⁹³ See John William Willcock (1800-1851), *The Law of Municipal Corporation* (1827).

²⁹⁴ Maitland (n 277) 95.

²⁹⁵ *ibid.*

property to other bodies, such as groups of commissioners and the like, Parliament fostered the notion that it was morally the property of the corporators, not the property of the township, matters such as the watching, the paving and the lighting of the town were no longer affairs of the corporation. Neither did it have duties to provide relief for the poor. It was a 'vicious circle': 'the corporation was untrusted because untrustworthy, untrustworthy because untrusted.'²⁹⁶

Corporate colonies

Although the city of London was the oldest municipal corporation in history, modern municipal corporations are most commonly found in America as a form of local government. In general, all American cities, towns and counties are public corporations, full or quasi. Created by the legislature and invested with the power and freedom to decide and control their local matters, municipal corporations mark one of the fundamental features of American federal government system. Municipal corporations are subject to the legislature of the State. If their acts are in violations of law or private rights, they are also subject to judicial judgment. As a renowned American judge has stated,

From time immemorial, the counties parishes, towns and territorial subdivisions of the country have been allowed in England and required to lay rates on themselves for local purposes. It is most convenient that the local establishments and police should be sustained in that manner; and indeed, to the interest taken in them by the inhabitants of the particular districts, and the information upon law and public matters generally thereby diffused through the body of the people, has been attributed by profound thinkers much of that spirit of liberty and capacity for self-government, through representatives, which has been so conspicuous in the mother country, and which so eminently distinguishes the people of America.²⁹⁷

The American ideas of establishing universal elective franchises as the basic unite of its government system, and of investing the citizens with

²⁹⁶ *ibid.*

²⁹⁷ Justice Per Ruffin, *Caldwell v. Justices, &c.*, 4 Jones (N. Car.) Eq. 323.

the power of self-government in local affairs, run back to the earliest period of its colonial history.²⁹⁸ The earliest establishment of three 'corporate colonies' in North America, namely the colonies of Massachusetts, Rhode Island, and Connecticut, were the only titled colonies in British imperial history that were legally chartered as private corporations.²⁹⁹ In this respect, it has been generally accepted that these three colonies constitute a unique category by themselves amongst British colonies, regardless of the divided opinions on the classification of colonies.³⁰⁰

Scholarship on studying the 'corporate colonies' highlights how the corporation as a form of governance has resulted the unique mechanism of American administration, characterized by 'technique' and 'systematic minds'. Especially in the late nineteenth century, there was an identified trend of in studying the American colonial history, known as 'the imperial school of American historiography'.³⁰¹ The historians of the 'imperial school' shared an unusual interest in these three 'corporate colonies' of

²⁹⁸ See generally Earnest S. Griffith, *History of American City Government: The Colonial Period* (1972).

²⁹⁹ The colony of Virginia was also established as a private corporation from the outset in 1606. However, in 1642, its charter was revoked due to the unreconciled dispute between Virginia Company's Virginia and Bermuda fractions over the tobacco trade. As a result, Virginia was changed into a royal colony, over which the king retained direct ownership and rulership.

³⁰⁰ Osgood challenges William Blackstone's orthodox classification of the colonies into: provincial establishments, proprietary governments and charter governments. On the other hand, except for the three colonies (Massachusetts, Rhode Island and Connecticut) that were set up solemnly as corporation in the first place, he brackets all the rest with the term 'province', for he thinks that 'it makes no difference whether the inhabitants of the colonies stood in a mediate or an immediate relation to the king'. See Herbert L. Osgood, 'The Corporation as a Form of Colonial Government I' (1896) 11 *Political Science Quarterly* 259-277.

³⁰¹ The Imperial School challenged the previous studies of American colonial history that treated American colonies as independent political entities isolated from the rest of the world. In contrast, the imperial school approached the early history of the American colonies as the integral part of the British Empire and looking at this period history from the perspective of the home government. It argues that the understanding of the America colonial history should be situated within the relationship between the colonies and the Empire and The leading figures of the imperia school in the late nineteenth century are generally includes Herbert L. Osgood, Charles M. Andrew, and George L. Beer, and sometimes Edward P. Channing was also considered as the one of them. See generally Michael Kraus and Davis D Joyce, *The Writing of American History* (Rev ed, 1 paperback print, University of Oklahoma Press 1990) 210-238.

New England, and brought a richness of detail in understanding them. According to them, these three corporate colonies most represented the 'evolutional' governmental forms of American legal and political institutions, though whose beginning was similar to that of other British colonies under the same colonial policy and based on the same English common law. One of the leading figures, Herbert Osgood, particularly admired the stable operation of the corporate colonies, especially when compared to the other proprietary provinces that constantly suffered from turbulence due to the inefficient administration of the proprietors.³⁰²

Researching on these unique corporate colonies, the historians of the Imperial School were endeavoring to formulate a treatise of American colonies.³⁰³ The fundamental credo that shared by them was that the development of the colonies in America was driven primarily by the motivation of economic pursuit. All the other motives were subsidiary to this economic consideration. For example, Beer has defined it as the complex colonial system of regulations, 'whose fundamental aim was to create a self-sufficient commercial empire of mutually complementary economic parts'.³⁰⁴ In his opinion, British colonization of America was 'fundamentally an economic movement', although it 'was not solely economic in nature, for no extensive development can be reduced to so simply a category'.³⁰⁵ Similarly, Andrews has argued that 'the colonial governments in New England represent the system of a trading company applied to the political organization of a state'.³⁰⁶ Baldwin also suggested

³⁰² See Herbert L. Osgood, *The American Colonies in the Seventeenth Century* (London: Macmillan & Co., Ltd., 1904).

³⁰³ For example, Fox has pointed out, Osgood's work is not 'a narrative history in the ordinary sense, but a treatise on governmental forms in evolution'. See Dixon Ryan Fox, *Herbert Levi Osgood, an American Scholar* (Columbia UP 1924)55.

³⁰⁴ George Louis Beers, *The Commercial Policy of England toward the American Colonies* (Columbia College 1893)

³⁰⁵ *ibid.*

³⁰⁶ Charles M Andrews, *The Colonial Period of American History*, vol I (New Haven: Yale University Press) 43. Cf. Michael Kraus and Davis D. Joyce, *The Writing of American History*, Rev. ed., (Norman: University of Oklahoma Press, 1990)204.

that a sufficient familiarity with the knowledge of the corporate organization was manifested in 'all the relations of their life'.³⁰⁷

One of the governmental institutions that was mostly characterize of the corporate colonies was their township system. Many historians have admiringly written about the democratic character of the townships in these corporate colonies.³⁰⁸ It has been revealed that their democratic nature related closely the fact that they have innovatively used a planned method in in distributing land, which was "far different from the 'indiscriminate location' prevailing in most of the other colonies".³⁰⁹ This was often known as the ownership system of the land corporation.³¹⁰ The political rights and responsibilities of the individuals to the town closely related to their shares of the land corporation. In John Martin's word, the township system of corporate colonies was 'a complex public sponsorship of private enterprise'.

It is also well known that Tocqueville once was very much impressed by the institutions of New England towns (he even coined the term 'American Exceptionalism' to denote this phenomenon). He considered them as small independent republics forming the principle of American liberty. As he wrote,

Local assemblies of citizens constitute the strength of free nations. Municipal institutions are to liberty what primary schools are to science; they bring it within the people's reach; they teach men how to use and how to enjoy it. A nation may establish a system of free government, but without the spirit of municipal institutions it cannot have the spirit of liberty.³¹¹

³⁰⁷ Yale Law School, *Two Centuries' Growth of American Law, 1701-1901* (Charles Scribner's Sons 1901) 261.

³⁰⁸ See Alexis de Tocqueville, *Democracy in America* (G. Lawrence tr, Harper & Row 1988). And Robert D. Putnam, *Bowling Alone: The Collapse and Revival of American Community* (Simon & Schuster 2000).

³⁰⁹ Jr. Barck and Hugh Lefler, *Colonial America* (The Macmillan Company, 1968) 92.

³¹⁰ See John Frederick Martin, *Profits in the Wilderness: Entrepreneurship and the Founding of New England Towns in the Seventeenth Century* (University of North Carolina 1991).

³¹¹ Tocqueville's *Democracy in America* (first published 1835, Penguin 2003) ch V.

What Tocqueville described as 'a system of free government' in municipal corporations, or in other words, the concept of self-government and decentralized government system, has long been established by the Articles of Confederation, which predates the U. S. Constitution and the Bill of Rights'.³¹² This has been confirmed later by the Tenth Amendment of the Constitution, which was formulated in the context of the Age of Enlightenment, when political philosophers, such as Montesquieu, Voltaire, John Locke, and Thomas Paine, all authored many writings proposing decentralized representative government. The established federalist structure of the Constitution protects the individual self-determination where citizens lived and worked by delegating the federal government only few and defined power, ensuring 'the necessity of providing more effectually for the security of private rights, and the steady dispensation of Justice'.³¹³

But the American municipal corporations also had their drawbacks. Sometimes, the charters of these municipal corporations were carelessly worded and loosely construed, resulting in allowing municipal corporations to engage in extra-municipal projects (such as the building of railways), incurring debts and thereby creating huge financial burdens for its citizens. The remedy was often setting up the constitutional limitation to prohibit such extraordinary and extra-municipal projects. As to the franchises who had been granted the privilege to use the streets and public property of municipalities for railroad and other public utilities,

³¹² Article II of the Articles of Confederation declares that 'each state retains its sovereignty, freedom and independence, and every power, jurisdiction, and right, which is not by this confederation expressly delegated to the United States, in Congress assembled.' Similarly, the Tenth Amendment of the Constitution states that 'the power not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.' See generally *Milestones in the History of U.S. Foreign Relations: 1776—1783: Articles of Confederation, 1777-1781*, Office of the Historian, United States Department of State, see <https://history.state.gov/milestones/1776-1783> (2018).

³¹³ See *Madison Debates—June 6*, The Avalon Project (June 6, 1787).

a popular demand has arisen that such franchises should be granted only for limited periods, accompanied by periodical revaluations, and full compensation to the city should be ensured. Some argued that the public utilities of all kinds should be ultimately returned, owned and operated by the municipality for the common good of the inhabitants. Nevertheless, every municipal corporation in America is subject to the power of common law, which prevents the abusive of municipal corporations while encourages freedom and self-government within them. As John Dillon has argued, 'the common law, as well as the institutions which it developed or alongside of which it grew up, is pervaded by a spirit of freedom, which distinguishes it from all other systems and peculiarly adapts it to the institutions of a self-governed people.'³¹⁴ There has been not so much structural change until today, American citizens are still interacting most with their municipal departments and remain very much local.

³¹⁴ Dillon (n 289).

III. THE EARLY MODERN PHASE

In the late sixteenth and the seventeenth centuries, the public/private distinction re-emerged as the modern separation between the 'public' state and the 'private' property ownership. The 'public' nature of the state denotes, on the one hand, the abstract and impersonal form of the centralized state, separated from both the ruler and the ruled. On the other hand, it refers the formulation of the rational-technical administrative ethos that regulated the acts of the sovereign authority. In terms of the 'private' character of the property ownership, it corresponded to the collapse of the old feudal system: the ownership of the land has been reduced from the political indication of manorial authority to a mere personal occupation and usage with only economic significance. John Locke's labor view of property helped this transitional process in establishing the *unlimited* right of the private property owner over their lands. The property owners further organized themselves as civil society to coordinate their individual interests and, together, to request the government's protection for their properties.

During this period, the form of corporation has been innovatively applied to the area of business as the trading company, an unprecedented form of incorporation that combined private and public interest together. This unprecedented business companies have acquired extraordinary success in overseas trading. The importance of these early business companies, especially overseas joint-stock corporations, has been signified by scholars as 'bridg[ing] the medieval concept of the corporation as an essentially public body with an industrial model of enterprise acting

primarily in the interests of its shareholder'.³¹⁵ They have also been viewed as the progenitors of modern multinational corporations.

9. The Public State

The formulation of the modern idea of an abstract and impersonal state, which was separate from both the rulers and the ruled, was directly linked to the nobility's struggle against the Absolutist Monarchy in the late sixteenth century. The emergence of the Absolutist Monarchies, which mainly including the centralized monarchies of France, England and Spain in Renaissance Europe, represented a decisive rupture from the previous pyramidal and parcellized mediaeval sovereignty with its estates and liege-systems. It was a response to the difficulties that were caused by the outdated feudal mode of production and the emergence of middle-class society. This centralized form of the state system entailed a systematic and hierarchic division of labor within the unprecedented modern administrative government: this consisted of standing armies, a permanent bureaucracy with clergy, a codified law and judicature, national taxation, and an unified market.³¹⁶

Yet, it has been argued that the whole structure of the absolutist state was paradoxical in nature, whose superficial modernity (apparently capitalist) was contradicted by the subterranean feudal domination.³¹⁷ Rather than being a mediator between the old feudal nobility and the new urban bourgeoisie, or being a prototype of the bourgeois state that representing mainly the middle-class interests over those of the nobility, the absolutist monarchy was still fundamentally an apparatus for

³¹⁵ Philip Stern, *The Company-State: Corporate Sovereignty and the Early Modern Foundation of the British Empire in India* (Oxford University Press 2011).

³¹⁶ Most of the points about the absolutist state derive from Perry Anderson's discussion in *Lineages of the Absolutist State* (first published 1974, Verso 1993).

³¹⁷ *ibid.*

protecting aristocratic property and privilege.³¹⁸ Since the aristocratic agrarian property still blocked a free market in land and the mobility of manpower, the rural relations of production remained feudal and that the fundamental means of production remained in the hands of the noble landowners. But the new form of absolutism indicated that instead of continuing to maintain a *decentralized administration*, the feudal aristocracy had to be restructured as a reinforced apparatus to clamp the double threats, namely both the threat posed by peasant unrest and the threat posted by mercantile or manufacturing capital.

The significance of the new paradoxical apparatus thus should not be minimized, especially in terms of recognizing its centralized structure was 'secondarily over-determined by the rise of an urban bourgeoisie'.³¹⁹ Anderson cited both Engels and Althusser in emphasizing this transitional feature: Engels has concluded that 'the political order remained feudal, while society became more and more bourgeois'; Althusser wrote similarly that 'the political regime of the absolute monarchy is only the new political form needed for the maintenance of feudal domination and exploration in the period of development of a commodity economy'.³²⁰ This double character of the absolute monarchy was also reflected on the Renaissance reintroduction of Roman Law. It introduced an unconditional system of private property right, which timely answered to the vital interests of the commercial and manufacturing bourgeoisie. It also renovated the Roman conception of *Imperium (public autonomy)*, which responded to the constitutional exigencies of the new royal governments for increased central powers. It provided the juristic protocols for the kings and princes in overriding medieval privileges, ignoring traditional rights, and subordinating private franchises. As Anderson concluded, 'the enhancement of private property rights from below was matched by the

³¹⁸ *ibid* 40.

³¹⁹ *ibid*.

³²⁰ *ibid* 19.

increase of public authority and discretionary powers available to the royal ruler from above'.³²¹

The indivisible sovereignty

The new centralized political regime naturally required the conception of a new understanding of sovereign power as the ultimate source of all coercive (feudalist) power. The application of such a concept to concrete reality, though, was always controversial, since political power was never a clear-cut hegemony. This task was achieved by Jean Bodin's celebrated principle that sovereignty is *indivisible*, which basically meant that 'the high powers of government could not be shared by separate agents or distributed among them, but all had to be entirely concentrated in a single individual or group'.³²²

Before Bodin, to say that a magistrate had a certain power (the possession of *merum imperium*) meant that, based on *the right of office*, he could exercise that power according to his own discretion without direct reliance on the king.³²³ With the growing centralization of Renaissance monarchies, this view of *merum imperium* by right of office was increasingly under attack, most detrimentally so by Italian legal humanist Andrea Alciato. Alciato held that every power in the state was merely a right of exercise derived by delegation from the prince. Despite his preference for a strong monarchical authority, Bodin however, did not follow this line of argument. Instead, he divided the *merum imperium* into two parts, one held by magistrates, and the other held only by the prince (the sovereignty). This differentiation led to the most theoretically momentous question concerning the definition of this exclusive right of

³²¹ *ibid* 28.

³²² Julian H Franklin, 'Introduction' in Jean Bodin(1530-1596), *On Sovereignty: Four Chapters from The Six Books of the commonwealth* (Julian H. Franklin tr and ed, Cambridge University Press 1992) xiii.

³²³ For a historical survey of *merum imperium* in medieval legal theory, see Myron P Gilmore, *Argument from Roman Law* (Cambridge University Press 1941).

the prince, which marked the essence of sovereignty. According to Bodin, the exclusive rights of the prince was the right to suspend a valid law (the valid commitment of the prince to the estates, or the people) under the condition of urgent necessity, the case in which it became necessary to violate such commitments, to change laws or to suspend them entirely.³²⁴

According to Bodin, if in an emergency the prince had to consult a senate or the people before he could act, he would have to be prepared to let his subjects dispense with him. Since the people were not above law, they in turn would have to permit their prince to dispense with them. Sovereignty would thus become an absurd play between the two parties: sometimes the people would rule, and sometimes the prince would rule. This would be contrary to all reason and all law. Bodin thus concluded that sovereignty is indivisible and in the hands of the king.³²⁵ He then came to his most impressive achievement: by considering sovereignty to be indivisible, he reduced the relationship between prince and estates to a simple question of the emergency and finally settled the ultimate power in the hand of the prince. He, thus, standing at the beginning of modern theories of the state, laid the cornerstone for the typology of modern political power. Nevertheless, the ruler and the state were yet to be distinguishable, as there was still no difference between the 'office-holder' and the 'office'. The affairs of the state were still considered to be the secret and private affairs of the prince.

The abstract state

For the Absolute Monarchy to acquire 'public' character, it, firstly, required a distinction between the *office* and the *office-holder*, or between the

³²⁴ Bodin (n 322).

³²⁵ Carl Schmitt, 'Definition of Sovereignty', in *Political Theology: Four Chapters on the Concept of Sovereignty* (University of Chicago Press 2005) 4.

personal king and an abstract and impersonal form of the state as the embodiment of sovereignty. Secondly, it demands the absolute monarch to not rule arbitrarily but to rule according to reason and persuasion with an internal coherence. This constitutional requirement was encapsulated by the notion of *raison d'État* (governmental reason), which means 'an absolutely specific art of government' with 'its own reason, its own rationality, its own *ratio*'.³²⁶ Taking the economy and public opinion as its two objects to work on, this new knowledge of the government set the framework for modern bureaucracy. Though the complex character of the modern state should not be reduced to the ways in which the institutional machinery of a government functions, it was precisely in 'the phenomenon of bureaucracy and the formation of the rational-technical administrative ethos of large-scale government' in which this 'public' character of the state materialized.³²⁷

The idea of the 'public' state, as an abstract artifact separate from both the ruler and the ruled, was part of 'the general movement of ideas of the mid-seventeenth century'.³²⁸ It came from previous constitutional upheavals in British politics: as the constitutional crisis deepened, a new voice cut through all the old well-worn debates, arguing that the true subject or bearer of sovereignty was neither the natural person of the monarch nor any corporate body of the people, but was rather the artificial person of the state. The concurrent centralization both of royal power and of noble representation in English polity resulted in the increasing confrontation between the centralized monarchy and the uniquely unified parliament in the early modern period.³²⁹ Although without fiscal control over the king nor the rights of regular convocation that later characterized some of the continental estates systems, the

³²⁶ Michel Foucault, *Security, Territory, Population: Lectures at the Collège de France 1977-78* (Palgrave Macmillan 2009).

³²⁷ Stuart Hall, 'Introduction' in Stuart Hall, David Held and Gregor McLennan (eds), *The Idea of the Modern State* (Open University Press 1987).

³²⁸ Foucault (n 326)

³²⁹ Anderson (n 316) 113-115

unitary parliament in London somehow managed to secure control over royal legislative power: no monarch could decree new statutes without the consent of the Parliament. The monarchy in England thus was not only limited by the divine or natural law according to Bodin's theory of sovereignty, but also by the 'positive' law that set by the parliament.³³⁰

However, it was in the political theory of Hobbes, and in other theorists of *de facto* sovereignty in the English Revolution, that this abstract notion of the state was theoretically completed.³³¹ In his *Leviathan* of 1651, Hobbes first crystallized the idea of viewing the state as an artificial person carried by those who wield sovereign power. As he wrote, the state or commonwealth 'is One Person, of whose Acts a great Multitude... have made themselves every one the Author' and that 'he that carryeth this Person, is called soveraigne.'³³² 'That great Leviathan, called a Commonwealth or State,' Hobbes thus claimed. Hobbes's ambition as a political theorist had always been to demonstrate that the fullest powers of sovereignty must be vested neither in the people nor in their rulers, but always in the figure of an 'artificial man'. Hobbes's idea of the *Leviathan* announced the beginning of a new era, which manifested by the emergence of the modern usages of terms such as *état*, *stato*, *staat*, and *state*.³³³ This new understanding of the state was widely accepted and articulated by the English writers of the next generation. For example, Bacon suggested a similar understanding of the sovereign power, when he argued the rulers as well as their councilors as having a duty to consider the weal and advancement of the state which they serve. Nevertheless, to what extent a clear legal separation of the state (the office) from its actual incumbent (the office-holder) was achieved in law

³³⁰ See JP Cooper, 'Differences between English and Continental Governments in the Early Seventeenth Century', in JJ Bromley and EH Kossmann (ed.), *Britain and the Netherlands* (1960).

³³¹ Quentin Skinner, 'The State' in Terence Ball, James Farr and Russell L Hanson (eds), *Political Innovation and Conceptual Change* (Cambridge University Press 1989) 90.

³³² Hobbes, *Leviathan* (1651).

³³³ Skinner (n 331).

was still a contentious topic, since it is well remembered that the useless legal institution of 'the Crown as corporation sole' at common law has been criticized severely by F.W. Maitland.

The rationalized government

The modern state is essentially a government administration that based on the efficient systems of various institutions, such as armies, taxation or justice (the system of taxation, namely the bureaucracy of the treasury, is of course at the true core of modern state). But Foucault has argued that, when we are speaking of the emergence of the modern state at the end of the sixteenth century, we do not specifically refer to the real historical moment when such a set of modern institutions came into being.³³⁴ Instead, what has been talking about was the specific historical phenomenon when these institutions, as a whole, entered into 'reflected practice'. As he said,

The state began to be projected, programmed, and developed within (this) conscious practice...became an object of knowledge and analysis...became part of a reflected and concerted strategy...began to be called for, desired, coveted, feared, rejected, loved, and hated. In short, it is the entrance of the state into the field of practice and thought...³³⁵

The so-called state, in this sense, was first and foremost the regulatory idea of that form of thought, that form of reflection, of that form of calculation. It was just 'a schema of intelligibility for a whole set of *already* established institutions, a whole set of *given realities*'.³³⁶

Amongst these newly-emerged regulatory ideas of the state, the common law was rediscovered as a powerful lever by the aspiring nobility to limit the powers of the king, who was then claiming to rule on divinity with no

³³⁴ Foucault (n 326).

³³⁵ *ibid* 286-287.

³³⁶ *ibid*.

constraint. By insisting that the ruler must be responsible to the common law, which based on custom and tradition, the nobility set up the common law as the objective criterion to measure the king's actions. The king's actions, accordingly, became publicly known and acknowledged, supposed for all to see through public processes. The affair of the state was thus considered as 'public matter', and no longer the private concern or personal property of the king. Since the king's actions began to be subject to public scrutiny, it therefore became necessary to distinguish his actions as either private or public, or to distinguish his personality as either the King (the official holder of the Sovereignty) or the king (a private person with divinity).

This differentiation of the public/private actions of the king occurred simultaneously with the intensified problematic of conduct for the individual. At that time, the individuals were increasing scrutinizing the actions of themselves by asking what rules of conduct one must give oneself in daily life conduct in relation to others, which include questions such as how to conduct oneself, how to raise one's children, and how to properly behave in the family. A similar set of questions also arose with regard to the problematic of the public actions. As Foucault has described, these questions of 'how and to what extent can and must the exercise of the sovereign's power take upon itself these previously unacknowledged tasks of conduction', indicated that 'we enter the age of forms of conducting, directing, and government.'³³⁷

By asking what made the coercive force of the state legitimate, the problematic of the sovereign's conduct represented the beginning of the process of rationalizing the state and the government. This process embodied in the articulations of *raison d'État* (governmental reason) in the late sixteenth and seventeenth centuries. Situated in the general

³³⁷ *ibid* 231.

context of upheaval and revolutionary processes, which included the development of science, the Protestant Reformation, and the inauguration of mercantilist phase of capitalism, *Raison d'État* epitomized a whole new way of 'thinking power, the kingdom, the fact of ruling and governing; a different way of thinking the relationships between the kingdom of Heaven and the kingdom on Earth.'³³⁸ It was also part of the 'very complex phenomenon of the transformation of Western reason, of Western rationality which also associated with Kepler, Galileo Descarte.'³³⁹ The evolutionary significance of *raison d'État*, according to Foucault, was not a retrospective imputation by modern historians, but had been immediately realized by the contemporaries themselves in the late sixteenth century and the early seventeenth century.

Clearly, *raison d'État* is not a new concept that only emerged in the sixteenth century, but it has been renovated to the employ in constituting the unprecedented discourse of the rationale of the modern government. Foucault cites Chemnitz in particular, who wrote during the Peace of Westphalia 1647-48 (which dealt with the relations between the German Empire and the different states): 'Every day we hear an infinite number of people speaking of *raison d'État*. Everyone joins in, those buried in the dust of the schools as well as those with the responsibilities of public office.'³⁴⁰ After tracing down the texts from Palazzo (Italy), Bacon (England), and Chemnitz (France), Foucault observed one of the most significant achievements in the discourse of *raison d'État* was that instead of continuingly treating the public as a purely passive existence on which ideas and laws can be imposed, this new knowledge of government aimed at modifying public opinion, or at actively making use of it, or at instrumentalizing it.³⁴¹

³³⁸ *ibid.*

³³⁹ *ibid* 286.

³⁴⁰ *ibid* 240.

³⁴¹ *ibid* 278.

In essence, *raison d'État* was a kind of skill, or art, whose purpose was to preserve states against their natural tendency towards decadence and corruption. This included identifying what was necessary and sufficient for the state to exist and to maintain its integrity, how to re-establish its integrity in the case of its having been damaged. This was because it was generally believed at that time that the state was under the inevitable threat of revolutions, perceived as the natural cycle of birth, growth, maturity, and then decline. However, precisely because of this natural cycle, in the name of state salvation, *raison d'État* might also lead to a *coup d'État*, which referred to 'a suspension of, a temporary departure from, laws and legality'.³⁴² Though it was part of the idea of *raison d'État* to generally respect the laws, including the natural laws, the positive law, and the law of God's Commandments. This respect, however, did not originate from viewing law as superior, noble or representing the ultimate justice, but from the idea of that the state could make use of the laws to function well. In other words, the state treated the laws as the instrument of rule. This also meant that at a certain points in time, due to a pressing and urgent event, the state could and must free itself from these laws for the necessity and safety. At this point, the state prevailed over any laws, acting by itself without the rule of law, establishing a direct relationship with itself and therefore manifesting itself. In this sense, *coup d'État* was an assertion of the essence of *raison d'État*, confirming that the nature of the latter was politics, concerned mainly with the rational, existential necessities of rule, rather than legality or the maintenance of a system of laws.

The rise of governmental reason, as a means to control government, perhaps was also related the fact that during the early modern period the idea that government was 'a necessary evil' was inherited from medieval political theology and became part of the mainstream idea in Western

³⁴² *ibid.*

political thought. While in classic antiquity, government was believed to be as 'natural' as the family or as society,³⁴³ medieval theologians believed government arose as a consequence of the Fall of Man and original sin, and the sole reason for its existence was to discipline the sinful man.³⁴⁴ Hobbes secularized this idea by his famous account of man's chaotic and violent state of nature. According to Hobbes, life outside the state was an anarchic and nonpolitical war of all against all. In the absence of a supreme power, each of the actors remained 'in continual jealousies and in the state and posture of gladiators' towards each other. Life inside the state, on the other hand, was a realm of peace and secure, fenced off from anarchy. Since then, this view of government was repeatedly presented by theorists, including John Locke, David Hume, and Adam Smith. Perhaps, the most famous iteration was from Thomas Paine. In *Common Sense*, he argued that '[Natural] Society is produced by our wants, and government by our wickedness; the former promotes our happiness positively by uniting our affections, the latter negatively by restraining our vices...Society in every state is a blessing, but government, even in its best state, is but necessary evil... Government, like dress, is the badge of lost innocence.'³⁴⁵ Later, American federalist James Madison also expressed the same view, when he was saying that 'if men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary'.³⁴⁶

³⁴³ Cicero held that government grew or evolved by as 'natural' a process as did customs or language Cicero,

³⁴⁴ Rejecting the doctrine that government was in any way unnatural, St. Thomas Aquinas argued that leadership and rule would have been necessary in an earthly Paradise, even if Adam had not sinned, as it was also necessary among the angels.

³⁴⁵ *The Writing of Thomas Paine* 69 (Conway 1894)

³⁴⁶ *The Federalist*, Nos. 51 (Wesleyan University Press 1961) 349.

10. The Private Property Owner

The capitalist era in England begins in the sixteenth century with agricultural revolution as its prelude, when the peasantry was forcibly driven from their lands. Opposite to the socio-economic structure of feudal society, capitalism transformed the feudal titles into individual property ownership by removing all the political and social conditions that originally had been attached to the lands. John Locke's theory of absolute property right entailed the individual property owners to do whatever they wished to do, and hence enabled them to exploit their lands in a purely economically 'rational' way. Civil society was later established by these property owners as the realm of commodity exchange and social labor, and was assumed to be governed by its own laws immune from state intervention. For a relatively short period in the decentralized capitalist society, the public/private distinction could be viewed as a rough approximation of the social reality as the separation between the government and civil society. It has been argued, though, that liberal theorists have long neglected how such distinction dealt with people without property, namely the working classes.

The Labor View of Property

In the time of antiquity, property originally indicated one's particular location in the land and one's belonging to certain *body politic*, representing one's status as the head of a family and as a citizen of the public realm. The expulsion of a citizen was identical with the confiscation of his estate and the destruction of the real building in the physical sense. Equally, to lose one's property meant to lose citizenship and the protection of the law. The exterior appearance of the physical property represented the boundary between the private household and the public realm. As Arendt has argued, 'all civilizations have rested upon the

sacredness of private property.³⁴⁷ Property has long been the central condition for admission to the public realm, and feudalism maintained this inherent political meaning of property.

However, when the process of general expropriation began (the expropriation of the Church and monastic property after the Reformation, and the expropriation of the peasant class), property lost both its fixed location and its political meaning. Emancipated from all kinds of old manorial customs, it gained the new trait of exchangeability by relating itself to the common denominator of money. As the owner of money, the owner of property also acquired the unlimited and absolute right over the property. This was achieved mainly by a labor view of property, which was first famously illustrated in *The Second Treatises of Government* by John Locke, who viewed both land and money equally as 'capital'.

In an effort to refute the traditional argument of absolutism that all property belonged to the feudal king, Locke invented a new justification for owning a property by claiming that individuals had the right to keep anything that they have mixed their labor with. According to Locke, 'Men, being once born, have a right to their Preservation, and consequently to Meat and Drink, and such other things, as Nature affords for their subsistence.'³⁴⁸ It was self-evident that everyone, in order to preserve himself, had the natural right to appropriate anything given to mankind by God. But Locke inflated this natural right to an unprecedented extent by suggesting that man had the right to 'own' whatever he has worked on. As he said, 'this Labour being the unquestionable Property of the Labourer, no Man but he can have a right to what that is once joined to.'³⁴⁹ Locke's argument proved to be very convenient for newly emerging social classes, since it radically erased all the traditional social obligations

³⁴⁷ Hannah Arendt, *The Human Condition* (The University of Chicago Press 1958) 61.

³⁴⁸ John Locke, *Second Treatise of Government* (first published 1690, C.B. Macpherson ed, Hackett Publishing 1980) 25.

³⁴⁹ *ibid* 27.

that attached to the feudal fiefs, and thus rendered the property 'assets' of purely economic significance. In short, he transformed the land into exchangeable 'capital', as easy come and easy go as money.

The new belief that the individual had the unlimited and absolute right based own their labor was widely accepted, which can be observed in the adoption of new definition of property by law. The Roman law used to define property as the right to use and abuse one's property within the limits of the law. In The Declaration of Rights, property was defined as 'the right to enjoy and dispose at will of one's goods, one's income, and the fruit of one's labor and industry.'³⁵⁰ According to the Napoleonic Code, article 544, 'property is the right to enjoy and dispose of things in the most absolute manner, provided we do not overstep the limits prescribed by the laws and regulations.'³⁵¹

To what extent Locke's labor view of property is reasonable is very questionable. As early as the nineteenth century, Proudhon already exposed the deceptive nature of this view of property, arguing that the property only exists in the product, not the means of production. Proudhon discussed Cicero's comparison of the earth to a vast theatre and argued that, when each one *occupied* a place during the entertainment, this does not necessarily mean that the place was *owned* by them. Just as the theatre is always common to all, the possessor of land should not automatically acquire the right to his land and the land should remain common to all. Proudhon further asks 'does the skill of the fisherman, who on the same coast can catch more fish than his fellows, make his proprietor of the fishing-grounds? Can the expertness of a hunter ever be regarded as a property-title to a game-forest'³⁵² If the industrious cultivator has made improvements in the soil, he has the

³⁵⁰ Requoted from PJ Proudhon, *Property Is Theft!: A Pierre-Joseph Proudhon Anthology* (first published 1840, AK Press 2011) 95.

³⁵¹ *ibid.*

³⁵² *ibid* 112.

possessor's right of preference, since he obviously found the reward of his industry in the abundance and superiority of his crop. Never, under no circumstance, should he be allowed to claim a property-title to the soil which he cultivates, on the ground of his skill as cultivator.³⁵³ According to Proudhon, the labor view of property was a delusion, and the process of gaining and losing property through the lapse of time is fatal. Proudhon thus claims fiercely: 'Property is Theft!'³⁵⁴

Nevertheless, as mercantilist as Locke was, national wealth, rather than individual wealth or justice, was the issue about which he was most concerned. Almost a Hobbesian, in a note written in 1674, he included both agriculture and industry in the term 'trade'. His labor view of property was partly due to the fact that he took a pretty modern view of both money and land as 'capital', the accumulation of which would greatly benefit the nation.³⁵⁵ When talking about the difference between money and land, although he did not reject a traditional barren view of money, that is, that money is not like land in terms of that it cannot naturally produce something new and of value to mankind. He pointed out that money and land are alike insofar as they yield interest based on unequal possession. As he said,

...the unequal distribution of money; which inequality has the same effect too upon land, that is has upon money...For as the unequal distribution of land, (you having more than you can, or will manure, and another less) brings you a tenant for your land;...the same unequal distribution of money, (I having more than I can, or will employ, and another less) brings me a tenant for my money...³⁵⁶

³⁵³ As Proudhon further elaborated, 'even under the situation when men succeed in fertilizing land hitherto unproductive, this productive capacity of the land is still based on the same substance of the soil, only its qualities and modifications are changed. Therefore he might possess and use the land on the condition of permanent labor, but his doesn't have the right to the land.' *ibid.*

³⁵⁴ *ibid.*

³⁵⁵ Crawford B. Macpherson, *The Political Theory of Possessive Individualism: Hobbes to Locke* (Oxford University Press 1964) 206–207.

³⁵⁶ John Locke, 'Some Considerations of the Consequences of the Lowering of Interests and Raising the Value of Money. In a Letter sent to a member of Parliament, in the Year 1691' in *The Works of John Locke*, vol 4 (London 1824).

Civil Society

According to Locke, property owners established civil society by consent and thus subjected themselves to government rule in order to protect themselves from the inconveniences, insecurity and violence of the state of nature. His famous dictum was that 'government has no other end but the preservation of property'. Adam Smith, similar to Locke, has said that, 'till there be property, there can be no government, the very end of which is to secure wealth [i.e., to make wealth secure] and to defend the rich from the poor.'³⁵⁷ Although it is plain for all to see that Smith's sympathy laid with the poor and the lowly, and for the general masses rather than the privileged few, he still thought that the government was necessary in the absence of a better instrument, since people needed to rely upon government for fulfilling many tasks which individuals would not, or could not, do, or could only do badly. He had little trust in the competence of government, since he knew that whoever controlled it would try to serve their own interest. As he wrote, 'civil government, so far as it is instituted for the defense of the rich against the poor, or of those who have some property against those who have none at all.'³⁵⁸ Smith also emphasized that the most critical role of government was to establish 'an exact administration of justice' in maintaining the society. He compared, in that regard, beneficence with justice in society, and concluded that 'society may subsist, though not in the most comfortable state, without beneficence; but the prevalence of injustice must utterly destroy it.' Beneficence 'is the ornament which embellished, not the foundation which supports, the building... Justice, on the contrary, is the main pillar that upholds the whole edifice.'³⁵⁹

³⁵⁷ Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776) Book V.

³⁵⁸ *ibid.*

³⁵⁹ *ibid* 79.

Yet, one should be aware that there were two levels of consent in Locke's theory: one was the consent to use money between free, equal and rational men in the state of nature, secured by commercial contracts; the other type of consent was the agreement of someone to hand over all his power to the majority to establish civil society. The first kind of consent is valid without the second. But although the ownership of property was morally established by the first consent, they were practically difficult to enforce, for the consent still occurred in the state of nature. Therefore, ultimately, the sequence of consent involved three stages in all: two stages in the state of nature (one before and one after consent to using money and unequal possession), followed by one stage in civil society.³⁶⁰ Nevertheless, Locke's usage of the term 'property' is inconsistent. Sometimes he meant 'Lives, Liberties and Estates' and at other times he only meant estates. This led to the question whom he considered to be members of civil society. Did he include people without property in civil society? It has been argued that Locke did include everyone in civil society, that is, anyone who has an interest in preserving his life and liberty, but only those with 'estate' were eligible for a full membership.³⁶¹

Locke's separation of society from government was slowly eroded after the Glorious Revolution, as the term 'society' was gradually fused with both parliamentary representation and the so-called high society of manners and tastes. The thinkers of the Scottish enlightenment, including Ferguson, Hume, and Smith, also came to understand the essential feature of civil society 'not in its political organization but in the organization of material civilization'.³⁶² Thus they eventually reduced civil society to economic society, and exclude the public engagement of politics from it. Though engaged in parallel universe of discourse, both

³⁶⁰ See generally Macpherson (n 355).

³⁶¹ *ibid* 247-248.

³⁶² Jean L. Cohen and Andrew Arato, *Civil Society and Political Theory* (The MIT Press 1994) 89-90.

Marx and Foucault, the two peerless critics of modern civil society in the nineteenth century and the twentieth century respectively, have showed us that far from immune from the hegemony power, the construction of civil society, in fact, strengthened it by inventing a new and pervasive form of domination and stratification.³⁶³ Nevertheless, Locke's view of the emergence of separate realms of the public and private as an essential condition of the liberal democratic state, has often been regarded as the most important idea that transmitted from the Glorious Revolution in Britain to the drafters of the Constitution in American.³⁶⁴

11. The Overseas Trading Corporation:

The Hybrid of the Public Interest and the Private Interest

The sixteenth century witnessed the birth of an unprecedented form of incorporation, as the traditional form of the self-governing political entity has been applied to a business purpose specialized in overseas trade. This new form of corporation as the private-public hybrid was the joint-stock corporation. However, the legal relationship between the joint-stock corporation and the British Crown still continued to be based on the medieval franchise theory, and the law of corporation was still classified as part of the king's exclusive prerogative. This meant that the joint-stock companies could only be created by the authorization from the Crown, either in the form of a charter (or letters patent), or, occasionally, in an act of Parliament bearing the King's explicit consent, or a combination of an act and a charter. Nevertheless, the Glorious Revolution caused some

³⁶³ *ibid*

³⁶⁴ See David S. Lovejoy, *The Glorious Revolution in American* (Wesleyan University Press 1987) 235-70; Gordon S. Wood, *The Creation of the American Republic 1776-1787* (The University of North Carolina Press 1969); and FA Hayek, *The Constitution of Liberty* (Routledge 1960) 169-171. The above three all show how the colonies responded to the 1699 Glorious Revolution in England and 'borrowed promiscuously' from John Locke.

inconsistencies in this: there was a constant struggle between the Crown and Parliament over the privilege of granting incorporation, as the interests of these overseas joint-stock corporations became in contrast with those of the Parliament. The Bubble Act in 1720 forbade the formation of further joint-stock companies without an explicit approval from Parliament, a ban that remained in force for the next 105 years.

These trading companies were unexpectedly successful in overseas business. During the sixteenth and the seventeenth centuries, as they have established strong commercial relationships worldwide, ranging from Africa (the Royal African Company, originally the Company of Royal Adventurers Trading to Africa), Asia (the East India Company), Turkey (the Levant Company), to Russia (the Muscovy Company). The form of trading companies has also been used in establishing sustainable English settlements in North America (the Virginia Company, the Massachusetts Bay Company and the Hudson Bay Company). These overseas trading companies were involved deeply in both imperial politics and party politics. They played essential roles in issues with regarding to foreign policy, public exchequer and the politics of the native. Because of their constitutionally contentious activities and their entitlements to the re-negotiable privileges (their charters would be expired after the due date), they were the focal points of the metropolitan parliament debates all the time, especially during the eighteenth century.

Joint-stock companies vs. regulated companies

Before the emergence of the joint-stock corporation, overseas trade generally took the form of the regulated company. Regulated companies were common in cities and towns since early modern time. By joining the company and agreeing to submit to the regulations of the company, an inhabitant of a town was allowed to engage in a certain kind of trade. The regulated company collected entrance fees, annual payments, and

duties on imported and exported goods from its members. The collected money of the regulated company was used to provide facilities for its members, such as factories, embassies and consulates, and convoys. The most significant difference between the joint-stock company and the regulated company could be found in how they shared risk. While in the joint-stock company, members traded on a joint-stock account, sharing all of the company's business activities, both profits and losses, in proportion to their share in this stock. In the regulated company, each member traded on his own account, taking risks and liabilities individually to an unlimited extent.

The English overseas regulated companies were the ancient merchant adventurers' companies, including the Hamburg Company, the Russia Company, the Eastland Company, the Turkey Company and the African Company. As these companies inherited 'the usual corporation spirit', which meant that 'wherever the law does not restrain it' and 'they have been allowed to act according to their natural genius', 'they have always, in order to confine the competition to as small a number of persons as possible, endeavored to subject the trade to many burdensome regulation.'³⁶⁵ For example, Adam Smith describes several regulations (bye-laws) of the Turkey Company, which regulated that British manufactures could only be exported to Turkey in the general ships of the company, those ships could only sail always from the port of London, and the membership could only be granted to those who were free and living within twenty miles of London. These restrictions thus confined the trade to that expensive port, and the traders to those freemen of London. In addition, as the loading and sailing of those general ships depended all upon the directors at that time, they could easily fill with their own goods and those of their friends. They normally would exclude the others by

³⁶⁵ Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (first published 1776) Book V, ch I, part II 'Of the Public Works and Institutions which are necessary for Facilitating Particular Branches of Commerce'.

claiming that they had made their proposals too late. In this state of things, they were thus strict and oppressive monopolies in every respect. Those abuses and oppressive regulations gave occasion to the acts of parliament, which tried to reduce the fine for admission into these regulated companies, to loosen the restrictions to admissions, and to break up the monopoly. In this sense, Smith wrote, 'to be merely useless, indeed, is perhaps the highest eulogy which can ever justly be bestowed upon a regulated company; and all the three companies above mentioned [the Eastland Company, the Russia Company and the Hamburg Company] seem, in their present state, to deserve this eulogy'.³⁶⁶

In terms of foreign affairs, while joint-stock companies often maintained forts and garrisons in the countries to which they traded, regulated companies could only support ambassadors and consuls.³⁶⁷ Smith has explained the reason behind this difference. According to him, the directors of a regulated company had no particular interest in the prosperity of the general trade of the company, and thus had no incentive to maintain forts and garrisons for the sake of the trade. In fact, the decline of that general trade may even contribute to the advantage of their own private trade, that is, by diminishing the number of their competitors, it may enable them both to buy cheaper, and to sell dearer. The directors of a joint-stock company, on the other hand, were concerned with the prosperity of the general trade of the company, and with the maintenance of the forts and garrisons for its defense. Therefore, they were more likely to make continual and substantial effort in taking care of the necessary maintenance. Even when the colonial regulated company might attempt to maintain forts and garrisons sometime, it seldom had the same ability to acquire a large amount capital as the

³⁶⁶ *ibid.*

³⁶⁷ *ibid.*

joint-stock company did, since the directors of a regulated company had no common capital in hand to render this attempt effectual.³⁶⁸

The 'public' nature of the colonial corporation

The major aim of establishing overseas trading corporations, at least from the general perspective, still was primarily to promote the 'public interest', and they were continually defined as public institutions. Charters could only be awarded for ventures that mixed the broader public purpose for a better government with the private interest of its members. Colonial corporations, as national projects, were mainly established for exploring overseas trade with the objective of protecting national commerce and bringing back valuable commodities from overseas to England. For example, in the 1600 chapter of the East India Company, it was stated that the public goal of the Company was to 'the advancement of trade', to ensure that private profits upheld the public good.³⁶⁹

Given the high risks of overseas exploration, there were often clauses in the charters of joint-stock corporations that granted them monopolies over English trade with a specified territory abroad. In order to protect their monopoly and the rights over English subjects within their overseas territory, they were also generally empowered the semi-sovereign power to have armies and to fortify territory. Sometimes, they even had the right to coin money and to impose customs duties.³⁷⁰ Overseas joint-stock corporations therefore shared a considerable part in the English public exchequer. They were not only paying for various privileges that had been granted to them by the Crown and the parliament, such as the fees for the charters, monopoly, franchise, licenses and so on. But they

³⁶⁸ Though the parliament later had allotted an annual sum to some regulated companies for the purposes of maintaining the forts and garrisons. *ibid.*

³⁶⁹ James Mill, *The History of British India* (first published 1817, Associated Publishing House 1972) vol 2, 'The Chapter of the East India Company'.

³⁷⁰ See generally MF Lindley, *The Acquisition and Government of Backward Territory in International Law* (Longmans, Gree & Co 1926).

also were saving public expenses by taking over some of the state's responsibilities regarding foreign policy such as sending embassies, building fortifications, and maintaining naval and military facilities. In addition, the Crown often reserved a share of the potential interest of these corporations. For example, in the charters of the London and Plymouth Companies, the Crown has reserved a fifth of all the gold and silver that would possibly be found by these companies.³⁷¹

In the later days, almost all the controversies surrounding colonial companies in the metropole stemmed from the issues regarding their semi-sovereign powers and their relations to the public exchequer. It was publically criticized most influentially by Edmund Burke in his parliamentary speeches, and crystalized later by the two Mills.³⁷² For Adam Smith, although it was always the interest of commerce that first rendered it necessary to introduce the custom of keeping ambassadors and maintaining forts and garrisons. It should be, ultimately, the responsibility of the state to perform such duties of diplomacy, as part of the sovereignty, in an enduring and consistent way.

However, in the greater part of the commercial states of Europe, it was the companies that had successfully persuaded the legislature to entrust to them the performance of this part of the duty of the sovereign, together with all the powers which are necessarily connected with it. These companies by making at their own expence, an experiment which the state might not think prudent to make, have in the long run proved, universally, either burdensome or useless, and have either mismanaged or confined the trade.³⁷³

This was particular obvious in the situation where the local government was weak or out of order. When talking about the forts of East India Companies, Smith wrote, 'the disorders in the government of Indostan have been supposed to render a like precaution necessary even among

³⁷¹ Smith (n 365) Book IV Chapter VII.

³⁷² John Keay, *The Honorable Company: A History of the English East India Company*, (Harper Collins 1993) 393.

³⁷³ Smith (n 365) Book IV.

that mild and gentle people; and it was under pretense of securing their persons and property from violence that both the English and French East India Companies were allowed to erect the first forts which they possessed in that country.³⁷⁴ In other words, if the local government in India had been strong enough, then it would not have been allowed strangers to possess any fortified place within its territory. What is reasonable then, according to Smith, was to only maintain ambassador, minister, or consul. Whenever there was a dispute either among their countrymen, or among them with the natives, these officers would decide, interfere with, and offer the powerful protection based on their distinctive public authority.

At the international level, the controversy over the sovereign power of the colonial corporation continued when they acquired territories, waged wars, and made treaties in the name of the Crown. Since the legal relationship between the companies and the Crown was conceptualized as a feudal relationship, lands that were acquired by the companies in the overseas territories were to be held by the companies in the name of the Crown, under the assumption that they formed part of an English manor.³⁷⁵ It was until the turn of the twentieth century that the international lawyer John Westlake proposed a special status for these companies as 'the mediate sovereign'.³⁷⁶ Westlake did not continue to fit the colonial corporations' land into the pattern of the traditional feudal system. Instead, he defined the colonial company as 'the creature of the state to the law or to the government of which it owes its corporate existence and powers', 'a technical person having an existence in law' and 'a technical subject of the state which has called it from nothingness into

³⁷⁴ *ibid.*

³⁷⁵ See generally Viola Florence Barnes, *Land Tenure in English Colonial Charters of the Seventeenth Century* (Yale University Press 1931).

³⁷⁶ John Westlake, *The Collected Papers of John Westlake on Public International Law* (first published 1914, Cambridge University Press 2014) 195-96.

that mode of being in law'.³⁷⁷ It was 'as much an organ as the department of its government ostensibly entrusted with the conduct of its foreign affairs, or as the commanders of the forces which the state employs in its own name.' The doctrine of 'the mediate sovereign' further defined that if any of these companies acquires territory, the territory and the international sovereignty over it belong to the British Crown, though they may be held 'mediate' by the company. On the other hand, the Crown could not escape the responsibility for any treaties, wars, crimes, and misdemeanors in which the Company was involved.³⁷⁸

Westlake's narrative of the colonial companies as 'mediate sovereign' has been widely adopted by political and legal discourse. Until recently, there has been a renewed interest in early modern colonial trading companies, which challenge this traditional doctrine of 'mediate sovereign' by emphasizing on the autonomy of these companies as independent political entities. This academic resurgence resonates profoundly with the increasing global concerns about multinational corporations (MNCs) as a form of neocolonialism in the age of globalization, and about the potential dangers foreign corporations might bring to the local people and economy. Those concerns have also renovated the old researches on how the East India Company 'drained' India.³⁷⁹ Modern MNCs share strikingly similarities with the colonial trading companies. The concerns over executive malpractice, stock market excess, and corporate abuse of human rights were worries of the eighteenth and nineteenth centuries as much as today.

³⁷⁷ *ibid.*

³⁷⁸ *ibid.*

³⁷⁹ For example, see Romesh Chunder Dutt, *The Economic History of India* (1882), in which Dutt revived Edmund Burke's critique of the Company in the late eighteenth century. This perception was later maintained in India's independence movement. Jawaharlal Nehru also wrote the famous *The Discovery of India* by following this line of argument. As he said, "it is significant that one of the Hindustani words which has become part of the English language is 'loot'"

Specifically, traditional observers view colonial trading companies as instruments of the state (or, as the intermediary, outsourced, and privatized bodies of the government), and stick to a strict public/private state/non-state division (or the division between the government and the colonial trading company) in interpreting the European expansion into the New World.³⁸⁰ Recent works, however, have stressed the political independence of colonial trading companies, and their independent agency in international relationships, especially in the extra-European world, becomes the new academic focal point in the historiography of the companies.³⁸¹ The relatively independent role the colonial company played in the trilateral interaction of power between the company, the British Crown and the local power overseas thus has been rediscovered by historians, who replace the simplified bilateral dynamic depicted by Westlake's 'mediate sovereign' with the trilateral model. The ambiguity of the legal status of the colonial companies has also been widely discussed. Scholars offer different explanations regarding this: some believes that the Company took advantage of its ambiguous status in order to avoid contractual debts to local rulers.³⁸² Others observe the pragmatic convenience for taking the ambiguous legal status of the corporation in avoiding the complex diplomatic issues and in constructing a relatively flexible system of international law.³⁸³

³⁸⁰ See Beer, *Origins of the Old Colonial Systems*; Rich, *History of the Hudson's Bay Company*; Braddick, *State Formation in Early Modern England*; Brenner, *Merchants and Revolution*; Mancke, 'Chartered Enterprises'; MacMillan, *Sovereignty and Possession*; Thomson, *Mercenaries, Pirates, and Sovereigns*.

³⁸¹ This topic has recently culminated in a *dossier* on 'corporate constitutionalism' in the journal *Itinerario*. See *Itinerario*, Vol.39. The different perceptions of the colonial corporation have been provided by previous scholars, such as 'sovereign' (Philip J Stern), 'franchises' (Paul Halliday), and 'societies' (Phil Withington). See Stern, *Company-State*; Clulow, *Company and Shogun*; Westseijn, 'The VOC as a Company-State';

³⁸² Janet McLean, 'The Transnational Corporation in History: Lessons for Today?' (2004) 79 *Indiana Law Journal* 363.

³⁸³ Grietje Baars, 'From the Dutch India Company to the Corporate Bill of Rights: Corporations and International Law' in U Mattie and J Haskell (eds.), *Research Handbook on Political Economy and Law* (Edward Elgar Publishing 2015) 268; China Miéville, *Between Equal Rights: A Marxist Theory of International Law* (Haymarket Books 2006) 184.

The monopoly of the joint-stock corporation

The royal monopoly granted to the overseas joint-stock corporations has long been at the center of debates on the relative virtues of monopoly forms of organization and free trade. Supporters of these monopoly corporations argued that monopoly rights were necessary to create and maintain the expensive infrastructure that made long-distance trade with Asia both possible and profitable. Free trade advocates, on the other hand, attacked these monopoly corporations as limiting the expansion of commerce. Arguments over the efficacy of the overseas joint-stock corporations' monopoly continue to this day by historians.³⁸⁴ More importantly, the history of joint-stock companies and their monopolies also become the focal point for neoliberal debates. As Foucault has argued, neoliberalism should not be identified with the doctrine of *laissez faire*, but is about 'discover[ing] how far and to what extent the formal principles of a market economy can index a general art of government'.³⁸⁵ What follows is that the opinions towards monopoly significantly changes: monopoly used to be regarded as an unavoidable consequence of capitalist competition, which in turn resulted attenuating and even nullifying competition; now it has been demonstrated that monopoly could only take place by the intervention of the public power. In this sense, the question of what inheritance practices of the functioning of law that gave rise to joint-stock companies and their monopolies has become a new research interest.

Adam Smith has explicated the specific historical situation in which the monopolies of the colonies and the joint-stock corporations were

³⁸⁴ For example, see SRH Jones and Simon Ville, 'Efficient Transactors or Rent-Seeking Monopolies? The Rationale for Early Chartered Trading Companies' (1996) 56 *Journal of Economic History* 898; Ann Carols and Stephen Nicholas, 'Theory and History: Seventeenth-Century Joint-Stock Chartered Trading Companies' (1996) 56 *Journal of Economic History* 916.

³⁸⁵ Michel Foucault, *The Birth of Biopolitics: Lectures at the Collège de France, 1978-1979* (Springer 2008) 129-150.

operating.³⁸⁶ According to him, every European nation has endeavored more or less to monopolize the overseas commerce, but they attempted to do so in different manners. Some nations gave the whole overseas commerce to an exclusive company to sell and buy. Some confined the entire commerce to a particular port of the mother country. Since in the second case it would finally result in all merchants joining their stocks together to fit out the licensed vessel, the second case in fact differed little from the first. Others, such as Great Britain, left the trade of the colonies free to all, who may carry it on from all the ports of the mother country (provided it was in British ships or in Plantation ships, whose owners and three-fourths of the mariners were British subjects). There was no other license other than the common dispatches of the customhouse. This third way, according to Smith, would generate the competition that hindered the traders from making exorbitant profits.³⁸⁷ Nevertheless, in the export of the surplus produce from the colonies to England, there were certain commodities, enumerated in the act of navigation and in some other subsequent acts, which were confined only to the market of Great Britain. The *enumerated commodities* often included products that could not be produced, or could not be produced in good quantities. Also, the liberality of England towards colonial exports was only confined to those goods which were either in their natural, unprocessed state, or in the very first stage of manufacturing.³⁸⁸

The relative liberality of trade between Britain and its colonies might have been beneficial for matured colonies, but for the colonies in their infancy, the monopolies granted to certain colonial joint-stock companies were both necessary and essential. Adam Smith admitted that it was

³⁸⁶ See Smith (n 365) Book IV, 'Of Colonies'; and Book V, 'Of Expenses of the Sovereign or Commonwealth'. For a historiography on the origins of mercantilism and the monopoly system, see Robert B. Ekelund and Robert D. Tollison, *Mercantilism as a Rent-Seeking Society: Economic Regulation in Historical Perspective* (A & M University Press 1981).

³⁸⁷ *ibid*, Book IV, 'Of Colonies'.

³⁸⁸ *ibid*.

reasonable to grant joint-stock companies the monopoly of trade for certain years, since they undertook, 'at their own risk and expense, to establish a new trade with some remote and barbarous nation.'³⁸⁹ Monopoly is 'the most natural way to compensate them for hazarding a dangerous and expensive experiment, of which the public is afterwards to reap the benefit.' 'A temporary monopoly of this kind may be vindicated upon the same principles upon which a like monopoly of a new machine is granted to its inventor, and that of a new book to its author.' But in the long run, according to him, the monopoly should expired and it should be the government to maintain the forts and garrisons to provide adequate protection to the trade.

A perpetual monopoly, in Smith's view, would 'result all the other subjects of the state are taxed very absurdly in two different ways: first, by the high price of goods...; and secondly, by their total exclusion from a branch of business.'³⁹⁰ It was merely to enable the company to support the negligence, profusion, and malversation of their own servants'. With the case of the East India Company in mind, he further wrote that 'how unjustly, how capriciously, how cruelly they have commonly exercised [their monopoly], is too well known from recent experience.' In the long run, without an exclusive monopoly privilege, a joint-stock company could not carry on any branch of foreign trade for long and could seldom compete against *private adventurers*. Nevertheless, in the trading areas, where the practice was capable of being reduced to strict rules and method, was of greater utility than common trade, and was requiring a greater capital, the join-stock company without a monopoly was possible to survive.³⁹¹ Such areas included trades of banking, insurance from fire, from sea risk, and capture in time of war, making and maintaining a navigable cut or canal, and supplying water for a large city.

³⁸⁹ *ibid.*

³⁹⁰ *ibid.*

³⁹¹ *ibid.*, Book V, 'Of Expenses of the Sovereign or Commonwealth'.

It is also important to note that monopoly and free trade were not dichotomous, for sometimes the free private trades within the monopolies were almost identical to free markets. Overseas joint-stock companies often ceded several of its monopoly privileges to their employees, who often engaged in the so-called private trade of their own. This meant that while they were in the employ of these companies, they could trade on their own account and in their own interest. It has been argued that it was precisely the existence of the private trade that sustained the success of these overseas companies. Its organizational decentralization has greatly benefited the exploration of new market opportunities and the creation of a powerful internal network of communication, which effectively integrated Company operations across these overseas territories.³⁹² The contemporaries of the colonial joint-stock corporations at that time even took the success of the private trade as the evidence of the superiority of free markets.

³⁹² Emily Erikson, *Between Monopoly and Free Trade* (Princeton University Press 2014) 2.

IV. THE LIBERAL TRANSFORMATION OF THE PUBLIC/PRIVATE DISTINCTION I: *The Public Sphere and the East India Company*

The emergence of the bourgeoisie public sphere in the eighteenth century, as the communicative platform between the private civil society and the public state, fundamentally transformed the idea of the public/private distinction. Private property owners presented in the coffeehouses to debate their opinions about the state's regulations on the market. Critical publicity superseded the secrecy and privilege that traditionally regulated political communication. The public opinion, both constituted and invoked by critical journalism and printed petitions, thus was elevated from mere common sense to a source of legislative power, subordinating politics to popular will. As the communicative intermediate and institutional arrangements of democracy, the discursive public sphere epitomized the restoration of the ideological template of the Hellenic *polis*. It injected the critical element into public debate and public opinion, which supposed to base entirely on reason and rationality. Habermas describes the historical development of the discursive public sphere as the long path towards 'the parliamentarization of state authority'.³⁹³

The eighteenth-century metropolitan public discussions included not only domestic political affairs but also foreign policy regarding the colonies and the colonial companies. The East India Company, as one of the most heated topics in the public sphere, catered to the public appetite

³⁹³ Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* (first published in Germany 1962, Thomas Burger tr, Polity 2016) 27.

impeccably for various reasons.³⁹⁴ Those included its mysterious success in India, the sudden enrichment of its servants, the thrilled overseas explorations, and the exotic imagination. But the most important reason, perhaps, was that the East India Company worked as the mediator between the public and the private interest: on the one hand, its trading business conflated the public trade of the Company with the private trade of the Company servant; on the other hand, its shares on the stock market worked as the financial liquidation between the private property and the public debts, boding the two sides together.

The discussion on the Company has particularly occupied the English metropolitan public sphere since 1765, the year when the Company officially acquired sovereignty in India from the Mughal Emperor.³⁹⁵ The controversy was provoked over whether the Company was competent enough to rule in India. This also echoed deeply to the complicated domestic economic and political conflicts, as the merchants in England were trying to break down the commercial monopoly of the Company in order to participate in the lucrative commerce with India. While the East India Company excluded the common people from commerce with India, the House of Commons excluded the Company from Parliamentary representation, though rich nabobs that came back from India was trying to intervene in parliament politics.³⁹⁶ Nevertheless, taking advantage of the Company's financial trouble, the British Parliament successfully absorbed the Company's power and achieved direct rule in India. A series

³⁹⁴ For the illustration of the diverse ways in which eighteenth-century English metropolitan men and women engaged with the East India Company, see Margot Finn and Kate Smith (eds), *The East India at Home, 1757-1857* (UCL Press 2018); and Jeremy Osborn, 'India and the East India Company in the Public Sphere of Eighteenth-Century Britain', in H. V. Bowen, Margarette Lincoln and Nigel Rigby (eds), *Worlds of the East India Company* (The Boydell Press 2002).

³⁹⁵ The Company received the grant of the *Diwani* (tax revenue collector) of Bengal, Bihar, and Orissa from the Mughal Emperor.

³⁹⁶ See generally Tillman W. Nechtman, *Nabob: Empire and Identity in Eighteenth-Century Britain* (Cambridge University Press 2010), and James M. Holzman, *The Nabobs in England: A Study of the Returned Anglo-Indian, 1760-1785* (Columbia University Press 1926).

of Parliamentary Bills and Acts were enacted during the course of this taking-over process, the most important two of which were the 1773 India Act and the 1784 India Act. Since then, as Karl Marx has identified, the India question was no longer a great *political* question and turned into a *ministerial* problem.³⁹⁷

12. The Discursive Public Sphere

In the eighteenth century, a discursive public sphere began to emerge in the English metropolitan public in order to reflect the political demands of the 'bourgeois'.³⁹⁸ The bourgeoisie was a newly rising social stratum of 'capitalists', which included not only commercial and financial capitalists, such as merchants and bankers, but also a growing group of industrial capitalists, such as entrepreneurs, manufacturers, and factory owners. Embodied in the form of companies, its influence outgrew the traditional self-governing township and directly addressed against then the ruling group that consisted of the parliament and the king.³⁹⁹ As the constituent body of the reading public, each bourgeois envisaged himself as entitled to participate in the decision-making processes of certain state regulations, especially those that concerned 'the general rules of social intercourse in their fundamentally privatized yet public relevant sphere of labor and commodity exchange'.⁴⁰⁰ Instead of directly asserting their

³⁹⁷ Karl Marx, 'The East India Company', originally published in *New York Daily Tribune* (New York, 11 July 1853), collected in *Karl Marx on India* (Tulika Books 2006).

³⁹⁸ See generally Habermas (n 393). However, by focusing on real-world communicative practice, which were in conflict with the secrecy norms of political communication of that time, David Zaret argues that the public sphere in England already emerged as early as the mid-seventeenth century. See David Zaret, *Origins of Democratic Culture* (Princeton UP 2000). Similar idea has been expressed by Phil Withington, who argues that the public participation in incorporated commonwealth was formulated as early as the sixteenth and seventeenth centuries in various corporate 'bodies', including guilds, companies, cities and towns. See Phil Withington, 'Public Discourse, Corporate Citizenship, and State Formation in Early Modern England',

³⁹⁹ Habermas (n 393) 23.

⁴⁰⁰ Jürgen Habermas, 'The Public Sphere: An Encyclopaedia Article', in Meenakshi Gigi Durham and Douglas M. Kellner eds, *Media and Cultural Studies* (Blackwell Publishing 2006) 75.

interests against the existing ruling group, they resorted to the discursive power of public opinion to 'put the state in touch with the needs of society'.⁴⁰¹

The traditional norms of secrecy and privilege in political communication were superseded. Political discourse from this point became transparent and debatable, and it took the form of rivaling appeals to public opinion. Such appeals to public opinion animated the transformation of literary journalism from being mere institutions for the publication of news to being bearers and leaders of public opinion. The minority that did not get its way in Parliament could always sought refuge in the public sphere and appealed to the judgment of the reading public; the majority also legitimated its authority by appealing to reason against the opposition's claims to the contrary. It became apparent that the same rule, which granted parliament the right to critical judgments about the crown, should similarly justify the right of the public to make critical judgments of Parliament.

The institution of the public sphere also epitomized the core liberal value of equality. The public sphere gained its legitimation from claiming that anyone who was capable of reflexive self-questioning and knew the rules of rational discourse could participate in public debates, regardless of social status. However, this ostensibly equal public participation has been challenged by many feminist scholars recently in exposing the limitation of the public sphere. By asking 'whether certain subjects in bourgeois society are better suited than others to perform the discursive role of participants in a theoretical public', feminist scholars have revealed that the universalized subject of the 'public sphere', who, unsurprisingly, displays all the characteristics of the benchmark man, leaves virtually no

⁴⁰¹ Habermas (n 393) 31.

space for 'others'.⁴⁰² Specifically, within a system of 'western cultural representation', there is a strong association between feminine discourse and particularity, interest and partiality, whilst masculine speech is associated with truth, objectivity and reason. The former is also aligned with the private sphere and the latter with the public sphere. This exclusion is not only operated in terms of gender: the 'feminine' here is constructed not only as one of the two sexes but as a totality of what the masculine is not, which could be embodied as woman, non-white, Aboriginal, homosexual and disabled and so on.⁴⁰³ Landes has exemplified this argument in concrete history. As she argues, when women during the French Revolution and the nineteenth century tried to express their interests publicly, they were assigned to a place in the private domestic realm rather than the realm of the public.⁴⁰⁴ In this sense, the dark side of the public sphere was that it was devised as a technique to exclude 'the other' by ostensibly including it, ruling out the interests of the disadvantaged group in society by denying their subjectivity in legal or political discourses.

However, according to Habermas, the twentieth-century public sphere has been 're-feudalized', which means that the public sphere has once again been reduced to the status of spectator, to passive consumers of information whose only role is to acclaim expert opinions, which in fact represent the ruling elites' decisions.⁴⁰⁵ This manipulation of public opinion (or the rise of a passive consumption mentality amongst the masses) is due to the commercialization of the public sphere: the triumph of corporate capitalism (manufactures) in advertising and public relations has drastically curtailed the potential for critical discourse by cultivating a

⁴⁰² See generally, Carole Pateman, *The Disorder of Women: Democracy, Feminism, and Political Theory* (Stanford University Press 1989).

⁴⁰³ See Joan B Landes, 'The Public and the Private Sphere: A Feminist Reconsideration' in Johanna Meehan (ed), *Feminists Read Habermas* (Routledge 2013).

⁴⁰⁴ See Joan B Landes, *Women and the Public Sphere in the Age of the French Revolution* (Cornell University Press 1988).

⁴⁰⁵ Habermas (n 400).

mass commercial culture. Landes describes this process as 'a sorrowful voyage from reason to mediatized consumption'.⁴⁰⁶ Landes also aligns this account of the decline of the public sphere with Foucault's description of 'the once autonomous and rational subject [who] ended life as a candidate for the disciplinary society of total surveillance'.⁴⁰⁷ Scholars call for the revival of public life as a means of protecting independent cultural and social life and resisting the limits of corporate governance and politics.⁴⁰⁸ The discursive public sphere ultimately became part of the organ of the state and public opinion became part of the opinion of government.

Recently, the concept of the public sphere has been applied in a global context. It has been suggested that the emergence of an international public sphere would resolve the long-standing conundrum with regard to the democratization of global governance. Among the most common critiques of globalization is that 'this process sacrificed democratic politics to the demand for functional international cooperation and economic liberalization'.⁴⁰⁹ Traditional debate about democratic governance beyond the nation state often runs into a predicament. On the one hand, it is a utilitarian liberal viewpoint which holds that as long as the result of global rules are market-enhancing, international legal regimes such as the WTO are legitimate. On the other hand, there is the 'demos' view which attempts to extend democratic political participation from the national level to the global level in order to safeguard the global rules from the usurping of market. As a result, 'while libertarians deny that there is a problem, demos theorists deny that there can be a solution'.⁴¹⁰

⁴⁰⁶ Landes (n 388).

⁴⁰⁷ *ibid.*

⁴⁰⁸ James Carey, 'The Press, Public Opinion, and Public Discourse' in Theodore Glasser and Charles Salmon (eds), *Public Opinion and the Communication of Consent* (Guilford Press 1995) 373; Angela M Crack, 'Transcending Borders? Reassessing Public Spheres in a Networked World' (2007) 4 *Globalizations* 341.

⁴⁰⁹ Patrizia Nanz and Jens Steffek, 'Global Governance, Participation and the Public Sphere' (2004) 39 *Government and Opposition* 314.

⁴¹⁰ *ibid.*

Yet, the emerging global public sphere seems to provide a possible solution to reconcile these opposite views by emphasizing the role of non-state actors either as agents seeking to influence the behavior of states and intergovernmental negotiations or as substantial participants in global governance.⁴¹¹ However, this emerging global public sphere is argued as no longer conterminous with the Westphalian nation-state system that was established in 1648. The post-Westphalian political-economic system has not yet developed the adequate conception and vocabulary to be used as the analytical parameters of this new global public domain. A 'governance gap', as Habermas terms it, indicates this lag of the international legal framework behind the developments of the global market and political reality.⁴¹²

The coffeehouse discussion, the press and the petition

The earliest modern public sphere in England was exemplified perfectly by the eighteen-century English coffeehouses.⁴¹³ The first British coffeehouse was founded in 1650 in Oxford, and the first one in London was in 1652. Its distinctive gentility, as the exemplar of a post-Restoration middle-class 'culture of politeness', soon set it apart from other common drinking places, such as the tavern, the alehouse, and the inn.⁴¹⁴ On the other hand, the prevalence of the coffeehouses, which stood in opposition to the crown with its noble and clerical culture, also indicated the decline of the court as a center of elite sociability.

⁴¹¹ See generally, Paul Wapner, 'Politics beyond the State Environmental Activism and World Civic Politics' (1995) 47 *World Politics* 311; Margaret E Keck and Kathryn Sikkink, *Activists beyond Borders: Advocacy Networks in International Politics* (Cornell University Press 2014).

⁴¹² See William E Scheuerman, 'Global Governance without Global Government? Habermas on Postnational Democracy' (2008) 36 *Political Theory* 133.

⁴¹³ Brian Cowan argues that Habermas' concept of 'public sphere' just refashions the older historiographies of the coffeehouse discussion. See Brian Cowan, *The Social Life of Coffee: The Emergence of the British Coffeehouse* (Yale University Press 2005).

⁴¹⁴ Brian Cowan, 'The Rise of the Coffeehouse Reconsidered' (2004) 47 *The Historical Journal* 21.

Even before the coffeehouse has fulfilled any political functions, the crown and the government have already considered it as the seedbed of potential politic unrest due to its association with the dissemination of rumors and 'false news'. Charles II went to great lengths to suppress the coffeehouse culture entirely in December 1675, but failed in the end. The failure of the crown to wipe out the people's coffeehouses was commonly regarded by many earlier English historians and philosophers (including David Hume, James Ralph, and Henry Hallam) as an indicator that England could not be ruled in an arbitrary, despotic manner by its monarchs. This victory for the coffeehouses, which worked a necessary outlet for the English people's natural desire for the power of reasoning and reflection, was thus regarded as a key victory for individual liberty in terms of the freedom of speech and the press.⁴¹⁵ Thomas Babington Macaulay has particularly termed it the 'fourth Estate of the realm', arguing that the coffeehouses were 'the chief organs through which the public opinion of the metropolis vented itself'.⁴¹⁶

The elimination of censorship and the resulting proliferation of political journalism greatly encouraged the coffeehouse discussions to develop into a grand and polemical style. Traditional norms of secrecy and privilege in political communication were thus replaced by public debates in a highly visible manner. It was not the Whigs, however, who were in a dominant position with its mouthpiece, *London Journal* (the most widely read journal at that time), but the Tories, as the opposition, that first created this publishing platforms for public opinion and fostered a climate of political criticism. The Tory journals, the *Craftsman* and the

⁴¹⁵ *ibid.*

⁴¹⁶ Thomas Babington Macaulay, *The History of England from the Accession of James the Second* vol I (CH Firth ed, 1913) 360-61. On the history of the concept of the 'fourth estate', see JAW Gunn, *Beyond Liberty and Property: the Process of Self-Recognition in Eighteenth-Century Political Thought* (Kingston and Montreal 1983) 90-2.

Gentleman's Magazine, 'for the first time established as a genuinely critical organ of a public engaged in critical political debates: as the fourth estate.'⁴¹⁷ Later, the *London Magazine* began to report on parliamentary debates.

This emergence of independent political journalism, which provided continuing critical commentary and public opposition against the Crown's actions and (Whig) Parliament's decisions, created a direct confrontation between the government and the press. A great deal of satirical articles were published with the aim to reveal the political machinations and conspiracies between the King, the minister, the top military men, and the jurists. The parliament tried to protect the secrecy of the proceedings based on the old decrees of its privilege, but in this new political climate of criticism, it was difficult to exclude the public from parliamentary deliberations. It had to repeatedly renew the injunctions against publication to the extent that even a publication of its debates between sessions would be deemed a breach of privilege. More importantly, the discussions in the press and coffeehouses went beyond the concrete issues of the day to include the general political ideas of governance such as, the separation of powers, liberties, patriotism, and corruption.⁴¹⁸ Sometimes, it even included moral philosophy, such as the question of pleasure and happiness, passion and reason.

Amongst the wide range of publications in the public sphere, the innovative use of printed *petitions* as political propaganda brought the political maneuvering to a new level. Unlike critical journals and newspapers, which presumptuously represented the nominal (anonymous, fictional as well as literary) collective public opinion, the printed petition

⁴¹⁷ Habermas (n 393) 60.

⁴¹⁸ *ibid* 64.

instantiated the abstract public opinion as a real individual entity.⁴¹⁹ The petition was not only an indicator of public opinion, but also sought to influence public opinion and to further lobby elites on behalf of a legislative agenda. This complexity reflects the dual nature of public opinion as a nominal and real entity. In an effort to obtain signatures or marks, printed petitions were often read aloud and discussed among people in the public space. The coordination of the proceedings in Parliament with the procession of citizens bearing the petition to Westminster was then a political art practiced to perfection.

In the practical experiences with political petitioning in the public sphere, there emerged several speculations that took political theory into a liberal-democratic direction.⁴²⁰ Firstly, in their defense or attack of opinions in rival printed petitions, commentators began to adopt some modern principles of public debates. A rough consensus was achieved on the importance of informed consent, on the open exchange of ideas, and on using reason as the ground of opinions in political petitions. The validity of the institutions of the petition would be greatly undermined by fraud and the use of force to increase subscriptions. 'Free and voluntary' subscriptions promised to exclude the possible economic threats. Secondly, when petitions competed to claim the authority of public opinion, they confronted the question of whether the sheer number of signatories or the supporters' social status gave more authority to the opinions advanced in rival petitions. While traditional views on petitions valued more on the social status of the supporters, the contemporaries sometimes cited the number of signatories to justify or discredit a petition. This new importance placed on the number of signatories might to some extent express egalitarian beliefs that underpin modern democracy.

⁴¹⁹ David Zaret, *Origins of Democratic Culture: Printing, Petitions, and the Public Sphere in Early-Modern England* (Princeton University Press 2000) 220-21.

⁴²⁰ *ibid* 257-262.

The tension-charged political balance and the public opinion

Based on these practical experiences with political petitioning, there emerged a new idea that endowed public opinion with some unprecedented legislative authority. During this period, the political dynamic of metropolitan Britain was caught by triangular interactions between the Parliament, the informed public, and the King. The parliament at that time was still mainly composed of a homogeneous aristocracy. The King, since his royal power was limited by the parliament, now tried to secure for himself a firm following within the Parliament in order to rule indirectly. The bourgeois strata of the public, not being represented in parliament as part of a ruling group, attempted to install public debates as a kind of 'pre-parliamentary forum' to influence the decision of state authority. The already established culture of coffeehouse discussion easily facilitated the substantiation of their attempts.

One interesting question would be why the public sphere in Britain arose so much earlier than on the Continent, despite the fact that both of them had an active literary public sphere as the precondition for developing a political public sphere. Habermas ascribes the English peculiarity to the advanced capitalist mode of production in post-revolutionary Great Britain, which brought in a broader stratum of the population into the conflict.⁴²¹ The rise of the industrial capitalists, who in securing the low costs of production had to fight against the landlords and the merchants. This new conflict of interest between the emerging manufacturing capitalists and then dominant financial capitalists thus replaced the traditional opposition between landed and moneyed interests to become the major antagonism in Great Britain. Although this new class conflict was still falling into old patterns as a tense between the interests of the

⁴²¹ Habermas (n 400).

established generation and the interests of the new-comers in the market. It was however embedded in a relatively balanced political situation. The general division and balance of political power preferred the discursive public sphere as the most advanced way to resolve political confrontation. Institutional innovations were also essential for the rise of the public sphere. Three major preconditions have been identified by Habermas as aiding this rise: firstly, the founding of the Bank of England (the consolidation of capital system), secondly, the elimination of the institution of censorship (free publication and press), and, thirdly, the establishment of the first cabinet government (the first step towards a modern parliament).⁴²²

Within the parliament, the same kind of tension-charged political balance was evident. Especially in the late eighteenth century, the end of the era of 'Whig Oligarchy' (1714-1783) gave rise to the balanced political powers of the two parties, namely the reconstituted Whig Party under the leadership of Charles James Fox and the new Tories under William Pitt the Younger. It was an easy step for the weaker party to appeal to the new authority of the public opinion by carrying the conflict into the public sphere and making their 'party interest' into a 'public interest'. It was in a speech given by Fox in the House of Commons, opposing Pitt's war preparations against Russia, that 'public opinion' for the first time has been introduced into Parliament and received sanction. As Fox said:

It is certainly right and prudent to consult the public opinion...if the public opinion did not happen to square with mine; if, after pointing out to them the danger, they did not see it in the same light with me, or if they conceived that another remedy was preferable to mine, I should consider it as my due to my king, due to my Country, due to my honour to retire, that they might peruse the plan which they thought better, by a fit instrument, that is by a man who thought with them...but one thing is most clear, that I ought to give the public the means of forming an opinion.⁴²³

⁴²² For the first time the King appointed a cabinet composed entirely of Whigs (1695-1698).

⁴²³ Habermas (n 393) 65-66.

The significance of the public opinion related closely to the fact that England entered into a period of 'conservative' (if not cynical) liberalism at that time. As the rapid industrial development of the country expanded it into a great imperialist power, England was no longer in need of an old antiquated rationalization of liberalism, which had led to dangerous revolutionary conclusions. The French Revolution had given English capitalists a great scare, all sections of the ruling class united together to extinguish any signs of radicalism. Represented by David Hume, liberalism, now tired of strife, became more conservative as well as uncertain. With Hume, no truth was eternal but depended on the point of view, and any abstract idea is prejudice and not worth arguing about, which also included the theory of social contract. For example, in contrast to Locke, who based property on labor, Hume founded property on seizure and pointed out that government was founded solely on usurpation and conquest and not on the voluntary subjection of the people.

Since there was no eternal truth, but only opinion, the public opinion has been elevated from a pure 'opinion' to a sensible 'judgment'. As it has been said, a right sentiment would only alive in the mass of the population, the public opinion, at least representing the people's common sense, would represent a direct and undistorted sense for what was right and just. It has been glorified as curtailing the corruption of those in power, identical to the enlightened 'Spirit of Liberty' in 'the knowledge of the millions'. But it was Edmund Burke who first endowed the public opinion with clear legislative power. In a letter to the electors regarding the affairs of America (after *the Declaration of Rights* was published), he wrote:

I must beg leave to observe that it is not only the invidious branch of taxation that will be resisted, but that no other given part of legislative right can be exercised without regard to the general opinion of those who are to be governed. That general opinions is the vehicle and organ of legislative omnipotence.⁴²⁴

It is worth mentioning that whereas the English used public opinion as an authority that could compel the ruler to legitimize themselves to some extent, the French limited the absolutist ruler by the force of reason and persuasion, namely the rationalization of sovereignty. It was not until Rousseau, who provided the full foundation for the public's democratic self-determination, that the public opinion (or in Rousseau's words, the general will) became the sole legislator, which, however, arguably eliminated the public's rational-critical debates in the public sphere at the same time. It was because, for Rousseau, the general will was more of a consensus of hearts than of arguments, and long public debates (as manifested in the press and in the *salon* discussions), always influenced by particular interests, would irritate the people and corrupt the healthy simplicity of the established morals and the good soul.⁴²⁵

In short, Rousseau wanted democracy and public opinion without public debates, which means that he eliminated the critical element from the public sphere. This was where the French version of the public sphere was radically different from the British version. For Jeremy Bentham, it was the very critical capacity of the public sphere that made it an incorruptible tribunal to supervise the exercise of political power through the publicity of parliamentary deliberations.⁴²⁶

⁴²⁴ Edmund Burke, *Burke's Politics* (Hoggman and Levack eds, 1949) 106, quoted in Habermas (n 393) 94.

⁴²⁵ Habermas (n 393) 97-98.

⁴²⁶ *ibid* 102.

13. The East India Company

Initially entitled *The Governor and Company of Merchants of London Trading into the East Indies*, the English East India Company was established in 1600 by a charter granted by Queen Elizabeth I, who in the last years of her reign endowed the Company with a monopoly over all overseas trades within the extensive area of the East Indies (the entire area from the east of the Cape of Good Hope to the west of Cape Horn). The royal charter also granted the company a series of semi-sovereign privileges, including the right to raise armies, to wage war, to rule its overseas territories, to mint coin in subsidiaries, and to exercise justice in its settlements. At that time, a charter would only be awarded to an overseas venture if it served a broader public interest, instead of only serving the private interests of its members. In the case of the East India Company, it was established with a 'national object' to ensure that England would gain a slice of the lucrative Asia trade, as the India market had already been taken by other European countries, including the Portuguese, the Dutch, and the French.⁴²⁷

Generally, the Company consisted of the *Court of Proprietors*, the *Court of Directors*, and the servants of the Company. The Company was self-governing organization, like all the other forms of corporation at that time. The Company's shareholders had to have over £500 of nominal stock to be able to vote on corporate policy and to hear the directors' reports, in the quarterly meetings of the Court of Proprietors held in March, June, September and December. More importantly, at the annual meeting in April, which was described as 'little parliaments' by William Pitt and

⁴²⁷ Portuguese traders were the first to establish a presence in India in 1535, but their privilege was replaced by the Dutch a century later. The English came yet later. However, 'John company' (the British East India Company) had gradually replaced 'Jan Compagnie' (the Dutch United East India Company/VOC), becoming the master of Europe's trade with Asia.

Elder,⁴²⁸ they would gather to elect 24 directors. 'No matter how large a shareholding, each individual with more than £500 in stock only had one vote, a surprising expression of financial egalitarianism.'⁴²⁹ Only shareholders with over £2,000 in stock—the mercantile aristocracy—could put themselves forward as candidates for the office of director. These shareholders also had the right to override executive decisions taken by the directors up until 1784.

The central power of the Company was in this elected *Court of Directors*. There was no chief executive, which means that the distinction between executive and non-executive directors did not yet exist. The 24 directors met weekly on each Wednesday. Each director was assigned to one of ten committees that looked after different aspects of the Company's operations. Among these, three committees were regarded as supreme: Correspondence, which handled all the communications with the Company's geographically remote subsidiaries; Treasury, which managed relations with the financial market, buying bullion and paying dividends; and Accounts, which aimed to maintain financial discipline. In addition, there were committees for buying commodities, warehousing, shipping, managing the East India House, and regulating (and preventing) private trade and lawsuits. Alongside these was the all-powerful Secret Committee, which defined the Company's political and military strategy in times of war.

The Court of directors also controlled the Company's *patronage system*. The patronage system referred to the system wherein the Directors of the East India Company had the right to appoint offices in the East India Company's administration in India, such as those of civil servants, writers, and so on. Each Director was said to have at his disposal at least six or

⁴²⁸ Quoted in Huw Bowen, *Revenue and Reform* (Cambridge University Press 1991) 39.

⁴²⁹ Nick Robins, *The Corporation That Changed the World: How the East India Company Shaped the Modern Multinational* (Pluto Press 2006) 31.

seven appointments a year, and they sometime sold their patronage to buy and maintain seats in Parliament.⁴³⁰ This system enabled them to place friends, relatives, and business partners in key positions, a 'gift' that became increasingly valuable in the second half of the eighteenth century.

The Company's trade

After the initial explorations in a desultory fashion, it was the Company's demonstration of its naval superiority over the Portuguese taking off Surat in 1612 that paved the way for its first trade concession from the Mughal Emperor Jahangir. It was also in this year that the Company turned into a joint-stock company after the first twelve voyages.⁴³¹ In 1689, new subscribers made a proposal to parliament to advance two million at an interest of eight percent in exchange for the establishment of a new East India Company with exclusive privileges. The proposal was accepted and a new East India Company was established. However, the old East India Company still had the right to trade until 1701, which gave rise to the intense competition between the two companies. It had 'miserable' effects on both 'the cheapness of consumption' and 'the encouragement given to production', which were precisely the two effects that 'the great business of political economy to promote'.⁴³² This situation did not continue for long. In 1702, the two companies were united by an indenture tripartite, to which the queen was the third party. In 1708, they merged and became *The United Company of Merchants trading to the East Indies*. At this point, the Company fully established the monopoly of English commerce in the East Indies.

⁴³⁰ Philip Lawson, *The East India Company: A History* (Longman 1993) 14-17.

⁴³¹ The life of the early East India Company was repeatedly threatened by changing politics. For the early trading history of the East India Company and its transformation into the first joint-stock company with perpetual capital, see KN Chaudhuri, *The English East India Company: The Study of an Early Joint-Stock Company 1600-1640* (Frank Cass & Co Ltd 1965).

⁴³² Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (first published 1776) 235.

Meanwhile, in India, despite the keen rivalry of the Dutch and the French and the growing competition of interlopers and private traders, the East India Company gradually consolidated its position as a powerful trading body. The Company's trade consisted of both the public trade and the private trade. In the public trade, the Company maintained its own organization for the acquisition of goods concerning imports and exports between Europe and India, that is, mainly the necessary supply of piece-goods, either first hand from the producer or through a middleman. The private trade refers to the interport trade and the trade between India and the Further East. This trade was largely carried out by the Company's servants and by free merchants as their private trade. The prospect of amassing a fortune in the private trade attracted many men to the Company's service. They were allowed by the Company to use the *dustocks* for private trade. *Dustocks* were a kind of passport signed by the president of the Company which exempted the goods from the customs officers of Bengal. This was one of the privileges awarded by the Mughal Emperor Farukhsiyar (who became Emperor in 1713) to the Company.⁴³³ It was this very privilege that led to frequent complaints, on part of the revenue officials, that the payment of inland duties was largely evaded, and finally drove the Company into wars with local authorities.

The Company annually exported great values in silver, gold, and foreign coins to India, in exchange for Indian manufactures. In an age in which

⁴³³ The chief privileges that were granted to the Company by the Emperor in 1717, in return for the payment of a fixed sum, included: all duties upon goods entering Surat on behalf of the Company should be remitted; the three villages adjoining Madras which had been withdrawn from the Company by the Government at Arcot should be restored in perpetuity; a passport, or destock, signed by the president of the Company at Calcutta should exempt the goods which it specified from stoppage or examination by the customs officers of Bengal; and the Company should be allowed to purchase the zemindary of thirty-seven towns in Bengal as they had already purchased that of Sutanati, Kalikata, and Govindpur. CJ Hamilton, *The Trade Relations between England and India, 1600-1896* (first printed in India 1919, Delhi 1975) 72.

these precious metals were the only real source of wealth, this trade with India was justified favoring the exporting nation in the sense that commodities imported from East India were mainly re-exported to other countries to obtain a much greater quantity of bullion.⁴³⁴ The Indian manufacturers remained excluded from the English market itself, as the industrial class repeatedly petitioned for parliamentary intervention, claiming that the importation of East India cotton and silk stuffs would ruin the poor British manufacturers.⁴³⁵ As early as the late seventeenth century, the competitive actions of the New and Old East India Companies flooded the English markets with Indian goods and the popular writer of the day began to prophesy disastrous results to the home manufacturers. In 1681, the outraged silk weavers of London unsuccessfully petitioned the House of Commons against wearing East Indian silks and cottons. The trade policy of England was later directed against the East India Company and favoring the interests of home manufacturers. In order to encourage the English silk industry, in 1700, Act II, William III, cap. 3, imposed further duties on wrought silks, muslin, and some other commodities of the East Indies.⁴³⁶ The Prohibitory Acts followed. For example, the Act 11 and 12 in William III Cap. 10 enacted that the wearing of wrought silks and of printed or dyed calicoes from India, Persia, and China should be prohibited, and a penalty of £200 was imposed on all persons having or selling the same.⁴³⁷

The Company's takeover of Bengal in 1765 resulted in an extraordinary turnaround in terms of the reverse of the flow. The Company's purchase at Canton used to be made almost entirely in bullion, with only the limited exception of the Company's raw cotton from Western India. Mughal revenue-raising practices had routinely included state monopolies

⁴³⁴ Thomas Mun, *A Discourse of Trade: from England unto the East Indies* (1621); Josiah Child, *A Discourse Concerning the East-India Trade* (1813).

⁴³⁵ John Pollexfen, *England and India Inconsistent in Their Manufactures* (1697).

⁴³⁶ CJ Hamilton, *The Trade Relations between England and India, 1600-1896* (first published in India 1919, 1975) 103.

⁴³⁷ Marx (n 397).

on the production and distribution of certain commodities. Following this example, in 1773, the Company assumed the monopoly of opium growing in Bengal and sold it in China.

The public finance

The Company's presence became significant in public finance from 1688 onwards, the beginning of the so-called 'long eighteenth century'. In this year, the English stock market was established, and the most prominent stock shares traded on Exchange Alley were by the East India Company. On the other hand, the Revolution gave the East India Company the opportunity to buy its liberty through providing financial support to both the constitutional Monarchy and the parliamentary government.⁴³⁸ Especially for the king, the strict parliamentary control over taxation required him to seek new potential lenders that had considerable liquid capital, and the East India Company with its permanent capital therefore soon became the primary choice.

At every epoch when the Company's charter was expiring, it could only effect a renewal of its charter by offering loans of enormous sums at the lowest interest and by direct bribery, either in cash or in Company shares. For example, in 1693, the year when the Company's charter was technically forfeited, the annual expenditure of the Company reached £90,000 under the head of 'gift', which had rarely amounted to more than £1,200 before. In the parliamentary investigation, the Duke of Leeds was impeached for accepting a bribe of £5,000, and the King himself was convicted of having received £10,000. The New East India Company lent the Exchequer £2,000,000 in 1698. The old and the new companies took out a loan of an additional £1,200,000 when they merged to form the

⁴³⁸ The Glorious Revolution resulted in new regulation concerning the creation of a new corporation: in addition to a royal charter granted by the Crown, a company's incorporation also needed to be authorized by the sanction of parliament.

United East India Company in 1708.⁴³⁹ The United Company also gave further loans of £200,000 in 1730 and £1,000,000 in 1744 to the king in order to secure extensions of its charter.

These loans were unprecedented, since in earlier generations, it was more customary to make one-time payments rather than to develop a continuous credit relationship. These long-term loans laid the foundation for a continuing financial and political relationship between the state and the Company, indicating that the latter became a steady source of wealth for the government and the king. This was a constitutive part of the new system of credit, which, during the larger process known as the Financial Revolution (1688-1739), fundamentally transformed England.⁴⁴⁰ This new mechanism allowed for a significant expansion of the public debt and a concomitant increase in state capacity by featuring the active securities market, the widely circulating credit currency, and the chance to invest in public loans. This modern financial system enabled England to create a powerful fiscal and military state, which later actively engaged in imperial expansion.⁴⁴¹

Nonetheless, the successful implementation of financial revolution depended not only on the larger political changes for creditors to trust that the government would honor its debts, but also on the existence of moneyed merchant corporations, such as the Company, with access to fungible capital. The Company's ability to supply large funds to the

⁴³⁹ Ron Harris, *Industrializing English Law: Entrepreneurship and Business Organization, 1720 - 1844* (First paperback edition, Cambridge University Press 2010) 53.

⁴⁴⁰ For a more detailed account, see Peter Dickson, *The Financial Revolution in England: A Study in the Development of Public Credit, 1688-1756* (Macmillan 1967). HV Bowen, *The Business of Empire: the East India Company and Imperial Britain, 1756-1833* (Cambridge University Press 2006).

⁴⁴¹ For detailed accounts on the role of the Financial Revolution in English state building and imperial expansion, see Carl Wennerlind, *Casualties of Credit: the English Financial Revolution, 1620-1720* (Harvard UP 2011) and John Brewer, *The Sinews of Power: War, Money and the English State, 1688-1783* (Knopf 1989). Peter Rousseau and Richard Sylla, 'Financial Revolutions and Economic Growth', *Explorations in Economic History* 43 (2006) 1.

government, in turn, relied upon the concurrent development of the London Stock Market and the creation of new financial instruments. The Company, together with the Bank of England (founded in 1694) and the South Sea Company, became one of the three most dominant corporations at that time, known as the moneyed companies.⁴⁴² As the shares of the Company could be traded on a public market, the Company was able to transfer its public debt to third parties through the creation and sale of India bonds, which increased the liquidity of public debt tremendously. In this sense, the Company greatly facilitated the transfer of funds between private investors and the government's exchequer, through which the financial and merchant classes now had a direct stake in the continued success of the government. The government, in turn, had a direct stake in responding to the needs of the merchants and financiers.

14. The Controversy over the Company-State

In the mid-eighteenth century, the Company launched a political government in the subcontinent of Bengal. In every respect, this was unexpected and unplanned by the British government and even the Company's London headquarter. As one historian writes,

With the benefit of hindsight, it is known that the British came to dominate the sub-continent over the next hundred years, yet it should be acknowledged that the initial advance lacked precise deliberation or forethought. On the contrary, the company's expansion in the mid-eighteenth century most frequently arose from events dictated by native

⁴⁴² By 1714, 39% of the national debt was owed to the three moneyed companies: the Bank of England, the East India Company, and the newly formed South Sea Company, and their share continued to grow in the following years. For the role of the East India Company as a moneyed company, see Lucy Sutherland, *The East India Company in Eighteenth Century Politics* (Clarendon Press 1962) 14-48.

power in India, and without direction from London or the presidencies.⁴⁴³

Indeed, before this, the Company had long given up on its attempt to develop an imperial foothold after the early unsuccessful attempt when the Mughal Empire of Maratha was at its peak of power in the seventeenth century. But by 1750, the Mughal Empire was in a state of collapse. Although emperors continued to possess the legitimacy to rule over the country, the rise of regional states throughout India brought unforeseen opportunities for the Company to become a participant in the power politics of the successor to the Mughal Empire. The British had also been involved in an open conflict with the French, which in turn dragged the Company into alliances with Indian rulers in the Southeast. The East India Company was continually engaged in war ever since. As Adam Smith later commented: 'the spirit of war and conquest seems to have taken possession of their servants in India, and never since left them.'⁴⁴⁴

Acquiring sovereignty

In the canonical account, the famous Battle of Plassey in 1757 was the turning point in the Company's history, as it marked the inauguration of British political establishment in India.⁴⁴⁵ In 1756, Siraj-ud-Daula, the new young Nawab of Mughal, took the Company's settlement at Calcutta, as the Company refused to stop strengthening its fortifications against possible French attacks. The Company's army in South India, which had

⁴⁴³ Philip Lawson, *The East India Company: A History* (Longman 1993) 91-92.

⁴⁴⁴ Adam Smith, *An Inquiry into the Nature and Cause of the Wealth of Nations* (first published in 1776) 749.

⁴⁴⁵ Although some argue the turning point was the Company's victory in the battle of Buxar (1764), which was the result of the Seven Years' War (1756-63) between the Anglo-Prussian and the Franco-Russo-Austrian coalitions. One of the chief causes of this war was the colonial and commercial rivalry between England and France. The war ended with France losing almost all possessions in India and with England considerably strengthening its colonial might.

been engaged in a battle with the French for many years, was recalled, and they recaptured Calcutta. The Company's forces under Robert Clive finally defeated the Nawab of Bengal at Plassey, 90 miles north of its trading base in Calcutta. Instead of declaring themselves the new sovereign of Bengal, the Company persuaded the Mughal emperor, Shah Alam II, to grant it the status of *Diwani* (tax revenue collector) of Bengal, Bihar, and Orissa under the treaty of *Allahabad*, upon the payment of a small annual tribute to him.

On the other hand, the Company quickly installed Mir Jafar, an elderly general who had betrayed the defeated Nawab, as the first of a series of puppet rulers of Bengal. In return, Mir Jafar made a personal payment of £234,000 to Robert Clive. Ambition and greed fuelled these episodes of king-making to serve British interests as much as possible. Mir Jafar was deposed by the Company in 1760 in favor of the supposedly more pliable Mir Kasim, who paid £200,000 to the Bengal Council for this privilege. He did not turn out to be so pliable and went to war against the Company in alliance with the Emperor at Delhi and the ruler of Oudh. Overall, there was a continuing dual sovereignty in Bengal: the *de jure* sovereignty of the Mughal emperor (the puppet ruler) and the *de facto* sovereignty of the Company (with the real controlling power). Accordingly, there were two governments: one was the East India Company as the machinery of revenue collection, and the other was the original ruler of Bengal, continuing to bear the responsibilities of maintaining law and order and criminal administration.⁴⁴⁶

From a legal perspective, the Company's control over the gained territory was legitimated by an integral of two higher sources: firstly, by the Royal

⁴⁴⁶ Ramkrishna Mukherjee, *The Rise and Fall of the East India Company* (Monthly Review Press 1974) 268–84.

Charter that was authorized by the British Crown,⁴⁴⁷ and secondly, by several grants (decrees and *Diwani*) that they received from the emperor of the Mughal. While the Royal Charter from the Crown gave birth to the Company and equipped it with monopoly privileges and military force, it is the grant of the *Diwani* of Bengal from the Mughal emperor in 1765 that endowed the Company with sovereign powers. Though it has been argued that the 1765 appointment was just an official affirmation of the Company's long-established political power in the local politics and its series of territorial conquest.

Nonetheless, it is generally agreed that this was the climactic but contentious historical turning point, officially transforming the Company from a trading company to a sovereign power. As historian P. J. Marshall wrote, 'the formal assertion of British sovereignty over India was to be delayed until 1813. Yet whatever its right to do so, there could be no doubt that from 1765 the East India Company possessed *de facto* power over the administration of justice in its provinces.'⁴⁴⁸ This was a near 'revolution', which transformed the Company from being a 'client' of the Mughal Empire to being its 'principal agent' in north-east India. From this point on, a new way thinking about British's role in the East has been provoked.⁴⁴⁹

John Morrison and his proposal

John Morrison's work, *The Advantages of An Alliance with the Great Mogul*, was one of these voices in the public sphere that explicitly expressed the disapproval of the transformation of the Company into a

⁴⁴⁷ The Company was founded solely in a royal charter of 1600, and parliamentary sanction for the Company's charters began in 1698.

⁴⁴⁸ Nicholas B Dirks, *The Scandal of Empire: India and the Creation of Imperial Britain* (Harvard University Press 2006) 10; also see PJ Marshall, 'A Free Though Conquering People': *Eighteenth-Century Britain and Its Empire* (Ashgate 2003).

⁴⁴⁹ Lawson (n 443) 103.

sovereignty.⁴⁵⁰ As he claimed, 'to account for this step, on the principles of justice, was impossible'.⁴⁵¹ He further wrote 'such a dishonorable blow to the law of nations and to the British faith struck me in the most forcible manner; and I could not help looking forward to the baneful tendency of this disregard to all truth, and the most sacred of engagements.' Instead, he proposed that the British government should directly align itself with the Mughal emperor and prevent the Company from meddling in affairs concerning the sovereign power of the Mughal empire. Reflecting on the difficult financial situation of the Company at that time, whose dramatically decreased revenue also faced increasing expenses at the same time, he argued that the problem was owing to the fact that the adjacent districts of the Company, the provinces of Bengal, Behar, and Orissa, consistently committed 'barbarism, plunder, and carnage'. He emphasized the importance of peace in India as a whole for the financial well-being of the Company. Such peace, according to him, would be hard to achieve if the British government continued its indifferent attitude and its generally non-aggressive policy in India, as the inadequacy of the Company in dealing with the major power in Asia, especially the Mughal Empire, was apparent. A direct alliance between the sovereign British Crown and the sovereign Mughal Empire, according to Morrison, would be a better solution.

In addition to his considerations of the utility and the expediency of such an alliance, Morrison also explained his motivation for such a proposal based on his personal experience in India. Perhaps, given that he was working for the Mogul emperor as the 'General and Commander in Chief of the Great Mogul's forces, he thought it was necessary to explain the circumstances that brought him there. According to Morrison, he first

⁴⁵⁰ John Morrison, *The Advantages of an Alliance with the Great Mogul* (1774). This monograph so far has received little attention mostly because Morrison's suggestions were not influential at that time. Nevertheless, the passing of time should give his stand on this issue more respectability.

⁴⁵¹ *ibid* 25.

conceived of the idea of a direct alliance between the two empires as early as 1769, when he was first introduced to the prince of the Great Mughal, one year after his arrival in Bengal as the Major in the Company's force. He described the prince as 'a prince of amiable manners, of tried fortitude, courage, and ability', but in an embarrassing situation: the prince was 'sitting in a hut covered with straw, hardly large enough to hold above twelve people; yet this hut was called the Durbar or Court of the Great Mogul; and this while protected by the English East India Company.'⁴⁵²

Two years later, Morrison resigned from the Company when Captain Eyres was 'unjustly' appointed to the rank of the oldest Major on the Bengal establishment. Disappointed by the illiberal and unjust system of the Company, Morrison believed that the Company's system raised men to think that 'interest at home will outweigh services abroad', forcing them 'in despair to grasp at any immediate opportunity of improving [their] fortune', and informing them 'all powerful gold will cover a multitude of sins'.⁴⁵³ He even regarded it as the most complete system ever known of fraud and violence by uniting the functions of merchant, soldier, financier, and judge in the same person. His self-confession, as an important part of the book, gives the reader the perceptions of an unbiased author struggling in the corrupted system of the Company. These perceptions are shaped by Morrison's strong sense of humanity and justice.

Parliament's taking over the Company

At every epoch when the Company's charter was expiring, the renewal of the charter would generally ensue some political drama leading up to the parliamentary inquiry into the India affairs. These inquiries often ended up with the Company's agreement to offer loans of enormous sums at the

⁴⁵² ibid 14-15.

⁴⁵³ ibid 23.

lowest interest to the parliament, which also generally included bribes, either in the form of cash or Company shares. The 1767 renewal session was not an exception. The situation in 1767, however, was unprecedented not only because, in 1765, the Company had acquired the sovereign power in Bengal, but also because, over the years 1763-84, the Company had lost control over its financial problems and jeopardized British interests and investments both at home and abroad. Furthermore, the image of the Company had lost its glamour in the eyes of the nation.⁴⁵⁴ Negative feelings about the Company began to grow in the metropolitan population: documents alleged abuses of the Company servants, the Company's despotic rulership in India, the catastrophe of the Bengal famine, and the evidence of corruption in the form of 'presents' to the Company's head.

The news that the Company became a *de facto* sovereign was initially received with relative enthusiasm by the Company's administrators and the general investors in London, as the Company's stock value and dividend payments more than doubled by early 1767.⁴⁵⁵ As some optimistic speculations circulated that the *Diwani* acquired by the company would tremendously enhance Company's revenue, the Company's territorial acquisition in India was generally viewed as a successful step in the process of recovering the Company's fortune. Parliament wanted to claim their share in these imagined treasures, and consequence, the Company successfully saved its existence by agreeing to pay £400,000 annually to the National Exchequer from the year 1767 to the year 1773, 'in respect of the territorial acquisitions and revenues lately obtained in the East Indies'.⁴⁵⁶

⁴⁵⁴ Lawson (n 443)

⁴⁵⁵ Marx (n 397).

⁴⁵⁶ James Mill, *The History of British India* (first published 1817, Associated Publishing House 1972) vol 2, 933.

But the reality was that the military actions of the Company had already cost a vast amount of money that could not be covered by the normal operating capital of the Company. In order to make up this shortfall, the Company had to extract more money from London by convincing the investors of future profits. In 1769, conflicts in south India rattled nervy investors, sending its share price into free fall. Initial stock market euphoria quickly gave way to excess, mismanagement, and collapse. As local oppression became the norm, drought turned to famine, the company's military spending spiraled out of control. Finally, in 1772, the Company not only failed to fulfill its agreement with the English people, but also got itself into serious financial and credit crises too.

Consistently on the brink of bankruptcy, it had to appeal to the Parliament for the financial aid. The British government, taking this chance, began its enduring agenda for transforming the Company from a commercial enterprise into an administrative organ, serving solely the British national welfare. Besides, the Company was simply too big to be allowed to fail, as its shares were widely held by the public at that time. In exchange for the loan, some serious alterations needed to be made in the Company's Charter to redefine its relationship with the government. A series of parliamentary debates and inquiries into the Company's affairs thus started, the first of which was the establishment of a Select Committee of the House of Commons in 1772 that started parliamentary inquiries concerning the personal activities and acquisitions of Robert Clive. As the Commander-in-Chief of the Company, he was accused of the 'unabashed' extraction of loot and collection of 'presents' in India, the most notable of which was a *jaghire* (land grant) from the nawab Mir Jafar.⁴⁵⁸ Although the House of Lords finally rejected this condemnation, it still helped changing the general opinion against the Company and its

⁴⁵⁸ Clive later convinced the public that it was a present from the Mughal emperor, instead of an underhanded thank-you gift that came at the expense of Company profits. See Nichola Dirks, *The Scandal of Empire: India and the Creation of Imperial Britain* (Belknap Press of Harvard University Press 2006) 10.

corruption, paving the road to the later Lord North's Regulating Act of 1773.

While parliament, led by Lord North, agreed to provide financial assistance of £1,400,000 to the Company in 1773,⁴⁵⁹ in return, it also enacted the India Act 1773 to acquire some control over the Company's Indian administration. Even though Warren Hastings could continue to be the chief of the Company, he should be renamed as *Governor-General*, which was the same denomination used for the head of other British colonial governments. The Act also established a four-man *Supreme Council*, nominated by the Crown, to serve with Hastings. This soon resulted in a state of virtual civil war between Hastings and the majority of the Council. One of the councilors, Philip Francis, held different views from those of Hastings over a wide range of issues regarding the Company's administration in India.⁴⁶⁰ In addition, the Act provided that a *Supreme Court* of judicature should be set up at Calcutta to apply English law to all cases in its jurisdiction. This court was independent of the *Governor-General* and the Council. Later, much evidence was collected that portrayed the Supreme Court as trampling upon Indian traditions and customs, which was a recurring theme in Burke's writing and speeches.⁴⁶¹

Since 1780, Indian affairs came before parliament with increasing frequency, and alarming reports about the discreditable conducts of the Company in India were also accumulating. This was because that both the Company's Charter and the Regulating Act of 1773 were going to expire, it was now high time for the negotiation between the Treasury

⁴⁵⁹ Accordingly, there was a financial restriction attached that it should not be lawful to make a dividend of more than six percent per annum on the Company's capital stock until, by the application of the whole of their surplus profits, their bond debt was reduced to the sum of £1,500,000. In the year 1779, the loan was repaid. *ibid.*

⁴⁶⁰ Later, it was Francis who played an important role in assisting Burke in prosecuting Hastings.

⁴⁶¹ PJ Marshall, *The Impeachment of Warren Hastings* (Oxford University Press 1965) 13.

and the East India House. Conflicts were mainly concerning two points: the first was about whether the right to the Indian territory belonged to the Crown or to the Company; the other was what proportion of the proceeds from the Indian territory by the Company should be made as the remunerations to the public.

Meanwhile, under political pressure, North's government had to compromise to let Philip Francis leaving Bengal in 1780. Warren Hastings, therefore, 'almost for the first time in his career', 'was given unreserved support from the administration, the Courts of Directors, and his colleagues'.⁴⁶² Yet, the complaints and representations of Francis made in the metropolis had filled the public mind with ideas of injustice and crimes on the part of Hastings and the misconducts of his agents.⁴⁶³ The metropolitan public sphere had strong fears that the ruin of English interests by the Company was at hand. As the English nation simultaneously lost their colonies in America, the necessity of maintaining the power of the great Empire became imperative. In 1783, the Shelburne administration fell. Charles James Fox, in coalition with Lord North, became the Secretary of State and George III's minister.

Thinking the opportune moment had arrived, Fox introduced his India Bills, which were regarded as a significant attempt by the government to strengthen its intervention in the Company's affairs after the Regulation Act 1773. As James Mill later commented, 'no proceeding of the English government, in modern times, has excited a greater ferment in the nation, than these two bills of Mr. Fox'.⁴⁶⁴ There was much evidence indicating that Burke was the principal author of the Fox's Bills.⁴⁶⁵ Fox's India Bills included two Bills. The first Bill dealt with the administration of the Company at home. Based on the principle that the Company's commercial

⁴⁶² *ibid* 11.

⁴⁶³ Mill (n 456) 934.

⁴⁶⁴ *ibid* 946.

⁴⁶⁵ Marshall (n 461) 20.

affairs ought to be separated from its governmental functions, it appointed seven commissioners, nominated by the parliament, to control the Company's territorial possessions and nine assistant commissioners to manage the commercial affairs of the Company. The second Bill was 'for the better government of the territorial possessions and the dependencies in India', which included the rules that the Company's servants from then on were to follow. Overall, the essence of Fox's Bills was to establish that the Board of Director, consisting of the seven commissioners, should be chosen by the House of Commons and not by the owners of Company's stock.⁴⁶⁶

However, the bill also provided that the patronage system of the Company should be completely removed, which alarmed the king. The principal business of the Company in the eighteenth century was really about exporting men to India, and everyone agreed that the opportunity to appoint servants constituted a vast resource. The idea circulated that by vesting the power to appoint offices entirely in the Company's board of commissioners, which, in turn, was appointed by Fox, 'the power of Fox would be rendered absolute over both the king and the people'.⁴⁶⁷ The suggested removal of the patronage system also received strong opposition which claimed that the Bills violated the Company's charter rights by seizing private property without due process and without adequate compensation. In fact, it was this very proposal for the removal of the patronage that formed the foundation of the furious opposition to Fox's Bills.

As a result, due to the personal influence of King George III over the House of Lords, not only were the Bills defeated, but Fox's political life had also come to an end. William Pitt the Younger placed him at the head of the government. In 1784, Pitt pushed a bill through both Houses which

⁴⁶⁶ Mill (n 456) 947.

⁴⁶⁷ *ibid.*

established the Board of Control, consisting of six members of the Privy Council. Comparing the 1783 Fox Bill and the 1784 Act, James Mill wrote,

In passing that law two objects were pursued. To avoid the imputation of what was represented as the heinous object of Mr Fox's bill. Mr. Pitt's bill professed to differ from that of his rival, chiefly in this very point, that while the one destroyed the power of the Directors, the other left it almost entire. Under the act of Mr. Fox the powers of the ministers would have been avowedly held. Under the act of Mr. Pitt, they were held in secret and by fraud. The bill of Fox transferred the powers of the Company to Commissioners appointed by Parliament. The bill of Mr. Pitt transferred them to Commissioners appointed by the King.⁴⁶⁸

Based on the Act 1784, Lord Cornwallis, who was outside the Company's service system, was appointed as the new *Governor-General* of Bengal. The Company was finally brought under the control of the British government. As a result, the public criticism of India softened, since it was generally believed that Cornwallis had extended 'the essentials of civil society, secure property and the protection n of law... to millions [of Indians] who had previously quaked under oriental despotism'.⁴⁶⁹

From 1784 on, Indian finances continued to deteriorate. There was an existing national debt of 50 million pounds, a continual decrease in the resources of the revenue, and a corresponding increase in the expenditure. Previously this was balanced by the dubious income from the opium tax, but now the finances were threatened not only by fact that the Chinese beginning cultivate the poppy themselves, but also by the heavy expenses in the Burma War.⁴⁷⁰ In 1813, the Company's monopoly of Asian trade was only limited to China, which was abolished later in 1833. Nevertheless, the Company lingered on as the proxy

⁴⁶⁸ James Mill, *The History of British India*, vol 5 (1984) 88-92, quoted by Karl Marx in 'The East India Company', *New York Daily Tribune* (July 11, 1853). In fact, Marx put together different passages from Mill's text. See Karl Marx, *Karl Marx on India* (Tulika Books 2006) 23.

⁴⁶⁹ See PJ Marshall, 'The Moral Swing to the East: British Humanitarianism, India and the West Indies,' in '*A Free though Conquering People*': *Eighteenth-Century Britain and Its Empire* (Ashgate 2003) 83.

⁴⁷⁰ Marx (n 397).

administrator of British rule in Asia. The shattering revolt of its Bengal Army in 1857 was followed by the final abolition of the Company in 1858, and the British Crown assumed the mantle of a British Raj. Since then, the colonial sovereignty in India started establishing the public/private dual project by a comprehensive legal regime: on the one hand, the market was standardized to promote the free circulation of capital; on the other hand, the private realm under personal law was created to preserve the indigenous culture.

V. THE LIBERAL TRANSFORMATION OF THE PUBLIC/PRIVATE DISTINCTION II: *Edmund Burke on the East India Company*

Let my endeavors to save the Nation from that shame and guilt, be my monument; The only one I ever will have. Let everything I have done, said, or written be forgotten but this.⁴⁷¹

Based on the essential measures of the India Act 1784, the British government assured effectual control over the Company in India by establishing a *Parliamentary Board of Commissioners for the Affairs of India* to revise and control all the Company's political decisions. Lord Charles Cornwallis was also appointed to replace Warren Hastings as the Governor General of Bengal. However, if the Act was more than a contingent result of party politics and power struggle, the regulatory concerns behind it needed to be further elucidated and justified in the public. One central question, perhaps, required to be answered: how the direct rule by the British government in India would be more preferable than the mediate rule by the Company?

This chapter argues that the answer to this question was most influentially articulated by Edmund Burke in his parliamentary public speeches on India, especially in his four-day opening speech to the impeachment of Warren Hastings. Edmund Burke is commonly regarded as one of nine patriarchs of modern conservatism, and his reputation

⁴⁷¹ Edmund Burke talked about his fight in the impeachment in a letter written to Dr. French Laurence in 1796, one year before the end of his life. Edmund Burke, *Correspondence of Edmund Burke*, vol IX (RB McDowell and JA Woods eds, Cambridge University Press 1970) 62.

stems from his vehement opposition to the French Revolution. It has been argued that Burke's speeches on the affairs of India carry less authority, because his extreme hostility to Hastings personally sometimes deviated his speech from the usual good sense to something more akin to 'raving vulgarity'. Indeed, in these speeches, Warren Hastings has been described excessively by Burke as a criminal that corrupted to the very core. Before returned from India, Warren Hastings had been the Governor General of the East India Company for thirteen years. He was then accused by the British House of Commons for 'high crime and misdemeanour' in front of the House of Lords in 1788. The impeachment has often been regarded as one of the great political trials in British history and the first major public event of its kind in England (arguably in Europe as well). It was on this very occasion, Burke emphasized the importance of an institutional separation between public governance and private commerce by demonstrating that part of Warren Hastings's misrule in India might have been the structural consequence of the Company as 'mercantile sovereign'.

However, rather than a solid argument built on convincing evidence and logical analyses, Burke's accusation of the East India Company relied heavily on his skillfully rhetoric, deploying various literature techniques including the narrative pattern that borrowed from the popular gothic novel of that time, and the rhetorical ornamentations informed by his readings of Cicero. It was later revealed that in order to demonize Warren Hastings's rulership in India, some of Burke's charges were exaggerated and fabricated, 'trading on the enormous ignorance of his audience'.⁴⁷² In addition, the success of his speeches also because they catered perfectly

⁴⁷² How truthful Burke's accusations of Hastings were was much explored by historians from the nineteenth century onward. In general, while historians of the nineteenth century defended Burke's accusations against Warren Hastings, historians from later periods generally agree that Burke moderately exaggerated, sometimes to the point of being unfair to the just and humane sentiments of Warren Hastings. See Thomas B. Macaulay, *Macaulay's Essay on Warren Hastings* (written in the eighteenth century, Harrap 1911); Keith Granhame Feiling, *Warren Hastings* (St. Martin's Press 1954).

to the imperial sentiment of that transitional period from the first British Empire to the second British Empire. A new imperial ideology was calling in order to bring civilization and justice all over the world. More importantly, Burke's speeches resonated deeply with the changing public opinion on the relationship between the public and the private at that time. It could be argued that during this period, there was inaugurating a general awareness that the public and private interest should be organizationally separated. Much evidence shows that before the impeachment a large discussion over the relationship between the public and the private interest took place in the early eighteenth-century public sphere, especially in terms of what was the best way to harness the private interest to benefit the public interest. In this sense, Burke's articulation of the institutional separation of the public governance and private corporations could be read against Bernard Mandeville's *Fable of the Bees*, best known for its aphorism 'private vices, public virtues'.⁴⁷³

15. The Impeachment of Warren Hastings

When the impeachment trial of Warren Hastings opened before the House of Lords in 1788, Burke was giving a four-day speech, which was often described as 'one of the Greatest oratorical achievements of their age'.⁴⁷⁴ In many respects, the impeachment of Warren Hastings that was initiated and led by Edmund Burke was just a natural continuation of his support for Fox's 1783 India Bills and his enduring obsession with India. Back then, Burke had already been more and more fixated on Hastings as the epitome of the intolerable abuses perpetrated by the Company in India. Although his rhetorical ability was widely acknowledged, he was

⁴⁷³ Bernard Mandeville, *The Fable of the Bees: or, Private Vices, Public Benefits* (first published 1714, Oxford University Press 1924).

⁴⁷⁴ PJ Marshall, 'Introduction' in Edmund Burke, *The Writings and Speeches of Edmund Burke* (Clarendon Press 1981) vol VII, 1.

not considered by Warren Hastings and his supporters as a real threat, due to Burke's insufficient knowledge about India. They commented on Burke that he 'hath not yet knowledge sufficient of Indian affairs; he hath taken things superficially without distinguishing between glamour and realities'.⁴⁷⁵ However, Burke's association with Philip Francis proved to be a turning point. Francis had just returned to England from India after serving as one of the four members of the supreme council for seven years, during which he was in forceful opposition to Hastings. Francis had provided Burke a large amount of inflammatory material directed against Hastings. Marshall has particularly signified this involvement of Francis, as he said, 'it is very hard to believe that the attack on Hastings could have been either so violent or so quick to develop if the Committee had not been provided with a most articulate witness anxious to inflict on Hastings as much damage as he could'.⁴⁷⁶

The unexpected defeat of the 1783 Bill and the overthrow of the Fox-North Coalition left Burke little power, but he decided not to abandon the battlefield, leaving it entirely to his enemy. At that time, although Hastings' crimes and the notorious activities of the Company had already been exposed to the public, there was no clear established record yet. Fearing that Hasting might be again received as a national hero, Burke felt that he had no choice but to counter-attack. He chose to initiate an impeachment because at the beginning of an impeachment, all charges with their material support would be published in the *Journals of the House*, which would allow the public judge by itself.⁴⁷⁷ Still, Burke was

⁴⁷⁵ Quoted in *ibid* from a letter from S. Pechel to Hastings, 8 Jan. 1871, Add. MSS. (Additional Manuscripts, British Museum) 29147, f.24. Indeed, Burke's incompetence was also identified by historians. Macaulay once mocked that the oppression in Bengal to Burke was the same thing as oppression in the streets of London Reference.

⁴⁷⁶ *ibid*.

⁴⁷⁷ Impeachment was used very little during the eighteenth century. It had only been invoked against one of the Jacobite rebels in 1746. The impeachment of Hastings was also the second last use of impeachment in England, and the last one was the impeachment of Henry Dundas on ground of corruption in 1806, who used to be the president of the board of control for the Company.

extremely pessimistic from the outset, hardly expecting any tangible success on the impeachment. As he said, it was 'vain and idle' to think of what might happen in a trial, since 'we know that we bring before a bribed tribunal a prejudged cause'.⁴⁷⁸

At that time, Warren Hastings (1732-1818) had just returned to Britain after thirteen years as Governor General of Bengal from 1772 to 1785. Hastings was the first Governor General of Bengal, and he had substantial control over the Company in India for fourteen years. Called in Calcutta's first newspaper as 'the Great Moghul', Hastings has endured an unstable public reputation that often rested on various seemingly irreconcilable assertions. As Macaulay has concluded, no public figure has ever 'so singularly chequered with good and evil, with glory and obloquy'.⁴⁷⁹ Grown up in Oxfordshire as an orphan with only his grandfather as his guardian, Hastings went to the village school, 'where he learned his letters on the same bench with the sons of the peasantry'.⁴⁸⁰ At the age of eight, he was sent to London by his uncle to receive an education. After his uncle died, he was arranged, by a friend of his uncle, a writership in the East India Company. Hastings sailed to Bengal in 1750. He then joined Robert Clive's army and became a soldier in the war. In 1772, when Hastings started to serve as the head of the government of Bengal, Bengal was still governed by the two governments devised by Clive, one was the Company and the other was the local government. Hastings carried out the revolution that dissolved the double government and gave the Company full reign over Bengal.⁴⁸¹ The great similarity between what had happened to Lord Clive during 1772-73 and what happened to Warren Hastings has often been identified: both of

⁴⁷⁸ Edmund Burke, *The Correspondence of Edmund Burke*, vol V (T. W. Copeland and others eds., Cambridge University Press 1958-78), quoted in PJ Marshall, 'Introduction' in Edmund Burke, *The Writings and Speeches of Edmund Burke* (Clarendon Press 1991) vol VI.

⁴⁷⁹ Macaulay (n 472).

⁴⁸⁰ *ibid*

⁴⁸¹ *ibid*

them dealt with the financial crisis of the Company, both faced the public pressure about the Company's scandals, and both took on the legal charge as head of the Company.

Burke started the impeachment in 1785 with an inquiry into the despotic and arbitrary rule of Warren Hastings. To his surprise, the House of Common (that elected in 1784) received his speech much more positively than he had anticipated. The commonly held beliefs about the strength of an 'Indian' faction in parliament turned out to be an illusion, since Hastings failed to rally a party to support him. Pitt and Dundas, who gained office by exploiting the controversial Fox's Bill, still wanted to be regarded by public as Indian reformers, standing against an older India administration of corruption and abuse.⁴⁸² Warren Hastings was therefore charged of 'high crime and misdemeanors' by the House of Common in 1788 for misruling in India and for abusing the rights of the indigenous population. The trial was then passed on to the House of Lords for a verdict. The opening of the trial before the House of Lords has been described as a pomp public event. Taking place in Westminster Hall, its tickets were sold out and the attendees include the Prince of Wales, Queen Charlotte, and other members of the London 'haut ton' (a term referring to the fashionable elite of Georgian society). Fanny Burney, the celebrated novelist, also attended and kept a diary of the proceedings. This elite audience proved to be gratifyingly responsive.

The impeachment, however, went at a snail's pace from 1789 onward, and, surprisingly, lasted for another six years. The length and dreary trial caused the public disenchantment with Edmund Burke, who then also delved into the controversies of the French Revolution. The tide of popular expressions of compassion for native Indians soon receded when Hastings's barristers adapted their trial strategy and directed the trail into

⁴⁸² Marshall (n 474).

wearying arguments about legal technicalities.⁴⁸³ The press publication that was once manipulated by Burke now turned against him. Burke accused Hastings of 'buying up all the newspapers', a charge that was possibly true, as Hastings apparently outspent during the trial. The protracted trial became a draining undertaking for Burke, who eventually lost any substantial influence over the press due to his isolation from the Whig party. All he could do was to complain about the 'scandalous paragraphs and gross misrepresentations' of the venal press.⁴⁸⁴

But it has also been argued that there was a general change of public opinion about the British Empire in India, when the role of the British Empire in India was firmly established in the nineteenth century. Hastings's contribution was recognized and his conduct was justified, to some degree, by the difficult circumstances he had faced. The press might have simply reflected this changing opinion rather than bringing it about. King George III continued in his steadfast support of Hastings, and Hastings regained public respect and restored his reputation during the later phase of the trial. As a result, in 1795, twenty-nine members of the House of Lords eventually (and predictably) acquitted Hastings on all counts.

The anomaly of the company-state

Earlier, in 1772, when Burke engaged in the parliamentary inquiry of the Company, he still insisted on maintaining the integrity of the Company's corporate property and its legal rights to conquer and wage war. He believed that the problems of the Company's rule in India were simply regulatory and personnel issues. The Company needed to improve its management and operations in order for it to serve better the British

⁴⁸³ Richard Bourke, *Empire and Revolution: the Political Life of Edmund Burke* (Princeton University Press 2015) 822.

⁴⁸⁴ Marshall (n 474).

national interest, and an external judicial regulation was also necessary in controlling the possible abuses of the Company. The main problem, he argued, was that the Company's charter 'was well enough calculated for the purposes of a factory', yet was 'totally insufficient upon the acquisition of extensive territories'.⁴⁸⁵ Therefore it lacked 'a comprehensive and well-digested code of laws, for the rule of every man's conduct' and 'appropriate institutions to enforce them'.⁴⁸⁶ Without a proper legal framework, unlimited authority would fall into the hands of the Company's governors in India, as the directors of the Company in London did not have sufficient time or capacity to oversee its government in India. Later, in 1781, when he was consulted about the ministry's plan concerning the Company, he was still intensely suspicious of any concrete proposals that might threaten the independence of the Company, though he was no longer opposed to a stronger government intervention.⁴⁸⁷

During the impeachment, Burke continued this line of argument by endeavoring to expose the enormity of Warren Hastings's crimes and the unprofessional, illegal behaviors of the Company's servants. According to Burke, junior and senior officers in the Company's service could not be trusted, had no dignity, and knew no honor. They tried to enrich themselves as much as possible in order to compensate for their low salary. What was lacking in them was the 'glory, family reputation, the love, the tears of joy, the honest applause', which were often bestowed upon British officers stationed in other territories.⁴⁸⁸ However, Burke began to realize that the main problem of the Company was more than a regulatory issue. It was, in fact, systemic and independent of the performances of the individual officers and governors in the Company's

⁴⁸⁵ Edmund Burke, 'Speech, April 13, 1772' in *Party, Parliament and the American Crisis, 1766/1774* (Langford ed, Clarendon Press 1981) 372-73. *The Parliamentary History of England, from the Earliest Period to The Year 1803* (1813) vol XVII, 461-62.

⁴⁸⁶ *ibid*

⁴⁸⁷ Edmund Burke, *The Writings and Speeches of Edmund Burke* (PJ Marshall and William B Todd eds, Clarendon Press 1981) vol V, 132.

⁴⁸⁸ *ibid* vol VI, 287.

employ. Burke thus initiated a broader agenda that targeted at the structure anomaly of the Company, or, in his words, the problem of the 'mercantile sovereign'. As he said,

The India Company became to be what it is, a great Empire carrying on subordinately (under the public authority), a great commerce. It became that thing which was supposed by the Roman Law so unsuitable, the same power was a *Trader*, the same power was a *Lord*.⁴⁸⁹

By shifting his focus to the problematic combination of the public governance and private business, Burke added an entirely new dimension to his original charges against the Company. According to Burke, this could be further broken down in two respects. Firstly, the development of the Company 'reversed' the natural order of history. In ordinary affairs, 'a political body that acts as a Commonwealth is first settled, and trade follows as a necessary consequence of the protection obtained by political power.'⁴⁹⁰ But the situation was reversed in the case of the Company, as 'the constitution of the Company began in commerce and ended in Empire'.⁴⁹¹ Due to its inherently mercantile character, the Company's commercial interests outweighed any of its other responsibilities, the responsibilities of governance, making peace and waging war, which should be treated as the highest.

Secondly, Burke observed that traditionally in history whenever a nation extended its sovereign power from one country to another, it did so as a nation, not as a company. For example, French treaties of conquest were signed on behalf of the French Crown rather than a French company; the Dutch took direct charge over their conquests. But the British Company's practice diverged from its European rivals in this respect. When the Company established itself as a sovereign power in India, it tended to operate through Indian Viziers and Nawabs, establishing native rulers as

⁴⁸⁹ *ibid* vol V, 242.

⁴⁹⁰ *ibid* vol VI, 283.

⁴⁹¹ *ibid*.

'an empire in an empire'.⁴⁹² It did not exist as an extension of the British Nation but rather as 'a Nation of placemen', 'a seminary for the succession of Officers'.⁴⁹³ In other words, the Company was 'a Kingdom of Magistrates', or 'a Republic, a Commonwealth without a people'. Since the Company did not have to answer to or serve a people, there was also no other power to control the Company in the country. It also preserved the whole exterior mercantile order with mercantile place and mercantile principles. This contrast resulted the fact that the Company became 'a State in disguise of a Merchant', 'a great public office in disguise of a Countinghouse'.⁴⁹⁴

Esprit de Corps

As a result, instead of representing the interest of the local people or the interest of its mother country, the Company only served its own interests, which was called the *Esprit de corps* (the 'corporation spirit') by Burke. *Esprit de corps* was never was a spirit that 'corrected itself in any time or circumstance in the world'.⁴⁹⁵ Such an *Esprit de corps* transformed the already highly hierarchical constitutional structure of the Company into an instrument of tyranny and corruption. This also explains Burke's reduction of the Company's issues to the figure of Warren Hastings, which was criticized by many modern historians. When substantial political responsibilities were given to the Company, the Company not only came into conflict with the welfare of the respective local population, but also misused these political powers for commercial gain. This meant that the East India Company harnessed its new political powers to support its trade in alternative ways, for instance, by forcing Indian merchants out of business and by compelling artisans and cultivators to accept lower

⁴⁹² *ibid* vol VI, 284.

⁴⁹³ *ibid* vol VI, 285.

⁴⁹⁴ *ibid* vol VI, 284.

⁴⁹⁵ *ibid* vol VI, 286.

rewards when they worked for the Company.⁴⁹⁶ Yet, the goods produced at the artificial prices enforced by the Company did not sell at a profit in Britain. The Indian population thus suffered, and the servants of the Company only served their own advantage, making their fortunes by oppressing those over whom they ruled. The service of the Company in India continued to expand with the growth of the Company's territorial power. The quest for further territories and patronage began to absorb the Company's directors and proprietors in London, who thus benefited greatly from the appointment of 'plunderers' in India.

In talking about the interest *Esprit de corps*, Burke shared a similar view of the political economy in India as his contemporary academic commentator, Adam Smith.⁴⁹⁷ According to Smith, when the Company received a share in the power to appoint the 'plunders' of the country, it transformed itself from a profit-seeking into a rent-demanding organization. Revenue, rather than trade, became to dominate its agenda, and there was no limit to their thirst for the forced trade in booty. Governance should not be identical with commercial enterprise. In marrying politics and trade, the Company corrupted the character of both, transforming itself into an avaricious and bureaucratic engine.⁴⁹⁸ In the long run, neither Britain, nor India would benefit. India would become impoverished and the East India Company would become bankrupt. Indeed, since 1765, the Company had tried to finance its trade from a surplus of territorial revenue, thus creating a 'drain of wealth' or an 'Annual Plunder', which would inevitably ruin the British provinces in India.

Burke argued that the only remedy was to end the use of force and to allow a free market in India, as was already supposed to have happened

⁴⁹⁶ *ibid* vol V, 226.

⁴⁹⁷ Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776) Book V.

⁴⁹⁸ *ibid* Book V, 752-54.

in the past.⁴⁹⁹ The Indian people should be allowed to gain wealth by selling goods at freely negotiated prices. The Company, in turn, was to concentrate its attention on those goods that met a genuine demand in Britain and thus could be sold at a profit. Both India and Britain would benefit greatly, if the Company could again 'fix its Commerce upon a Commercial Basis'. Belief in the benefit of the free market was as strong in Burke's Ninth Report as it was in the *Thoughts and Details on Scarcity* twelve years later. The main maxims of the *Thoughts and Details* were that a monopoly of authority would ruin whatever it touches, and therefore all trading governments would speedily become bankrupt.⁵⁰⁰ Adam Smith saw free trade as the way to recovery. Smith believed that what Burke called the anomaly of the 'mercantile sovereign' should be fully abolished. As he wrote, 'it [the Company] should either cease to be a merchant, or at least lost its monopoly, or it should cease to be a sovereign, allowing its provinces to be administered by the national government.'⁵⁰¹ The Company should return to 'a bottom truly Commercial' in its own activities and should endeavor to restore prosperity to Indian merchants.

The government of writing

Interestingly, even during the impeachment, Burke did not hide his great admiration for the novel system that created by the Company, which he called the 'government of writing' or the 'government of records'. He described it as 'one mercantile constitution of the Company, so great, so excellent, so perfect, that I will venture to say that human wisdom has never exceeded it'.⁵⁰² This system was so great, according to Burke, that the state should adopt it for governing any remote, large, disjointed

⁴⁹⁹ Burke (n 471) vol V, 195.

⁵⁰⁰ Edmund Burke, *Thoughts and Details on Scarcity, Originally Presented to the Right Hon. William Pitt: In the Month of November, 1795* (Fb&c Limited 2017).

⁵⁰¹ Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776) Book V.

⁵⁰² Burke (n 471) vol VI, 295.

empire. Even the strictest Court of Justice in its proceedings was not more a Court of Record than the India Company in all its proceedings. As he said,

It does so happen that there the Counting-house gave lessons to the State. And it will always happen that, if you can apply the regulations which private wisdom makes for private interests to the concerns of the State, you will then find that active, awakened and enlightened principle of self-interest has contrived a better system of things for the guard of that interest than ever the droning wisdom of people looking for good and of themselves – I mean for the greater part of mankind – ever contrived for the public. And therefore I repeated it, that the regulations made by mercantile men for their mercantile interest, when they have been able, as in this case, to be applied to the discipline and order of the State, have produced a discipline and order which no State should be ashamed to copy, and without which such a State cannot exist.⁵⁰³

Indeed, the Company's development of archival governance was unprecedented. Governance was carried out through a practice of archiving, a systematic circulation, preservation, and recall of written texts that made it possible to rule remotely from London. The system obliged their servants to keep a diary of all their transactions and other activities. Every proceeding in public Council was to be written down, and there were to be no verbal debates. The entirety of any argument was recorded on paper—the proposition, the discussion, the dissent. This allowed anyone in power in London to track and evaluate the activities of their servants, and to form an accurate judgment of everything that happened in India. James Mill, in one of his letters in 1819, described his job at London's India Office in the following way: 'the Government of India is carried on by correspondence...and...I am the only man whose business it is, or who has the time to make himself the master of the facts scattered in a most voluminous correspondence, on which a just decision must rest.'⁵⁰⁴

⁵⁰³ *ibid* vol VI, 296.

⁵⁰⁴ Betty Joseph, *Reading the East India Company 1720-1840: Colonial Currencies of Gender* (University of Chicago Press 2004) 5.

This was quite different from the operation of other government bodies at the time, such as the Houses of Lords, Commons, the Privy Council, as all of these had to abide by secrecy laws. In those bodies, only final resolutions of affairs were written down and the course of discussion was missing. As a hierarchical bureaucracy, the Company was stratified into different levels of competence and authority, ranging from writers, factors, junior merchants, senior merchants, counsellors, and presidencies to the governorship. The writing system equipped the Company with an effective instrument for monitoring and assessment. As Burke concluded, 'it not only produced to them a more accurate idea of the nature of their affairs and the nature of their expenditures, but it gave them no mean method of knowing the characters of their servants, their capacities, their ways of thinking, the turn and bias of their minds.'⁵⁰⁵ In addition, it also formed a means of detecting and proving the morality of the Company's servants. This mechanism, thus, could be of great benefit for the government, certainly the imperial government.

Nevertheless, it was one thing for the directors of the Company to lay down the well-defined guidelines to ensure that new information would be received safely and timely from India (in order to avoid a complete breakdown in communication, several copies of a dispatch had to be sent via three or four different ships, and, sometimes, an additional copy was carried by messengers who travelled over land). It was quite another thing to secure compliance with the rules from servants whose self-interest, incompetence, and neglect of duty would prevent them from providing the required information, since everyone wanted to put themselves in the best light.⁵⁰⁶ Occasionally, the information for the East India House was deliberately withheld by senior Presidents in India, instigating bitter wars between them. More importantly yet, after the

⁵⁰⁵ Burke (n 487) vol VI, 297.

⁵⁰⁶ HV Bowen, *The Business of Empire: The East India Company and Imperial Britain, 1756–1833* (Cambridge University Press 2005) 157–58.

Company had acquired its empire, new types of information were required by the Directors, which related the day-to-day workings of the overseas government, including governance, diplomacy, military affairs, revenue collection, and so on. As senior officials were often told to mention every detail, not only enormous collections of information were sent and much time was devoted to reading them, but more complicated balance sheets and sophisticated accounting system were established. The Company has developed a great sense of corporate pride in its unrivalled record keeping and communication system, maintaining bureaucratic order and efficiency.

16. Contextualization

Often being described as one of the most powerful oratorical accomplishments of the time, the theatrical and rhetorical nature of Burke's speech in the impeachment led to the fact that historians treated it more as a public moral drama than a judicial proceeding. Indeed, since the form of impeachment had not been used for fifty years, there were few established laws or pre-existing legal principles with regard to most of Burke's charges. Rather than focusing on legal technicalities, Burke deliberately wrote the speech to be readily intelligible to the lay public and to direct its attention to the moral deficiency of the Company and Warren Hastings. Burke exhibited his rhetorical powers in depicting the Hastings's regime in India as cruel, unscrupulous, and mercenary to the extent of a total extinction of all moral principle. In the opening speech of the trial, Burke claimed that his engagement with the impeachment was for the sake of justice, humanity and the honor of government. The extraordinary passion of Burke to this trial was reflected by his frequent applications of the strong emotional language, which was so strong that observers often reported it to be offensive.

Although Burke's skillful demonization of the Company was crucial in establishing a moral distinction between the public state and private company. It would hardly have had the same effect if his arguments had not perfectly catered to the imperial sentiment of the metropolitan public in the late eighteenth century that aroused by the loss of the American colonies. His articulation of the distinction between the public and the private strengthened the moral superiority of the British Parliament over the private corporation. It endowed the parliament the public honor and responsibility to restore the universal justice in India by protecting the local people from the selfishness and violence of the Company. The new idea of the public/private distinction, thus, constituted a crucial part of the general trend in reconstructing an imperial identity that was associated with universal justice, civilization, and humanity all over the world. This emerging moral differentiation between the public state and the private corporation also related to the heated moral discussion of the public interest and the private interest in the eighteenth-century public sphere. The regulatory concern behind both Fox's India Bill 1783 and Pitt's 1784 Act was to alter the facts that the private predations of the Company's servants in India had disgraced the British national honor, and the Company's deteriorating fiscal condition posted a threat to public credit. The absence of public responsibility, or moral personality, of the Company, thus became the central critics towards the Company in the late eighteenth century.

The literary technique of demonization

It has been argued that Burke's strongly moralizing language and his severe scorn resulted from his intentionally modeling the speech after Cicero's rhetorical style.⁵⁰⁷ Cicero enjoyed particular renewed prominence

⁵⁰⁷ Geoffrey Carnall, 'Burke as Modern Cicero' in *The Impeachment of Warren Hastings: Papers from a Bicentenary Commemoration* (Geoffrey Carnall and Colin Nicholson eds, Edinburgh UP 1989) 76. Burke also mentioned the influence of Cicero in his closing speech of the impeachment in 1794. As he said, 'we have all, in our early education,

in the eighteenth century due to the great constitutional controversies of that time. He has been depicted as a 'Whig hero of the Roman Republic', its heroic defender and, in the end, a 'martyr to liberty'.⁵⁰⁸ Cicero's historical prosecution of Verres, the corrupt governor of Sicily in Roman history around 70 B.C., was read widely at that time. The same kind of eloquence skill, originated from Cicero's usage of strong moral language in his prosecuting Verres, has been highlighted and deliberately imitated widely by the eighteenth-century intellectuals. David Hume noted Cicero's particular fame at his time, in comparison with the decayed popularity of Aristotle. He also admirably spoken of Cicero's strong language as the kind of eloquence which is 'infinitely more sublime than that which modern orators aspire to'.⁵⁰⁹ No speaker in modern times, according to Hume, could afford to venture on such bold language used by Cicero at the climax of his persecution of Verres. What Hume criticized was the fact that the so-called modern good sense would disdain the rhetorical tricks employed by Cicero, who strove to create a strong passion in the audience, in other words, to inflame the audience. Hume further explicated 'the orator, by force of his own genius and eloquence, first inflamed himself with anger, indignation, pity, sorrow; and then communicated those impetuous movements to his audience.'⁵¹⁰ James White, one of Burke's contemporaries, also remarked in the preface to his translation of Cicero's speeches that particularly the early Cicero was most deserving of applause for his fearless and firm integrity, which contrasted with his later timidity.⁵¹¹

read the Verres. We read them, not merely to instruct us...but we may read them for much higher motive...he left to the world and the latest posterity, a monument, by which it might be seen what course a great public accuser, in a great public cause, ought to pursue... In these orations, you will find almost every instance of rapacity and peculation, which we charge upon Mr. Hastings.'

⁵⁰⁸ *ibid.*

⁵⁰⁹ David Hume, 'Of Eloquence' in *Essays: Moral, Political and Literary* (Thomas Hill Green and Thomas Hodge Grose eds, Longmans, Green, and Co. 1875) 166.

⁵¹⁰ *ibid.*

⁵¹¹ The Orations of Marcus Tullius Cicero Against Caius Cornelius Verres (James White tr, 1787) i-v. James White was writing pamphlet against the immorality of the slave trade.

Yet, one of Cicero's advantages in the Verres' case over Burke in Hastings's was that Sicily was much closer to Rome, compared to the remoteness of the East Indies to England. India was far less comprehensible to Members of British Parliament and to the general British audience. Burke himself also acknowledged these difficulties, as he said, 'but we are in general... so little acquainted with Indian details, the instruments of oppression under which the people suffer are so hard to be understood, and even the very names of the sufferers are so uncouth and strange to our ears, that it is very difficult for our sympathy to fix upon these objects.' Nevertheless, modern commentators argue that Burke successfully bridged this cultural gulf by deploying familiar gothic narratives and themes in his speeches.⁵¹² Such narrative parallels to gothic literature would allow the audience to comprehend events that would have otherwise seemed removed from their own, daily experiences.

Burke's borrowing from the conventions of gothic fiction in portraying Warren Hastings has often been described as striking and effective. Gothic fiction emerged during the eighteenth century and reached the peak of its popularity in the period of the French Revolution. It particularly reflected the anxieties of women, both as readers and writers, and the 'deep-seated fear of radical social upheaval, a fear dramatized in a plot that typically confronts the helpless, imprisoned heroine with the double threat of impoverishment and violation'.⁵¹⁴ This fear also reflected the social realities of late eighteenth-century England in that women's social position depended on their sexual purity and their property, and the stability of their social position was threatened by the growth of capitalism and the imperial expansion. Alluding to or making use of

See James White, *Hints for a Specific Plan for an Abolition of the Slave Trade* (London 1788).

⁵¹² Frans De Bruyn, 'Edmund Burke's Gothic Romance: The Portrayal of Warren Hastings in Burke's Writings and Speeches on India' (1987) 29 *Criticism* 415.

⁵¹⁴ *ibid.*

elements of gothic fiction was a popular trend among the journalists in that age. As Bruyn writes,

In an age when unprecedented historical events were rapidly overtaking the strangest of gothic fancies, to say nothing of previous historical and political orthodoxy, journalists and political commentators such as Edmund Burke increasingly recognized in the gothic mode a means of apprehending or conceptualizing the bewildering sequence of public events unfolding before their eyes.⁵¹⁵

Although Burke's 'gothic reading' of the French Revolution might be the most famous example,⁵¹⁶ his voluminous writings on British affairs in India represent a more subtle and complex elaboration of this narrative strategy. He explained historical events in India according to the conventions of the gothic novel: the Indian peoples were the innocent and virtuous heroine, who was suffering from and could barely escape the violence of the gothic villain, that were Warren Hastings and his Company. Since Hastings was depicted as immune to the humanizing influence of moral feeling, it was up to Burke, who visualized himself as the 'paternal protector' (or the sublime guardian), to take up the cause of the Indians. He dramatized himself as someone who would 'give up all the repose and pleasure of life, to pass sleepless nights and laborious days, and, what is ten times more irksome to an ingenious mind, to offer oneself to calumny and all its herd of hissing tongues and poisoned fangs, in order to free that world from fraudulent prevaricators, from cruel oppressors, from robbers and tyrants'. As Bruyn has concluded, Burke's allusion to gothic themes not only served the purpose of making the

⁵¹⁵ *ibid.*

⁵¹⁶ It has been argued that Burke attempted to make sense of the seemingly unthinkable political phenomenon of the French Revolution by explaining it in terms of the gothic and sublime (two intimately related aesthetic modes). For example, in his *Reflections on the Revolution in France*, Burke described the assault upon the royal family at Versailles in the following way: 'A band of cruel ruffians and assassins, reeking... with blood, rushed into the chamber of the queen and pierced with a hundred strokes of bayonets and poniards the bed, from whence this persecuted woman had but just time to fly almost naked, and through ways unknown to the murderers, had escaped to seek refuge at the feet of a king and husband not secure of his own life for a moment.' Edmund Burke, *Reflections on the Revolution in France* (Oxford University Press 1790) 86.

peoples of India seem more like the British, but it also simplified the complexity of the reality to a clear-cut vision of good and evil.⁵¹⁷

The imperial sentiment

In the second half of the eighteenth century, England entered into an era of 'conservative' liberalism. As the industrial revolution expanded the country into a great imperialist power, it was no longer in need of the antiquated rationalization of liberalism that might lead to some radical and dangerous revolutionary conclusions. The French Revolution had given English capitalists a great scare, all sections of the ruling class thus united together to extinguish any signs of radicalism. Represented by David Hume, liberalism became more conservative (if not more cynical), since according to him, no truth was eternal, all depended on the point of view. Any abstract idea would be prejudice and not worth arguing about. In contrast to Locke, whose notion of property was based on labor, Hume founded property on seizure. He further pointed out that government was founded solely on usurpation and conquest, instead of the voluntary subjection of the people based on social contract.

Meanwhile, it has been argued that, in the years between 1756 and 1783 the empire was particularly unstable, and the metropolitan British vigorously sought to rework the notion of empire and good imperial governance.⁵¹⁸ During this period, two high-profile imperial issues structured the public debates in the British metropole: one was the loss of British colonies in North America, the other was the East India Company's rule in India.⁵¹⁹ The experience of losing the American colonies in the immediate past, apparently dispirited the public who used

⁵¹⁷ Frans De Bruyn, 'Edmund Burke's Gothic Romance: The Portrayal of Warren Hastings in Burke's Writings and Speeches on India' (1987) 29 *Criticism* 415.

⁵¹⁸ HV Bowen, 'British Conceptions of Global Empire' (1998) 26 *The Journal of Imperial and Commonwealth History* 1.

⁵¹⁹ PJ Marshall, *The Making and Unmaking of Empires* (Oxford University Press 2005).

to have a sense of imperial enthusiasm and grandeur. Rather than surrendering to the idea of a diminished empire, the metropolitan public determined to maintain the Empire's dominance at international level. As one British writer wrote at the end of the American Revolution, 'I will take upon me to affirm [that] we are, and shall continue, to be the greatest empire, as to riches, commerce, and manufactures, in Europe, mistress of its seas, and the balance of its power.'⁵²⁰ In practice, historians commonly agree that, in the decades after the loss of American colonies, Britain attempted to centralize its control over India.⁵²¹ This led to a rethinking of the concept and identity of the Empire and to a re-evaluation of the appropriate mode of imperial governance. If the loss of America was irrevocable, the British still had a chance to improve in India.

As a result, there is much evidence suggesting that, among these public debates, there was a sudden emergence of substantial critiques of the inhumane British behaviors in the colonies overseas.⁵²² The English public of that time was appalled by the injustices committed by the agents of the empire, which mainly included the East India Company servants, the American slaveholders, the Atlantic slave traders and so on. This represented a radical shift from the traditional imperial discourse that uncritically celebrated the vibrant power of the British Empire. Specifically, the imperial enthusiasm had lasted for several decades previously in the metropolitan public sphere, which was companied by a voracious public appetite for exotic tales and news of the British overseas world, supplemented by the emergence of a wide variety of publications on imperial issues. While the general public became more and more intimately involved with the colonies, either through producing goods

⁵²⁰ Edward Stratford, *Essay on the True Interests and Resources of the Empire* (Dublin, 1783) 30, as cited in Eliga H. Gould, *The Persistence of Empire* (The University of North Carolina Press 2000) 180.

⁵²¹ PJ Marshall, *The Making and Unmaking of Empires: Britain, India, and America c. 1750-1783* (Oxford University Press 2005) A Free though Conquering people; C.A. Bayly, *imperial meridian*, 1989; Maya Jasanoff, *Liberty's exiles*, 2011,

⁵²² See generally Jack P Greene, *Evaluating Empire and Confronting Colonialism in Eighteenth-Century Britain* (Cambridge University Press 2013).

exported to the colonies or through exchanging goods with them, there were some basic ideas of what distinguished the British Empire from both past empires in history and the contemporary European rivals (such as Spain and France) already emerged.⁵²³

Apart from the general positive representations of the British Empire, including commerce, maritime power, richness, and civility, what was exclusive to the attributes of the British Empire was the idea of civilization, individual liberty and justice in particular, which was supposed to be introduced by the British Empire and enjoyed by all inhabitants of its colonies through the exportation of British common law to the British Atlantic world.⁵²⁴ Yet, the American experience has demonstrated that it was imperative for the Empire to refine this ideology in the face of the growing problems. The municipal nature of common law was regarded as too narrow to be adequate for the imperial operation. A global perspective needed to be developed to represent and implement new idea of the British Empire. Thus, a new supranational and deterritorialized concept of 'justice' emerged in England which was held above the common law as belonging to all human people and became part and parcel of a new imperial identity. It was particularly aimed at protecting the local population from the oppression and violence that had been illegally committed by the trading agents of the Empire. The notion of a natural law was the embodiment of this new and universal sense of justice for all. To think that the empire brought 'justice' to the other side of the world also meant to think that it 'civilized' the world. Therefore, it

⁵²³ Anthony Pagden, *Lords of All the World: Ideologies of Empire in Spain, Britain and France* (Yale UP 1995).

⁵²⁴ David Armitage, *The Ideological Origins of the British Empire* (CUP 2000); Jack P Greene, 'Empire and Identity from the Glorious Revolution to the American Revolution' in PJ Marshall ed, *The Oxford History of the British Empire* (OUP 1998) vol 2, 208.

has been argued that this imperial discourse of justice could also be viewed as the prototype of modern international law.⁵²⁵

This new identity of the British Empire was particularly formed with respect to its colony in India, not only because it was then the most extensive territory of the empire, but also because the situation of India was quite different from the other overseas territories. As early as 1783, when Burke gave a speech to promote Fox's India Bill, he argued that the previous settlers' ideology could not be applied to the India situation.⁵²⁶ Burke writes, 'the earlier invaders of the subcontinent were more violent in their conquest, but because they made their homes where they conquered, they had an interest in good government. They are very few who can bear to grow old among the curses of a whole people.' However, 'British administrators and traders were not settling in India.' Therefore, 'young men (boys almost) govern there, without society, and without sympathy with the natives. They have no more social habits with the people, than if they still resided in England; nor, indeed, any species of intercourse but that which is necessary to making a sudden fortune, with a view to a remote settlement.' This led Burke to suggest a new model of self-governance in India. Burke believed that Britain should give up envisaging the empire as a 'spectacle of unity', and focus instead upon a utilitarian pragmatics – the empire would only work based on the practical needs of the diverse people it governed. As he has said, it was Britain's duty that:

In all soberness, to conform our government to the character and circumstances of the several people who compose this mighty and strangely diversified mass. I never was wild enough to conceive, that one method would serve for the whole; I could never conceive that the natives of Hindostan and those of Virginia could be ordered in the same

⁵²⁵ Mithi Mukherjee, 'Justice, War and the Imperium: India and Britain in Edmund Burke's Prosecutorial Speeches in the Impeachment Trial of Warren Hastings' (2005) 23 *Law and History Review* 589.

⁵²⁶ See Susan Staves, 'The Construction of the Public Interest in the Debates over Fox's India Bill' in Paula R Backscheider and Timothy Dykstal (eds), *The Intersections of the Public and Private Spheres in Early Modern England* (Frank Cass).

manner; or that the Cutchery court and the grand jury of Salem could be regulated on a similar plan. I was persuaded that government was a practical thing, made for the happiness of mankind, and not to furnish out a spectacle of unity, to gratify the schemes of visionary politicians.⁵²⁷

Earlier, in 1775, at the close of his speech on conciliation with the colonies, Burke has already developed this theme of love and happiness of the colonies by arguing that it was not the votes in Parliament that brought in the revenues and secured the defense of the colonies. Rather, 'it is the love of the people; it is their attachment to their government, from the sense of the deep stake they have in such a glorious institution, which gives you your army and your navy, and infuses into both that liberal obedience, without which your army would be a base rabble, and your navy nothing but rotten timber.'⁵²⁸ Burke believed that 'the spirit of the English constitution, which, infused through the mighty mass, pervades, feeds, unites, invigorates, vivifies every part of the empire, even down to the minutest member.' Burke may well have had the famous saying from his role model Cicero at the back of his mind, which states that the effects of fear are temporary, but that 'which is the effect of love will be faithful for ever.'⁵²⁹

Burke's argument resonated deeply with the tremendously growing attention to and sympathy toward the Indian people in the British metropolitan public sphere at the time. In this new climate of imperial humanitarian discourse, the Company's behavior in India was seriously condemned. As the public knowledge of the Company affairs and British activities in India increased markedly, every aspect of the Company's operation was openly debated both in parliament and in the public sphere. Burke deliberately wrote the Ninth Report, a report from the Select

⁵²⁷ 'Letter to the Sheriffs of Bristol', Warren M. Eofson and John A. Woods, eds *Speeches and Writings of Edmund Burke, III, Party, Parliament and the American War 1774-1780*. (Oxford, 1996), 316-17.

⁵²⁸ Edmund Burke, 'Speech on conciliation with America, March 22, 1775' in Burke (n 485).

⁵²⁹ Carnal (n 507); Cicero, De Officiis.

Committee of Parliament, in a clear and comprehensive way for a public which had no specialized knowledge of India.⁵³⁰ The public became familiar with the financing of the national debts, the functioning of the patronage system, and many other matters of political significance on India. While the British public was particularly concerned with the discreditable means by which the Company had gained its power in India, at the same time, the metropolitan public also showed a great admiration of the local culture in India. Several publications had helped to create this climate of opinion⁵³¹: Abbé Raynal's *Histoire philosophique et politique des Établissements et du Commerce des Européens dans les Deux Indes*⁵³² and Alexander Dow's *History of Hindostan*⁵³³. Indian history was portrayed by them in a sympathetic light, addressing the grievances and complaints of the local people resulting from the lurid European exploitations and oppressions. One petition in the late eighteenth century also reflected this human sympathy:

It is long since the nations, which have the misfortune to live near the East India Company's settlements, have stretched out their industrious and helpless hands to our gracious Sovereign, imploring his protection from the oppressions they were sinking under; and it must give great pleasure to everyone who knows how much the interest of Great Britain are connected with those of humanity...⁵³⁴

This new image of the Empire as delivering universal justice all over the world largely culminated in the impeachment of Warren Hasting. At this point, the House of Lords successfully elevated itself to a premier position

⁵³⁰ The Ninth Report is attributed to Burke and has enjoyed an unchallenged place in the canon of Burke's writings. Ninth Report from Select Committee, Appointed to take into Consideration the State of the Administration of Justice in the Provinces of Bengal, Burke (n 487) vol V, 194-333.

⁵³¹ Marshall (n 474) xvi.

⁵³² The English translation of this book went through twelve editions between 1776 and 1794, see Dallas D Irvine, 'The Abbé Raynal and British Humanitarianism' (1931) 3 Journal of Modern History 564-77.

⁵³³ The first edition appeared in 1768, and 2nd in 1770. The most sensational allegations occurred in a section inserted in vol.3 of the 2nd edition, published in 1772.

⁵³⁴ *An Enquiry into the Rights of the East-India Company of Making War and Peace: In a Letter to the Proprietors of East-India Stock* (written in 1769, London 1772) iii.

as supranational tribunal, rising above the narrow English national interests and representing universal judicial neutrality and impartiality. There thus emerged a triadic judicial structure: the British parliament as an 'arbiter', the people of India as the 'plaintiff', and the East India Company as the 'defendant'.⁵³⁵ This triadic imperial juridical formation replaced the old dyadic colonial political struggles, in which the East India Company was perpetually in conflict with the indigenous India. It was precisely the differentiation of the public and the private that endowed the British parliament such a moral superiority over the Company and a capability to restore justice in India that had been previously ruined by the Company. It also allowed the parliament to ascribe to itself attributes, such as universally objective, impartial, rational, all of which were closely connected to its public characters at that time.

Private vices, public virtues

The meaning of the 'public' in the late eighteenth century was also closely related to the emergence of the idea of 'public virtue'. As trade and commerce became the dominant features of the eighteenth-century economy, the question of public immorality escalated to an unprecedented degree. Unlike modern discussions of public and private interest, which focus on state interventions in market and individual property, the debates at that time mainly revolved around the popular idea of 'public virtue' (or civic/republican virtue).⁵³⁶ There were substantial political debates about whether a particular form of virtue really exists in the public realm, and, if it does, what would be the best

⁵³⁵ Mithi Mukherjee, 'Justice, War, and the Imperium: India and Britain in Edmund Burke's Prosecutorial Speeches in the Impeachment Trial of Warren Hastings' (2005) 23 *Law and History Review* 589.

⁵³⁶ For a summary of the eighteenth-century ideology of civic virtue, see Maurice Goldsmith, *Private Vices, Public Benefits: Bernard Mandeville's Social and Political Thought* (Cybereditions 2002) ch 1.

means of establishing it.⁵³⁷ These debates were mainly sparked by Bernard Mandeville's popular work *Fable of the Bees*, whose subtitle, 'private vices, public benefits', was perhaps the best known aphorism of eighteenth-century British political thought.⁵³⁸ In its popular version, this phrase was altered to 'private vices, public virtues'. This transformation nevertheless does render the phrase more intelligible, since 'vices and virtues are more naturally contrasted than vices and benefits'.⁵³⁹ The idea of 'public virtue' generated sophisticated and imaginative public discussions about the possibility of public participation in political power, and about the justified ground on which the political authority and decision could be established. This could be viewed as the origin of modern constitutionalism and political populism. The later impeachment of Warren Hastings, on the other hand, as an extraordinary emblem of the condemnation of the erosion of the public interest by the private interest, thus carried immense significance for understanding this structural reformulation of the public/private distinction. Burke's differentiation between the public state and the private company might also relate to this eighteenth-century public debates on the relationship between public and private interest.

As one of the few eighteenth-century authors, who assumed a clear distinction between the public realm and private realm, Mandeville divided human life into three spheres: the private sphere, a social world or 'Society of Men', and a political or governmental realm.⁵⁴⁰ He, however, rejected the popular belief of that time that evil and vice could be

⁵³⁷ Gordon Schochet, 'Vices, Benefits, and Civil Society: Mandeville, Habermas, and the Distinction between Public and Private' in *The Intersections of the Public and Private Spheres in Early Modern England* (Paula R Backscheider and Timothy Dystal eds, Frank Cass 1996) 244; also see generally JGA Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton University Press 1975).

⁵³⁸ Bernard Mandeville, *The Fable of the Bees: or, Private Vices, Public Benefits* (first published 1714, Oxford University Press 1924).

⁵³⁹ Schochet (n 520).

⁵⁴⁰ Mandeville wrote, 'by Society, I understand a Body Politick in which Man either subdued by a Superior Force, or by Persuasion drawn from his Savage State, is become a Disciplin'd Creature.' Mandeville (n 521) 187.

eradicated by a 'reformation of manners', and he also rejected the general doctrine that the pursuit of an 'enlightened' self-interest would eventually reveal the closeness of individual (or private) interest to social (or public) good.⁵⁴¹ He entirely repudiated the idea that people are naturally and disinterestedly benevolent and generous, and that they love each other. As he said, 'this pretended Love of our Species, and natural Affection we are said to have for one another, beyond other Animals, is neither instrumental to the Erecting of Societies, nor ever trusted to in our prudent Commerce without on another.'⁵⁴² While these (traditional, biblical) human vices, such as avarice, self-interest, lust, and sloth, cannot be altered or even improved upon in Mandeville's view, they were nevertheless not only essential to the prosperity of the society (by keeping the wheels of society in motion), but could also be harnessed to accomplish desirable public ends. As he said, 'Private Vices by the dexterous Management of a skillful Politician may be turned into Public Benefits.'⁵⁴³

In this sense, the 'public virtue' proposed by Mandeville, was totally different from its antecedent in Aristotelian teleology, where civic virtue was conceived as the true end of human life and moral good, which was worthy of life-long practice and perfection by being an active citizen in the *polis*. Nor was it the same as the notion of public virtue in participatory republican doctrines (such as Rousseau's notion of general will), which saw individual vices, including immorality, evil, and corruption, as signs of human depravity that should be improved upon.⁵⁴⁴ Thus the idea of 'public virtue', conceived akin to Mandeville's, was the product of the eighteenth-century combination of Italian Renaissance humanism and Anglo-American republicanism, which is now revived as twentieth-century

⁵⁴¹ Schochet (n 520).

⁵⁴² Mandeville

⁵⁴³ Mandeville

⁵⁴⁴ EJ Hundert, *The Enlightenments' Fable: Bernard Mandeville and the Discovery of Society* (Cambridge University Press 1994) 116.

communitarianism. The political motivation behind the idea of 'public virtue' was to establish popular participation in political decision-making. This was substantiated in the discursive public sphere in the late eighteenth century.

VI. THE AFTERMATH

The current liberal interpretation of the public/private distinction was formulated during the nineteenth century, when a new 'scientific' rationale of *laissez-faire* was projected onto the established distinction between the public and private modes of social organization. By elevating the voluntary market to the status of the paramount institution for distributing rewards on a supposedly neutral and apolitical basis, *laissez-faire* doctrine seems to equate the maximum national wealth with the free trade, thus ultimately legitimating the freedom of private corporations from state regulation.

In a broader sense, *laissez-faire* doctrine embodies 'the nightwatchman doctrine of state'.⁵⁴⁵ This doctrine of the state proposes for setting a very specified narrow boundary for the state activities. As Mill has defined it as that the state should limited its internal functions to the simple business of 'the protection of persons and property against force and fraud'.⁵⁴⁶ In this sense, modern scholar Jacob Viner has defined the function of *laissez-faire* doctrine as:

[T]he limitation of governmental activity to the enforcement of peace and of 'justice' (in the restricted sense of 'commutative justice'), to defense against foreign enemies, and to public works regarded as essential and as impossible or highly improbable of establishment by private enterprise or, for special reasons, unsuitable to be left to private operation. (Though in case of emergency or abnormal conditions, such as war, famine, or earthquake, these limitations could be slightly relaxed or temporarily suspended.)⁵⁴⁷

It was commonly agreed that it was Adam Smith's *Wealth of Nations* (1776), the so-called Bible of political economy, that first formulated the doctrine of *laissez faire*. But to what extent Adam Smith believed that the

⁵⁴⁵ George Watson, *The English Ideology* (Allen Lane 1973) 68.

⁵⁴⁶ *ibid.*

⁵⁴⁷ Jacob Viner, 'The Intellectual History of Laissez Faire' (1960) 3 *The Journal of Law and Economics* 45.

principle of *laissez-faire* would maximize the wealth of a nation is still under debate: it has been argued that his proposal for *laissez faire* was also based both on his concern over the unqualified government of that time, and on his highly valuation of the individual liberty that inhered in *laissez faire*.⁵⁴⁸

What the English did in theory, the Americans did in practice. It has long been doubted by contemporary scholars whether the *laissez-faire* period ever existed in England, since even in the supposed heyday of *laissez faire*, namely the mid-nineteenth century, the Companies Act of 1844 presented clear interventionist and regulatory elements.⁵⁴⁹ On the contrary, it has been commonly agreed that in America, the dictum of free trade, free markets, and none governmental interference has been given enormous weight in the nineteenth century. The famous juristic distinction between the public corporation and the private corporation, which was first established in the Dartmouth College Case,⁵⁵⁰ has long been celebrated as a national achievement. Nevertheless, the heated legal debate on whether the self-governing colonial government could be personified as a corporation, was taking place in Britain and arguably strengthening the differentiation between the public and the private modes of social organization.

After the formative age of liberalism of the nineteenth century, most of the legal and political problems relating to the governmental regulation of market, the freedom of the corporation, or the relationship between the state and the corporation, at least from the juristic perspective, have a tendency to resolve themselves through the discussion of the liberal public/private distinction.

⁵⁴⁸ *ibid.*

⁵⁴⁹ Ron Harris, *Industrializing English Law: Entrepreneurship and Business Organization, 1720-1844* (Cambridge University Press 2010).

⁵⁵⁰ *Trustees of Dartmouth College v. Woodward* (1819) US 17.

17. The Rationale for the Public/Private Distinction as *laissez faire*

Although both the *laissez-faire* doctrine and the free trade doctrine represent the idea of economic freedom, their histories should not be identified, since some of the exponents of *laissez faire*, such as American businessmen and their legal spokesmen in the nineteenth century, were extreme protectionists and interventionists when tariff policy was in question (free competition internally and the predominance of monopoly abroad).⁵⁵¹ Perhaps, it makes more sense to differentiate a 'national' point of view of *laissez faire* from a 'universal' point of view of *laissez faire* (as the transnational free-trade policy). This would allow the separate assessment of the different technical factors between internal economic process and transnational economic process.

Economic Freedom

The idea of economic freedom in England is often regarded as having originated in the idea of individual liberty that was protected by the common law. Especially since the seventeenth century, the common law has been characterized by Sir Edward Coke as an institutional bulwark to anyone's free will, which included the sovereign and the king. This belief in the common law was legitimated by its antiquity: as an ancient custom, the common law has stood the test of time through trial and error and a process of evolution.⁵⁵² This evolutionary conception of the common law was later articulated by Edmund Burke in the eighteenth century. Later, in a manner analogous to Burke, Hayek formulated his famous idea of 'spontaneous order'.

⁵⁵¹ Jacob Viner, *Essays on the Intellectual History of Economics* (Princeton University Press 1991) 54.

⁵⁵² See generally JGA Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century* (Cambridge University Press 1987).

Specifically, in an attempt to revive liberalism against the perceived evils of central planning, Hayek emphasizes the previous characterization of the common law as a spontaneous arrangement. Common law, just like a language, was not a deliberate human design, but the unintentional product of intentional individual human actions.⁵⁵³ By demonstrating the superiority of the common law over the continental statute law in framing a free society, he formulated the theory of 'spontaneous order', arguing that social mores or legal rules (or, social cohesion and social institutions) can spontaneously emerge and evolve. They are the result of countless atomistic initiative of individuals, who act on their local knowledge. There is neither original comprehensive blueprints nor systematic guidance from the government. Instrumental rationality therefore only has a substitute role to play in designing law and social institutions. Besides, the sheer magnitude of variables in the economy makes the deliberate and central design of egalitarian institutions almost impossible.

Resonating with Adam Smith, Hayek proposes a kind of liberal individualism that permits some conservative caution. It is important to note that Hayek's supporting of the common law was almost entirely based on the criteria of individual liberty. In fact, quite contrary to the common assumption, it has little to do with either efficiency (wealth-maximizing), questions of public choice, or whether the decisions of the common law courts were Pareto optimal.⁵⁵⁴ As he has concluded, 'a consistent argument in favor of economic growth was the outcome of a free growth of economic activity which had been...the unforeseen by-product of political freedom.'⁵⁵⁵ Thus, the later defenses of the common law based on efficiency, notably by Posner, are not reiterations of Hayek's

⁵⁵³ See generally FA Hayek, 'The Origins of the Rule of Law' in *The Constitution of Liberty* (1960) 162-75; 'The Changing Concept of Law' in *Law, Legislation and Liberty* (1973).

⁵⁵⁴ Ronald Hamowy, 'FA Hayek and the Common Law' (2003) 23 *Cato J.* 241.

⁵⁵⁵ FA Hayek, *The Road to Serfdom: Text and Documents: The Definitive Edition* (Routledge 2014) 14.

earlier argument.⁵⁵⁶ Failure to distinguish these two kinds of literature in associating the common law with economic freedom might lead to serious confusion and misunderstanding.

In tracing the terminology of 'freedom' and 'liberty', Viner argues that the idea of economic freedom, or the idea of free trade, was not necessarily related with the general idea of 'freedom' as commonly conceived. Specifically, Viner noticed that it was not until the late eighteenth century that the terms of 'liberty' and 'freedom' began to be used in the *singular* in the economic and political fields. Before this time, debates always revolved around concrete issues and specific 'freedoms', or 'liberties', which were all used in the *plural* sense. This meant that the liberties at stake in these earlier time were the liberties 'within the law': the exponents were requesting liberties from either the exercise of unqualified authority, or without 'due process' of law. They were not requesting to do (often in the name of God) 'what is right to desire to do', which would possibly be advocated as a request for 'license'. 'There is little convincing evidence', as Viner wrote, 'that advocacy of specific liberties from specific coercive agencies for specific groups or categories of persons was historically, markedly elastic or extensible to other coercive agencies or to members of other groups of persons'.⁵⁵⁷

In this sense, the common association of the common law with the political and economic freedom of the individual, as Hayek notably expounded, would seem to be mere anachronism to Viner. After all, Viner argues that it would be an 'intellectually uninteresting variety of freedom', or a pure indulgence in daydreaming, if economic freedom is only studied in such vague sense, ignoring whether its subject were lack of power over economic resources, or lack of adequate knowledge and skills. He

⁵⁵⁶ For a literature review of the relation between the common law and efficiency, see Gillian K Hadfield, 'Bias in the Evolution of Legal Rules' (1991) 80 Geo. Lj 583.

⁵⁵⁷ Viner (n 551).

reminds us of St. Thomas Aquinas' dictum that 'when reason argues about particular cases, it needs not only universal but also particular principles.'⁵⁵⁸ The universal principles that are meaningful and serviceable to some good purpose can only be formulated in the attempt to deal wisely with particular cases.

Adam Smith and the *laissez-faire* doctrine

This changing usage of the terminology of 'freedom' (or 'liberty') from the plural sense to the singular sense, has also used by Viner as the evidence for the fact that the *laissez-faire* doctrine was first theorized by Adam Smith, though Smith did not mention the term *laissez faire* in the course of his book. He argues that it was only after Smith, the singular usages of the term freedom became popular. On the opposite, many modern scholars through examining the scattered and discrete ideas, have claimed that they have found the idea of *laissez-faire* to be prevalent in public discourses in England before Adam Smith. The instant success of *The Wealth of the Nations* when it first published also indicated that the public was already quite familiar with and in favor of this idea at the time, despite the fact that David Hume first thought that 'it requires too much thought' for the audience to really appreciate the *Wealth of Nations*.⁵⁵⁹ Indeed, Adam Smith has drawn from a wide range of earlier sources ranging from the Physiocrats, Descartes, Hobbes, to Christian rationality. But this only meant that the doctrine of *laissez-faire* was a product of the intersection of legal, political, ethical and economic discourses. Rather than an economic theory in a narrow instrumental sense, it was much more encompassing and eclectic in essence.

Yet, Adam Smith's major claim to originality and fame was his detailed application of the idea of a unified and invisible natural order to the

⁵⁵⁸ St. Thomas Aquinas, *Summa*, II/I, q. 58, art.5 (1964-76).

⁵⁵⁹ David Hume, *The Letters of David Hume* (Oxford University Press 1932) vol 2, 314.

wilderness of economic phenomena. In other words, economic phenomena were just part of the manifestations of the cordial natural order, which was operating according to natural laws and governed by the underlying natural forces. There was a providential harmonious and self-operating order in the sphere of economy, and for its most beneficent operation, it should be left to run its own course. Public regulation and private monopolies were often mere corruptions of this perfect natural order. According to Smith, the only role of the government was to protect the economic order from the uncooperative or even hostile actions from ignorant or malicious individuals. Beyond this, the normal operation of free competition would suffice to produce a harmony of cooperation and an efficient economic system, akin to the system in the physical order of nature. Therefore, Adam Smith insists that the freedom of individuals to maximize their own interests would lead 'as if by an invisible hand to promote an end which was no part of his intention'.⁵⁶⁰ The unintended result of each individual's work would produce the largest possible social product of the economy.

But Smith's belief in an invisible hand, as Andrew Schotter has argued, was 'the result more of faith than of logic': it was an effort in keeping up with the eighteenth-century religious beliefs that the natural order would be better preserved if man was not interfered with divine law.⁵⁶¹ (This faith has later been successfully formalized into a mathematical model of a general competitive equilibrium, known as Pareto optimality.) Indeed, there was a sincere optimistic deism that has been commonly held among the Enlightened Scottish circles, including Smith. And it run through the whole reasoning in *The Theory of Moral Sentiments* by Smith. Smith believes that God has endowed mankind the moral sentiments to bind with each other and to have concerns for each other. Based on these

⁵⁶⁰ Adam Smith, *The Wealth of Nations* (1776) book IV chapter 2.

⁵⁶¹ Andrew Schotter, *Free Market Economics: A Critical Appraisal* (St Martin's Press 1985) 11.

moral sentiments of mankind, smith was postulating a static society psychology that would be unaffected by changing environment.⁵⁶² But there are some complications with this line of thinking. As Viner has observed, people who have only read the *Wealth of Nations*, have not regarded it as something difficult to understand, whereas for those who sought to interpret it in the light of *Moral Sentiments*, often find themselves immersed in difficulties and failed to find a concordant explanation.⁵⁶³ A German scholar even coined a term, *Das Adam Smith Problem*, to denote this failure. Viner argues that the difficulty is due to the fact that 'the system of individual liberty is much in evidence among the interpreters of Smith, but that natural harmony which should also result is strikingly lacking.'⁵⁶⁴

This explanation, perhaps, is true, since most of Smith's analysis was very much based on an individual perspective. What has been often neglected is Smith's elaborate conception of human behavior as impelled by *conflicting* forces: a major counterbalance to the desire for and the pursuit of wealth is the love of ease and inactivity, or in other words, the fact that mankind is prone to indolence.⁵⁶⁵ The ideal institutional order for Smith thus is one that places the individual under just the proper amount of psychological tension, since the individual applies himself with maximum industry and efficiency when the reward for the effort is neither too low (as in the case of slaves, apprentices) nor too great (leading to monopolies, and large landownership). This is also the basis of Smith's critique of mercantilism, laws of entail and primogeniture, joint-stock companies, and government businesses. Thus, as Nathan Rosenberg has argued, the direct jump from the conception of a man who is relentlessly engaged in maximizing material gain to the

⁵⁶² Viner (n 551) 251-52.

⁵⁶³ Jacob Viner, 'Adam Smith and Laissez Faire' (1927) 35 *Journal of Political Economy* 198.

⁵⁶⁴ *ibid.*

⁵⁶⁵ Nathan Rosenberg, 'Some Institutional Aspects of the Wealth of Nations' (1960) 68 *Journal of Political Economy* 557.

recommendation of *laissez-faire* policy short-circuits much of the real substance of Smith's work and thus oversimplifies his theory.⁵⁶⁶

Although Smith took a rather individual approach in his analysis, in both *Moral Sentiments* and the *Wealth of Nations*, he only treated the increase in national aggregated wealth as a highly worthy objective for a country, and attached little importance to an increase of *per capita* wealth. If Smith cared so little about individual benefit, why did he care so much about individual liberty? How did he balance national wealth with individual liberty in his doctrine of *laissez faire*? These questions would require further serious discussions, and it is helpful here to quote some words from Viner as a reluctant ending:

It is not clear that Adam Smith believed that *laissez faire* would maximize the wealth of a nation in terms of a theoretically conceivable maximum. What is clear is that subject to a vaguely-defined list of qualifications, economic society left to its autonomous operation would produce a higher level of economic welfare than would accrue if government, inefficient, ignorant, and profligate, as in practice it was, should try to direct or regulate it. Beyond, moreover, its material benefits, left to the individual unimpaired the 'liberty' to which he had a natural right. It is quite probable, therefore, that Adam Smith would have rejected an extensive program of state regulation of economic enterprise even if he had believed that the wealth of nations could thereby be augmented.⁵⁶⁷

18. Public Corporation *vs.* Private Corporation

The distinction of the public corporation and the private corporation is fundamental in current legal discourse, since the legal principles with regard to them are assumed to be quite different. According to modern

⁵⁶⁶ *ibid.*

⁵⁶⁷ Viner (n 551) 62.

ideas, private corporations are created voluntarily for the pursuit of private interest. Their establishments would not promote, either directly or consequentially, the public interest. Once incorporated, the legislative grant is irrevocable, and generally any subsequent legislation cannot arbitrarily destroy it, unless the right to do so has been reserved at the time of incorporation. Public corporations, on the other hand, are established by the state for public purposes exclusively. Although in the case of the municipal corporation the charter may need the consent of the local people to be affected, it is in no sense the contract between the state and the local people, or the corporation. Public corporations are within in the boundary of the public law in the sense that they are often regarded as part of the administrative government. Unlike the private corporation, whose rights cannot be changed without its consent, the power of legislature over the public corporation is supreme and transcendent.⁵⁶⁸

However, this distinction has not been established until the nineteenth century. In the mercantilist tradition of the eighteenth century, most corporations were created by the state to increase available public goods and provide public services. These were in the areas of hospitals, insurance, banks, and canals. It was both practical and ideologically right for a state to claim large supervisory authority over these corporations. However, it made less sense for the government to do so once corporations entered the manufacturing area in the eighteenth century. On the one hand, the government did not have the adequate knowledge and resources to carry out such supervisions. On the other, individuals would not have invested money in corporate enterprises if they felt their investment would be influenced by political policies and state regulation. It seemed quite pertinent at that time to develop a proper doctrine to

⁵⁶⁸ John Forest Dillon, *Commentaries on the Law of Municipal Corporations* (Little, Brown & Co 1911) vol 1, 70-73.

separate the corporations into the two classes, namely the public corporation and the private corporation.

Before the public/private distinction has been applied in the categorization of the corporation, the corporation was classified based on the differences of their nature. For example, there were the distinction between the corporation sole and the corporation aggregate, and the distinction between the ecclesiastical corporation and the lay corporation. The lay corporation was further divided into the eleemosynary corporation and the civil corporation. Municipal and business corporations are both classed together as civil corporation, and the same rules were applicable them likewise. Yet, the law of corporations that has been applied on them without much distinction.⁵⁶⁹

A celebrated distinction in American legal history

When concerning American legal history, one of the earliest classification of the corporation could be found in Lord Chief Justice Holt's 1694 opinion in *Philips v. Bury*.⁵⁷² Holt distinguished between 'ecclesiastical and eleemosynary foundations' and 'corporations merely lay constituted for civil purposes'. He ruled that private charitable corporations were subject to the governance of those who create them.⁵⁷³ After the emergence of the modern business corporation in the late eighteenth century, this functional classification of the corporation became implicitly manifest in a few cases.⁵⁷⁴ Yet, the courts never further explicitly defined this distinction. This was probably because of the fact that even the most

⁵⁶⁹ Samuel Williston, 'History of the Law of Business Corporations before 1800' (1888) 2 *Harvard Law Review* 105.

⁵⁷² *Philips v. Bury* (1694) 91 ER Holt 715.

⁵⁷³ *ibid.*

⁵⁷⁴ These cases include *Terrett v. Taylor* (1815) 13 U.S. 43. See R Kent Newmyer, 'Justice Joseph Story's Doctrine of "Public and Private Corporations" and the Rise of the American Business Corporation' (1976) 25 *DePaul Law Review* 825.

private corporation have a public dimension. Thus the attempt to precise the definition would plunge the court into a morass of the ambiguous nature of the corporation. Nevertheless, Supreme Court Justice Joseph Story later abandoned this difficult functional perspective and drew the line exclusively on the nature of the foundational capital of the corporation. He explicitly announced his doctrine of the public and private corporation for the first time in his separate concurring opinion in *Trustees of Dartmouth College v. Woodward* (1819).⁵⁷⁵

Dartmouth College was established by a charter granted by the King of England in 1769. In 1816, the state legislature of New Hampshire passed a law revising the charter, changing the college into a state university under state control. The existing trustees filed suit, claiming that the state legislature violated the contract clause of the Constitution (article I, section 10 of the Constitution). The focal point of the case, however, was not on the issue of the contract clause of the Constitution, since the proposition that a charter was a contract was so obvious that 'it can require no argument'. It was the nature of the Dartmouth College that was at issue. If Dartmouth College was a 'civil institution', then the state had the power to control it, which included the right to revise its charter. If, on the other hand, it was a 'private eleemosynary institution', then the state had no general right of regulation, and Dartmouth was controlled entirely by the terms of its charter. Avoiding any sweeping doctrine, Chief Justice Marshall ruled that Dartmouth was a private eleemosynary institution, because the nature of corporations 'does not grow out of their incorporation, but out of the manner in which they are formed, and the objects for which they are created'.⁵⁷⁶ Whereas Chief Justice Marshall intended to limit the decision of Dartmouth College to private educational institutions, Story in his concurring opinion made one step further and

⁵⁷⁵ *Trustees of Dartmouth College v. Woodward* (1819) 17 U.S. (4 Wheat.) 518, 559, 669-73.

⁵⁷⁶ *ibid* 299-300.

broadened the potential application of the decision to all business corporations. He differentiated the corporation only through the source of their initial capital. Thus even when the function of the corporation was public, as long as it was established on the initial capital that came from individuals, it was regarded as a private corporation. Public corporations were subject to state regulation, whereas private corporations were protected by the contract clause of the Constitution against the state intervention.

The distinction between the public corporation and the private corporation resolved the long-lasting conflict over the need for regulating the corporation and the desire to provide the individual with possibilities to invest free from state control. It resolved this conflict by prioritizing the individual's right to free investment, and this choice satisfied economic expediency for a nation in its infancy like America. It laid the foundation of the relationship between corporations and state authority, and provided the basis for the later American company law. Therefore, the significance of the *Dartmouth College* case was not only that privately endowed educational corporations were now protected by the United States Constitution against state interference, but this protection was generalized to the normal business corporation. The doctrine of the public and the private corporation helped to free the newly emerging business corporations from state regulation. Assured of this protection, capital flowed into corporations, which intrigued the following pre-eminent growth of business incorporation in America. Therefore, the doctrine of the public and the private corporation was largely responsible for the transformation of the corporation into a modern business organization. Nonetheless, it has recently been argued that the truly radical aspect of the *Dartmouth College* case is that public contracts has been reduced to

the level of private contracts, thus putting them within the interpretive purview of the judiciary and the common law.⁵⁷⁷

The absence in English legal history

Such a doctrine of the public and the private corporation, which became so central in America in crystallizing liberal political and constitutional ideology, did not have an equivalent in English law. The eighteenth-century English common law had no explicit conception of the corporation either as a private organization or as a public organ. In fact, the corporate doctrine was not even a part of English legal discourse at that time. English jurists seemed still satisfied with the obsolete franchise theory, which simply told that the corporation was the entity created by the Crown by way of the concession in a feudal context, and was subject to his regulation or interference. The prerogative to form corporations, originally held by the Crown, was gradually transferred to Parliament during the seventeenth and eighteenth centuries. In the post-1689 constitutional settlement, Parliament was free to enact and repeal incorporation acts, according to changing circumstances or majorities. It was not until the Companies Act of 1844 that this purely public character of the corporation was abandoned. This delay might attribute to the general indifference of the jurists towards the business world of that time. Unlike the high continental law of early modern Europe, high English law of that period was not developed by scholars in university, but by a handful of overworked common-law judges and Lord Chancellors. Also, they only focused on the aspects of corporate life that were subject to dispute and litigation, and were not interested in more general and abstract theories.⁵⁷⁸

⁵⁷⁷ Newmyer (n 574).

⁵⁷⁸ Ron Harris, *Industrializing English Law: Entrepreneurship and Business Organization, 1720 - 1844* (Cambridge University Press 2010) 110-14.

Yet, it could be argued that in England the same process was still observable, though it might not have been defined as openly and legally as in America. It should be noted that although there was a lack of legal distinction between the public and the private corporation in English law, there was, however, a long-existing distinction between the *public joint-stock corporation*, which was allowed to seek public subscriptions within or outside the stock exchange, and the *private unincorporated partnership*, which was restricted by the Bubble Act of 1720 in issuing transferable shares. It was the very contrast between the monopolistic joint-stock corporation and the private partnership of the merchants that later evolved into the prevalent public antagonism towards the East India Company. The public antagonism was theoretically justified by the eighteenth-century political economists, most famously by Adam Smith in his attack on the massive corporation and his promotion of free private partnership.

If the liberal public/private distinction, after all, mainly concerned with freeing the corporations from state regulation, then the essential question would be whether *laissez faire* ever existed in England?⁵⁷⁹ Again, this cannot be traced by examining the general company legislations, as the earliest Act of 1844 had already clearly indicated an interventionist turning point. What exactly happened during this 'legislature-empty' period of the late eighteenth century and the early nineteenth centuries? Dicey's narrative of the *laissez-faire* in *Law and Public Opinion* has often been regarded as the orthodox narrative of the extent of *laissez faire* in the nineteenth-century Britain.⁵⁸⁰ According to Dicey, Britain of 1825-1870, the era of utilitarian reform, realized the apotheosis of *laissez faire*, the fundamental formulators/prophets of which were Jeremy Bentham and

⁵⁷⁹ For a bibliographical introduction see Ellen Frankel Paul, 'Laissez Faire in Nineteenth-Century Britain: Fact or Myth?' (1980) 3 *Literature of Liberty: A Review of Contemporary Liberal Thought* 1.

⁵⁸⁰ Albert Venn Dicey, *Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century* (first published 1905, Macmillan & Co, Ltd 1963).

John Stuart Mill. Yet, some argued that his articulation was rather a political pamphlet than the real history.⁵⁸¹ Others proclaimed that British laissez-faire was a political and economic myth (the myth here was used in the sense formulated by George Sorel), as it would have been incommensurable with the immense Parliamentary and Governmental intervention (for collectivist ends) of that time.⁵⁸² One scholar has argued that the idea of laissez-faire is 'one of the grander misunderstandings of intellectual history'.⁵⁸³

We may well recall here that, when talking about the English history of modern liberal constitutionalism, Martin Loughlin described how British legal scholars of the nineteenth century "are engaged in the exercise of assembling imaginary foundations or, like alchemists, devising 'fundamental' precepts from a jumble of customary arrangements of whose practical significance they have only a dim appreciation".⁵⁸⁴ Indeed, as Atiyah has described, what happened in England is that 'England stumbled into the modern administrative State without design, and even contrary to the inclinations of most Englishmen. They dealt with social problems, one by one, as these were brought to their attention'.⁵⁸⁵ In addition, the lawyers at that time might fail to rationalize what was really happening in their time, since the vast new body of law was not enforced by them but by the new bureaucracy with the new administrative staff and their expert advisers.⁵⁸⁶

⁵⁸¹ Henry Parris, 'The Nineteenth Century Revolution in Government: A Re-Appraisal Re-Appraised' (1960) 3 *Historical Journal* 17.

⁵⁸² This argument has been presented by a body of revisionist historiography. One writer, J. Bartlett Brebner, even argued that '[i]n using Bentham as the archetype of British individualism he [Dicey] was conveying the exact opposite of the truth—Jeremy Bentham was the archetype of British collectivism.'

⁵⁸³ George Watson, *The English Ideology: Studies in the Language of Victorian Politics* (Allen Lane 1973) 69.

⁵⁸⁴ Martin Loughlin, *The Idea of Public Law* (Oxford University Press 2004) 4.

⁵⁸⁵ PS Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford University Press 1979) 236.

⁵⁸⁶ *ibid.*

19. Personifying the Colonial Government as Corporation

The first phase of British imperialism, whose theatre of operation was mostly in the Atlantic Ocean in the early seventeenth century, is said to have been brought to an end by the loss of the thirteen American colonies in 1776. Meanwhile, the East India Company's conquest of India in 1757 launched the second phase of British imperialism, which was centered on the Indian Ocean in the nineteenth century.⁵⁸⁷ Since the late eighteenth century, industrialization in Britain and the corresponding expanding economy gave rise to the unprecedented need to invest overseas, which was later categorized as the period of late capitalism and thus was called 'new imperialism'.⁵⁸⁸ The British Empire continued its overseas expansion in two colonialist patterns in accordance with its two economic modes: one was the pattern of 'informal empire' accompanying the free trade economy, and the other was the pattern of formal dominion accompanying the traditional mercantilist economy. The 'informal empire' was identified as the main source of imperial income,⁵⁸⁹ and its most distinctive feature was a limited influence over the colonies

⁵⁸⁷ This conventional dichotomy between an early modern Atlantic colonialism, defined by colonial plantation and European imperial rivalry, and a later 'trading world' in Asia and the Indian Ocean has been challenged recently. Some scholars also researched on the overlapping period between the first and the second British Empires. See Vincent T. Harlow, *The Founding of the Second British Empire 1763-1793*, 2 vols. (1952-64); Alison Games, Philip Stern, Paul Mapp, and Peter Coclanis, 'Forum: Beyond the Atlantic,' *William and Mary Quarterly* (2006); Nicholas Canny, 'Atlantic History and Global History' in Jack P. Green and Philip D. Morgan (eds), *Atlantic History: A Critical Appraisal* (Oxford, 2009).

⁵⁸⁸ For a general introduction, see John Gallagher and Ronald Robinson, 'The Imperialism of Free Trade', (1953) 6 *The Economic History Review*, New Series 1-15; B Semmel, *The Rise of Free Trade Imperialism: Classical Political Economy and the Empire of Free Trade and Imperialism 1750-1850* (Cambridge University Press 1970); R Hilferding, *Finance Capital: A Study in the Latest Phase of Capitalist Development*, trans. by M Watnick and S Gordon (Routledge 1981); Phillip Darby, *Three Faces of Imperialism: British and American Approaches to Asia and Africa, 1870 - 1970* (Yale University Press, 1987); Bernard Semmel, *The Liberal Ideal and the Demons of Empire: Theories of Imperialism from Adam Smith to Lenin* (Johns Hopkins University Press 1993).

⁵⁸⁹ Between 1815 and 1880, almost five-sixth of the total £1,187,000,000 overseas accumulation was acquired in the Informal Empire. See AH Imlah, 'British Balance of Payments and Export of Capital, 1816-1913' [1952] *Economic History Review* 237.

with less direct colonial rule. Rather than a tight political possession or a full occupation, it was argued that the British Empire of this period would refrain from further involvement in the local affairs as long as a satisfactory trading environment could be secured.⁵⁹⁰ Flexible forms of colonialism, including the 'consular jurisdiction' and 'protectorates', thus emerged. Nevertheless, as Craven has argued, when it comes to matters of ultimate motivation, both the new colonial rule and the old colonial rule aimed to 'cultivate the non-European world into a space equipped for commerce.'⁵⁹¹ In this sense, a continuity of imperial colonial policy can be detected between the 'old colonial system' and new colonial form of 'internationalized regime'.⁵⁹²

Over the course of the second phase of imperialism, two long-existed legal tenets of the common law began to shatter. They were 'the colony was not a corporation' and 'the Crown was indivisible'. During this period, the promotion of self-governance in traditional colonial dominions gave rise to the maturity of the local colonial government. The requirement for a clear legal personality for these colonial governments before the common law stemmed from the increasing business contracts that they have involved themselves in with various trading companies. The proposal for viewing the colonial government as a 'corporation' in the common law thus was constantly brought up in formal lawsuits in order to held the colonial governments responsible for their business engagements. For the political considerations, the common law judges repeatedly denied such proposals. Yet, in order to solve the practical problem, they chose to resort to an alternative solution by viewing the colony as a separated Crown. In other words, although the Crown

⁵⁹⁰ John Gallagher and Ronald Robinson, 'The Imperialism of Free Trade' (1953) 6 *The Economic History Review* 1.

⁵⁹¹ Matthew Craven, 'Between Law and History: The Berlin Conference of 1884-85 and the Logic of Free Trade' (2015) 3 *London Review of International Law* 31.

⁵⁹² The term 'internationalized regime' refers to the Berlin Act of 1885, which might be viewed as the antecedent to the mandates system of the League of Nations in 1919.

remained 'one and indivisible' in general,⁵⁹³ it was divisible in the sense that separated new Crowns was created for both the self-governing colonies and for the constituent units of colonial federations.⁵⁹⁴

The reason behind the courts' choice might be attributed to two considerations. The fierce international competition among the European colonial powers required the British Empire to maintain the *de facto* political control as much as the *de jure* legitimacy over these colonies. Recognizing the colonial government as a corporation would be harmful to these both wishes. In terms of *de facto* political control, having a personality as corporation would naturally require the further stabilization and normalization of the degree of political autonomy in these colonies. This would be contrary to the Empire's political expectations in terms of the flexibility of colonialism, especially considering its bitter experience in dealing with the 'corporate colonies' in North America. With regard to the *de jure* legitimacy of an unitary Empire, the common law of the late nineteenth century still mainly relied on the old-fashioned property relationship to construct the political relationship between the 'Crown as corporation sole' and its colonies. Conceiving of the colonies as corporation would challenge this structure fundamental. A coherent discourse on the sovereignty of the Empire was still absent in the late nineteenth century. Therefore, personifying the colonial governments as corporation would cause widespread constitutional uncertainty and conceptual chaos.

⁵⁹³ See *R v Bank of Nova Scotia* (1885) 11 S.C.R. 1, 19 (Strong J). Later case see *R v Secretary of State for Foreign and Commonwealth Affairs, ex p India Association of Alberta* [1982] 1 Q.B. 892, 911 (Lord Denning MR).

⁵⁹⁴ See Anne Twomey, 'Responsible Government and the Divisibility of the Crown' (2008) *Public Law* 742.

The colonial government as corporation

The debate as to whether the colonial government could be granted a legal personality of corporation by the common law gathered momentum in Britain in the course of the nineteenth century. Most of the legal cases in question arose in the so-called self-governing Dominions. The term 'Dominions', or self-governing Dominion or Her Majesty's dominion, had already been widely used⁵⁹⁵ even before it was officially defined by the Statute of Westminster (1931) as 'appl[ying] to all the original Members of the British Commonwealth of Nations, except the United Kingdom'.⁵⁹⁶ It also referred to the dependent territories such as Protectorates and Mandated Territories. The colonial policy of self-governance began in the mid-Victorian period. In the late nineteenth century, this policy became prevalent, as it was the attempt of the Empire to avoid the administrative cost of the colonial rule.⁵⁹⁷ The promotion of self-governance in the colonies also related closely to the rise of nationalism among European countries. Since nationalism indicates the 'government by consent', in the case of colonialism it naturally implies the 'native consent' purported by Kasson.⁵⁹⁸ More importantly, the prevalent self-governance in the colonies correlated with the rising commitment to the belief in free trade: it was widely assumed at that time that nation's prosperity would depend on the free flow of goods around the world without the government interference. This resulted in heated domestic debates on the relationship between 'formal empire' and colonization, for both 'formal empire' and colonization represented a kind of government interference in trade.⁵⁹⁹

⁵⁹⁵ "The term 'self-governing Dominion' or 'Dominion' has been used in the past in a number of Acts, and defined as meaning Canada, Australia, New Zealand." Kenneth Owen Roberts-Wray, *Commonwealth and Colonial Law* (Stevens 1966) 18.

⁵⁹⁶ See section 1 of the Statute of Westminster 1931.

⁵⁹⁷ For a general introduction, see AB Keith, *Responsible Government in the Dominions* (Clarendon Press 1928).

⁵⁹⁸ Craven (n 591).

⁵⁹⁹ Phillip Darby, *Three Faces of Imperialism: British and American Approaches to Asia and Africa, 1870 - 1970* (Yale University Press 1987) 60–66.

As a result, most self-governing colonies had grown into political entities that had public debts of their own, and became the subjects of contracts with many colonial trading companies. But they were not yet recognized by the common law as a legal person, but were generally conceived as the representative of the Crown.⁶⁰⁰ Traditionally, writs could not be brought against the Crown in its own courts, though subjects would be allowed to bring petitions of right. "The procedure used was that a petition was made to the crown which endorsed it with the words, 'Let right be done'".⁶⁰¹ Through these petitions, claims against the Crown would be discussed in courts, although the ambit of the remedy often remained very unclear. In the end, 'the petition was sent to the Lord Chancellor, who would issue a commission to report on the facts alleged'.⁶⁰²

The first case that initiated the legal controversy was *Sloman v. Government of New Zealand (1876)*.⁶⁰³ The case *Sloman* concerned the legal liability of the colonial government under a contract of public works that was concluded with a German shipping agent. The plaintiff *Sloman* attempted to sue the New Zealand government in the English courts for the failure of the New Zealand government to fulfil the obligations under an emigration contract that had been concluded in Europe. The New Zealand Government had decided to stop paying passage money to subsidize migrants to New Zealand. The Court decided that New Zealand's government could not be sued in English courts because it was not a legal person. Although the plaintiff tried to argue that both the governor and the government of New Zealand had become a 'corporation sole' in New Zealand law according to the Crown Redress Act 1871, Judge James LJ still concluded that 'there is no body politic residing in

⁶⁰⁰ Frederic William Maitland, 'The Crown as Corporation (1901)' in David Runciman and Magnus Ryan (eds), *State, Trust, and Corporation* (Cambridge University Press 2003).

⁶⁰¹ Mark Godfrey, *Law and Authority in British Legal History, 1200-1900* (Cambridge University Press 2016) 238–39.

⁶⁰² *ibid.*

⁶⁰³ *Sloman v The Governor and Government of New Zealand (1875-76)* LR 1 CPD 563.

England,...called the Governor or Government of New Zealand.⁶⁰⁴ In this respect, it could be only concluded that the legal liability of the colonial government was invisible in common law because it lacked an appropriate legal personality. Later, in 1880, in the case *Kinlock v Secretary of State for India in Council*, Justice James L. once again denied that the colonial government was a 'corporation', stating that 'there really is in point of law, no such person or body politic whatever as the Secretary of State for India in Council'.⁶⁰⁵

The case *Sloman* was quite special at that time, because it was one of the few cases that considered the liability of the colonial governments in relation to *public contracts* concluded in their name,⁶⁰⁶ whereas most other cases concerned the colonial governments' liability in tort.⁶⁰⁷ This kind of public contracts that concluded between the colonial governments and the individuals or overseas companies, were generally made in the name of the Crown on behalf of a colonial government. Since the Crown could not be sued according to the Crown liability law in the late nineteenth century and the colonial government was not a legal person, the legal liability of the colonial government was invisible in the common law. This invisibility of the colonial government became a serious legal concern in the late nineteenth century, but surprisingly the concern was not only for the companies, but also for the colonial governments themselves. This was because the rapid economic development in the colonies required a high degree of foreign involvement and large amounts of foreign capital, which mainly took the form of legal contracts between

⁶⁰⁴ *ibid* 565.

⁶⁰⁵ *Kinlock v Secretary of State for India in Council* (1880) Ch. D. 1, 8.

⁶⁰⁶ In another case it was considered to sue the New Zealand Government in English courts for failing to live up to obligations concluded with overseas companies is *Broden v. The Queen* (1876), See *Broden v. The Queen* (1876) 1 NZ Jurist NS 69 (CA).

⁶⁰⁷ It was not until 1947, when the Crown Proceeding Act was enacted, that the Crown could be sued in tort. Nevertheless, the colonies of Australia were the exception. Lawsuits could be brought against the Crown in tort from 1860s. David W Mundell, 'Legal Nature of Federal and Provincial Executive Governments: Some Comments on Transactions between Them' (1960) 2 Osgoode Hall Law Journal 56.

the colonial government and the overseas companies. In the case of *Sloman*, the New Zealand Government was not satisfied with the court's decision as well. They feared that this inadequacy of its legal personality might prevent the government from suing its contractors in another instance, where a case was brought before court over the explosion of the ship *Cospatrick* in 1874.⁶⁰⁸

The divisibility of the Crown

Traditionally, the legal doctrine of the 'indivisibility of the Crown' was utilized in treating the legal relationship between the imperial government and the colonial governments. According to this doctrine, neither the colonial federal government nor the colonial provincial government had a legal personality in the common law, since they were merely the representative apparatus that were attributed 'executive authority' by Her Majesty, the Crown. The Crown, who was the head of all governments, the owner of all the public property, and the embodiment of the only reigning sovereignty, 'acts through different hierarchies of representatives, agents and servants but they are all acting in Her Majesty's business'.⁶⁰⁹

However, the practical necessity behind the controversy over the legal personality of the colonies, finally forced the English judges to resort to an alternative solution, which considered the divisibility of the Crown. It has been claimed that the indivisibility of the Crown at common law would not merely lead to 'inconvenient or absurd consequences' in business, but also to 'mischievous political result[s]' in the case of the self-governing colonies.⁶¹⁰ Hence, the long-established legal doctrine of the 'indivisibility of the Crown' has been changed: there was the tactical

⁶⁰⁸ Geoff McLay, 'The Problem with Suing Sovereigns (2010) 41 *Victoria University of Wellington Law Review* 403.

⁶⁰⁹ David W Mundell, 'Legal Nature of Federal and Provincial Executive Governments: Some Comments on Transactions between Them' (1960) 2 *Osgoode Hall Law Journal* 56.

⁶¹⁰ Harrison Moore, 'The Crown as Corporation' (1904) 20 *Law Quarterly Review* 358.

admission that although the Crown still remained 'one and indivisible' in its imperial sense, the colonies and the self-governing Dominions could be recognized as legal persons in their own right – as a *separate* Crown.

The modern principle of 'the divisibility of the Crown', meaning that a separate Crown is recognized if there is a separate government for a particular territory, was only formally established in the *Ex parte Indian Association of Alberta* (1982) case.⁶¹¹ 'The divisibility of the Crown' requires the monarch to act on the advice of the responsible Ministers of self-governing Dominions with respect to matters concerning those Dominions.⁶¹² Yet, the common assumption was that this new tenet had already manifested itself during the nineteenth century and the early twentieth century in a series of colonial legal cases concerning the divisions and transactions of the public lands between the colonial governments, where the self-governing colonies and the constituent units of colonial federations were recognized as a separate Crown.⁶¹³ Among these cases, the most famous one is *A.—G. of Brit. Columbia v. A.—G. of Canada*.⁶¹⁴ The case *A.—G. of Brit. Columbia v. A.—G. of Canada* considered one innovative legal provision in *the British North America Act, 1867* (B.N.A Act) relating to the division and transaction of the public land between the colonial governments.⁶¹⁵ In the article 109, it stated that 'all lands, mines, minerals, and royalties **belonging to** the several Provinces...'. This was of great significance since it established the legal

⁶¹¹ R v Secretary of State for Foreign and Commonwealth Affairs, ex p Indian Association of Alberta [1982] 1 Q.B. 892.

⁶¹² *ibid* 916 (Lord Denning MR).

⁶¹³ The cases include *Kinlock v Secretary of State for India in Council* (1880) Ch.D. 1; *Attorney-General of British Columbia v Attorney-General of Canada* (1889) 14 A.C. 295; *Liquidators of the Maritime Bank v Receiver General of New Brunswick* (1892) A.C. 437; *Municipal Council of Sydney v Commonwealth* (1904) 1 C.L.R. 204, 231; *Commonwealth v New South Wales* (1906) 3 C.L.R. 807, 813-4; *R v Sutton* (1908) 5 C.L.R. 789, 796.

⁶¹⁴ *Attorney-General of British Columbia v Attorney-General of Canada* (1889) 14 A.C. 295.

⁶¹⁵ For illustrations of this provision also see *St. Catherine's Milling and Lumber Co. v The Queen* (1889) 14 A.C. 46; *Attorney-General of Ontario v Mercer* (1883) 8 A.C. 767; *Attorney-General of Canada v Attorneys-Generals of Ontario, Quebec, Nova Scotia* (1898) A.C. 700; *Attorney General of Alberta v Attorney General of Canada* (1928) A.C. 475.

personalities of the colonial governments as the legitimate owners of public lands for the first time.

Nevertheless, the later case of *St. Catherine's Milling (1889)* soon denied the colonial government's right to own the lands and used an agency theory to explain this legal provision. According to this principle, the ownerships of public lands held by the colonial governments were 'vested' in the Crown. The colonial governments just worked as different representatives of Her Majesty to carry out the administration of the lands. Accordingly, the transactions of lands between the colonial governments were interpreted as the transfers of responsibility and duty to administer the lands. Therefore, the Crown still remained 'one and indivisible'. It further clarified the general property division in Act 1867: "in constructing these enactments, it must always be kept in view that, wherever public land with its incidents is described as 'the property of' or 'belonging to' the Dominion or a Province, these expressions merely important that the right to its beneficial use, or to its proceeds, has been appropriated to the Dominion or the Province, as the case may be, and is subject to the control of its legislature, and the land itself being vested in the Crown."⁶¹⁶

The emergence of the 'divisibility of the Crown' is generally regarded as the primary legal technique of conferring independence to the self-governing colonies.⁶¹⁷ As to the question of why the old tenet 'the Crown is indivisible' still partially remained, one explanation is that as long as a 'much more minor change' could solve the practical problem, a 'wholesale revision' of the 'Crown is indivisible' was simply not necessary and maintaining it also avoided the danger of 'widespread uncertainties'.⁶¹⁸ On the contrary, a seminal study on the history of the royal prerogative

⁶¹⁶ *St. Catherine's Milling and Lumber Co. v The Queen* (1889) 14 A.C. 46, 56.

⁶¹⁷ Noel Cox, 'The Control of Advice of the Crown and the Development of Executive Independence in New Zealand' (2001) 13 *Bond Law Review* 166–89.

⁶¹⁸ Mundell (n 609).

revealed that this remaining unity of the Crown was the very legal means through which Dominions achieved their separateness.⁶¹⁹ Nonetheless, the co-existence of these two conflicting legal doctrines still brought irreconcilable anomalies to the imperial constitutional structure.⁶²⁰ The recent *Quark Fishing* case provokes the controversy again as to the different understandings of the term 'the Crown' with regard to the 'divisibility of the Crown'.⁶²¹ Challenging the decision of the *Quark Fishing* case, Anne Twomey argues that the House of Lords conflated the two different meanings of the term 'the Crown', namely 'the concept of the Crown as a separate government' and 'the concept of the Crown that governs the constitutional relationship between the monarch and her realms and territories'.⁶²² This conflation, warned by Twomey, might undermine both the fundamental principle of responsible government and the constitutional integrity of the United Kingdom.

Contextualization

Perhaps it is only possible to understand the true nature of this nineteenth-century legal controversy on the legal personality of the colonial governments by situating it in the imperial and global context of the Second British Empire. It has been argued that one of the most important features of the Second British Empire was the imperial legal reordering project, as it reflected clearly the British aspirations to control the world through law and legal administration. Since the late eighteenth century, there were myriad imperial legal projects taking place that

⁶¹⁹ See Herbert Evatt and Leslie Zines, *The Royal Prerogative, Commentary by Leslie Zines* (N.S.W. Law Book Co. 1987).

⁶²⁰ See DP O'Connell, 'The Crown in the British Commonwealth' (1957) 6 *The International and Comparative Law Quarterly* 103.

⁶²¹ *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Quark Fishing Limited* [2005] UKHL 57. *R (on the application of Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2006] 1 A.C. 529.

⁶²² Anne Twomey, 'Responsible Government and the Divisibility of the Crown' (2008) *Public Law* 742-767.

attempted to use law as a technique to affect the colonial processes and institutions.⁶²³ *Colonial Commissions of Inquiry* were accordingly launched to collect the information about the law of the empire. Bundled information, including 'letters about colonial scandals, trial reports, drafts of law charters and treaties, and proposals for a diverse set of legal reforms' bombarded the jurists and officials in London.⁶²⁴

The imperial legal reordering project was not simply a project of imperial administration, it was also part of the British ambition to order the world. Having emerged from a half-century of war as the hegemonic global power since 1815, Britain had much interest in setting the terms for commerce and policing outside the boundaries of the empire. The reordering project was the very opportunity for it to project its legal episteme and political aspirations into the international legal system. Indeed, it has been argued that the reordering project developed in multiple international registers, 'installing [the] empire as the ghost in the machine of global governance'.⁶²⁵ Wilhelm Grewe further has observed that the British devised a distinctive global strategy of 'indirect rule', resulting in a 'worldwide unorganized interconnected State system that... depended entirely on the interests and requirements of the British global empire'.⁶²⁶ Nevertheless, since there were few international lawyers engaged in summarizing these processes, the global impact and legacy of this multifaceted project still remains largely opaque.

Both the imperial legal reordering project and the international aspiration behind it could explain to some extent why the English courts were reluctant to attribute to the colonial government a clear legal personality as corporation. It should be well remembered that the legal reordering

⁶²³ See generally Lauren A Benton and Lisa Ford, *Rage for Order: The British Empire and the Origins of International Law, 1800-1850* (Harvard University Press 2016).

⁶²⁴ *ibid.*

⁶²⁵ *ibid.*

⁶²⁶ Wilhelm Georg Grewe and Michael Byers, *The Epochs of International Law* (Walter de Gruyter 2000).

project, in fact, first emerged in the late eighteenth century as a response to the anxiety aroused by the immediate experiences of both losing the colonies of North America and governing a new territory in India. Those anxieties prompted sharp public challenges to the constitutional structure of the empire, and provoked heated debates over a large variety of issues with unprecedented liberal and humanitarian concern. These not only included general issues, such as the abolition of the slave trade, the degree of autonomy in colonial governance, the rationale behind British conquests, or British foreign policy, but also included specific colonial constitutional controversies, such as colonial legislative powers, the Crown's prerogative, and finally the legal personality of the colonial government. The public discourse of this period mostly ended up with a prevalent liberal account of citizenship, rights, free trade, sovereignty, and, ultimately, the independence and the self-determination of these self-governing dominions.

The political discourse over the independence of the self-governing dominions resonated deeply with the legal controversy over the legal status/personality of the colonial government. The issue was stirred up by both the British Empire and the Dominions themselves. The ambiguity and flexibility of the legal status and the constitutional theory of dominionhood echoed the elusive political stance of these self-governing colonies. For the self-governing dominion, there was the newly emergent constitutional self-consciousness of the dominions that visualized themselves as 'distinctive blend of national status and Imperial identity'.⁶²⁷ They required the British Empire to recognize their equality and independence in exchange of their loyalty. From the perspective of the Empire, there was the enduring tension between, on the one hand, the desire to construct a constitutional solidary Empire by normalizing the

⁶²⁷ John Darwin, 'A Third British Empire? The Dominion Idea in Imperial Politics,' in Judith Brown and Wm Roger Louis (eds), *The Oxford History of the British Empire, Volume IV: The Twentieth Century*, 64.

legal status of the self-governing colonies; and, on the other hand, the desire to have an unspoken tight grip of the substantial power in these colonies, which contributed to the reluctance for a genuine recognition of the dominions. Holland has illustrated this imperial self-conflicting psychology most vividly when remarking on the presence of the dominion premiers at the imperial conference. As he said, that this dominions' presence 'smacked of a metropolitan preference to allow imperial compatriots a tantalizing glimpse into the inner sanctum of power, without actually allowing them inside'.⁶²⁸

This contrasting imperial attitude towards the self-governing dominions was not hard to understand in the context of the late nineteenth-century world scene. The most important difference between the colonialism of the late nineteenth century and that of the previous ages, was the international political environment. Although it was still a dominant power at international level, Britain was no longer enjoying the exclusive privileges of colonialism and political pre-eminence. Several 'industrially invigorated and fiercely nationalistic' European colonial powers gave rise to the 'unsettling climate' concerning overseas politics.⁶²⁹ Among them, Germany was the primary threat. As Holland has identified, "a preoccupation with the potentialities of building a British imperial 'superstate', capable of competing with the new types of continental politics of which the Wilhelmine Reich was the archetype, ran deep in Edwardian psychology."⁶³⁰ In this sense, it might be right to argue that Britain's desire for colonial acquisition in this phase was largely driven by the fear that other rival colonial powers might impose 'monopolistic or protectionist policies' to prevent its trade.⁶³¹ This fear also gave rise to

⁶²⁸ Robert Holland 'Britain, Commonwealth and the End of Empire' in Vernon Bogdanor (ed), *The British constitution in the twentieth century* (Oxford University Press for the British Academy 2004).

⁶²⁹ Phillip Darby, *Three Faces of Imperialism: British and American Approaches to Asia and Africa, 1870 - 1970* (Yale University Press, 1987) 60.

⁶³⁰ Holland (n 628).

⁶³¹ Craven (n 591).

the concern about the legitimacy of the Empire's constitutional unity. As it has been argued, from the late nineteenth century to the beginning of First World War, what 'really mattered in imperial terms was the preservation of the British Empire's integrity as a single body within the international system, and thus its undifferentiated and efficient belligerency in war.'⁶³² Thus, it is not hard to predicate that the legal personality of the self-governing dominions, in the context of the prevalence of the liberal account of self-determination, left the English jurists and officials in an awkward position.

⁶³² Holland (n 628).

VII. CONCLUSION

As we have seen, drawing the line between the public and the private has long been one of central preoccupations of Western thought since the time of classical antiquity (though the dichotomy should also be treated as an universal and trans-cultural category).

The genealogy of the public/private distinction

In general, the Western idea of the public/private distinction could be concluded as having gone through four major phases to date, and chronologically, they are:

- (a) *The Pre-Modern Phase*: the earliest articulation of the public/private distinction could be traced down to Aristotle's *Politics*, where he has described a distinction between the democratic *polis* and the despotic household in Greek republican city-states. As democracy was gradually abandoned by the Roman Empire and religion became the primary occupation of people's life, it has been argued that the private household 'devoured' the public sphere entirely during the Middle Ages and the public/private distinction was accordingly dissolved. The feudal social unit, condensed in the medieval concept of *dominium*, was as a hybrid of the public and private authority.
- (b) *The Early Modern Phase*: in the sixteenth and seventeenth centuries, the public/private distinction re-emerged as the distinction between the public state and the private property ownership in the course of the nobility's struggle against the absolutist king. In order to restrain the unlimited divine rights that proclaimed by the king and also to avoid the possible alternation of popular sovereignty, the nobilities

promoted the idea of an abstract and impersonal state, separated from both the ruler and the ruled. They proposed that the operation of the state, instead of continuing to be secret and subject to the king's arbitrary will, should be both transparent to the public and restricted by a set of rationalized principles of governance. John Locke's idea of the unlimited property right and civil society also proved convenient for them to require the government to both respect their right over the property while providing essential protection for it.

(c) *The Republican Phase*: the *Hellenic* polis has been restored in the eighteenth century as the bourgeois discursive 'public sphere', which worked as the communicative mediator between the will of the private property owner and the will of the public sector. Political discourse became public, and derived from rival appeals to public opinion on many important topics that connected more or less intimately with colonies and colonial trading companies, such as those on the East India Company and the American Revolution. The focus of the public/private distinction thus has been transformed to the substantial political debates on civic (or republican) virtue in the public realm. Bernard Mandeville's near-utilitarian 'private vices, public virtues' became the best-known aphorism of eighteenth-century British political thought. The near experience of the East India Company also stimulated the public opinion holding that the public interest should be organizationally separated from the private interest. This arguably inaugurated the distinction of the public/private modes of social organizations.

(d) *The Liberal Phase*: Adam Smith's laissez-faire doctrine provides a finale rationale of the relationship between the public interest and the private interest, which proposes that the maximum public interest would be expected if the private interest would be allowed to work

freely on its own will. It legitimated the freedom of the private enterprise from the state regulation. While a clear distinction between the public corporation and the private corporation has been juristically defined in America, in English legal history there was apparently no such corresponding development. Nevertheless, in a similar sense, there was a heated legal debate taking place in England, which concerned whether the colonial government could be personified as corporation.

Some concluding observations

Having juxtaposed the intellectual history of the public/private distinction, with those of the state and the corporation, several important observations should be highlighted:

First, by tracing the genealogy of the public/private distinction, it has been revealed that one of the most genuine contributions of liberalism in reinventing the idea of the public/private distinction in the late eighteenth century was to establish the distinction as the key analytical marker for different modes of social organization, namely the public state and the private corporation. Part of the reason for this establishment was concerns stemming from the transformation of the East India Company into a local sovereign power in India. It has been widely believed that the public interest of both the mother country and the local Indian people was seriously jeopardized by the private interest of the Company and its servants. The majority of the public opinion at that time, most exemplified in Edmund Burke's speech in impeaching Warren Hastings, began to hold that public and private interests should be institutionally separated to avoid the possible erosion of the public interest by private interests. And the British government therefore should rule directly in India. It is requisite to add, however, that what was criticized in the case of the East India Company was that a mercantile organization should not

be endowed with the responsibility of governance. This should be carefully differentiated from a situation in which a government begins to participate in private service, manufacture and commerce.

On this premise, it might be sufficient to argue that when Adam Smith later rationalized the relations between the government and the market by the laissez-faire doctrine, he was working on an already existing organizational separation of the public and private interest. What he was concerned with was how to reconcile the public interest of the state with the private interest of the corporation (and other non-state actors). In fact, as early as the early eighteenth century, there was already a substantive moral discussion in this respect, which was provoked by Bernard Mandeville's famous articulation of how the private vices were essential in keeping the wheels of a prosperous society in motion. Adam Smith further argues that the most ideal institutional order for keeping these wheels in fastest speed is to place the individual under just the right amount of incentives, allowing the individual to apply himself with maximum industry and efficiency when the reward for effort is neither too low (slaves, apprentices) nor too great (monopolists, large landowners). Nevertheless, liberalism ultimately simplified all these doctrines into an equation of the maximum national wealth with the maximum freedom of the corporation and the minimum regulation of the market.

Secondly, a chronicle historical narrative of the public/private distinction makes clear that one of the most important aspects of the public/private distinction that has been hitherto neglected (or ill-remembered) in current liberal discourse is the concept of the discursive public sphere that underlies it. Emerging in the eighteenth century, the discursive public sphere has played a significant role in both practice and theory, inaugurating the democratic idea of public participation as an essential element in defining public interest and justifying government action. It

resulted in the elevation of public opinion from being mere common sense to a semi-legislative power that fundamentally rationalized and publicized the practice of politics. Reviving the concept of the public sphere is crucial in promoting real democracy as a way of enabling citizens to affect the national policies. This is especially important in the current situation, when globalization now seems to dictate national policies and international institutions are proving inadequate to harness its power.⁶³³

Last but not least, the most important insight of this thesis perhaps is that the current liberal interpretation of the public/private distinction prevents us from seeing the homogeneity and the interdependence between the state and the corporation by arbitrarily separating them into the public realm and the private realm as embodied the public interest and the private interest respectively. Especially given the fact that the justification for the separation of public governance from private business was established in the process of the British government's taking control over the East India Company, this thesis implies the 'artificiality' in using the public/private distinction as a rubric for defining the different characteristics of the state and the corporation. In addition, by reading the history of the corporation against the development of the public/private distinction, it suggests that the significance of the public dimension of the corporation has long been underacknowledged by modern minds. Not only did the form of the corporation first emerged in medieval time as an important form of self-governing political entity, but during the imperial period, it assumed the distinctive form of colony as well, even when its primary aim was gaining business profit. The earliest joint-stock corporation was also in fact a public organ of government from the outset (though it cooperated several private interest within it).

⁶³³ For discussions on how globalization dictates national politics, see Alain de Benoist, 'The Idea of Empire,' (1993-1994) 98-99 *Telos* 81; Antonio Hardt and Michael Negri, *Empire* (Harvard University Press 2000); Saskia Sassen, *Losing Control? Sovereignty in an Age of Globalization* (Columbia University Press 1996).

This last argument was particularly important in light of current problems that have been identified in the first chapter of Introduction, which concern the failure of the traditional public/private binary in corresponding to the new roles that the state and the corporation have played in promoting and protecting the public interest. Whatever the ontological truth about the natures of the corporation and the state, their increasing assimilation and the close cooperation in serving the public welfare is undeniable. In light of this, it might suggest that the real focus of contemporary enquiry should not be upon the putative corruption of democracy by way of privatization, but rather the 'corruption' of the corporation that came about by stripping it of any democratic responsibilities. In the following, I will try to explain why recognizing this interlinkage between the corporation and the state both in history and at present would significantly shed some light on current predicament. I will argue that what is at stake now is to redefine the relationship between the state and the corporation based on a nuanced understanding of their complex interactions in society, rather than a simplified public/private dichotomy.

Rethinking individualism

The centrality of the opposition between the public state and the private corporation has often been located in the contrasting and incompatible moral principles they inherited. In fact, all the social organizations could be divided according to these principles: conservative v liberal, public good v self-interest, solidarity v progress, moral v money, and democracy v economic efficiency, though the question of whether these values are really antagonistic never stops generating heated political argument. In general, the institution of the private corporation is often regarded as representing an opposed social value to that of the public state. The state is supposed to cater for the human needs of security and stability both

physically and psychologically, helping the individual to sustain his/her life in a basic way. It is united by common beliefs, whether these beliefs stem from religious or moral principles. Individuals thus are treated as passive subjects to political power. Anything original, progressive and competitive would not be encouraged (in some senses), as they present challenges to the existing harmony and cohesion of the social system.

On the other hand, the most characteristic quality of corporations is active self-government, which is grounded in the idea of the importance of the individual as free and equal. The corporation generally welcomes creativity, progress and evolution, as long as that is admitted by the political environment it inhabits. This allows the people to be united but still maintain their individual diversity. A new kind of ethics consisting of liberty, equality and fraternity is enshrined in the corporation. The very human need for collaboration and active self-improvement has led to constant innovative applications in the form of corporation, which proved to be critical to almost all the major evolutions of human society: churches created ecclesiastic corporations to acquire land and appoint officials; guilds were founded to regulate local craft and trade; traders created merchant companies to pursue new markets overseas; and municipalities were established to govern free urban communities outside the traditional feudal system. In this sense, it has been argued that modern individualism might be seen to have been inaugurated in corporate life long ago, rather than in the nineteenth-century industrial revolution as traditionally presumed.⁶³⁴

The word 'individualism' often represents the Enlightenment stress on political liberalism, freedom of conscience, individual rights and the pursuit of economic self-interest. According to classical liberal individualism, a society is the aggregate of individual interests and there

⁶³⁴ See Alan Macfarlane, *The Making of the Modern World: Visions from the West and East* (Palgrave 2002).

is no social or universal interest beyond this. Only individuals have ends and those ends prevent the state from imposing collective ends on individuals. Therefore, society should be judged by how well it preserves the maximum space for permitting individuals to pursue their interests without leading to social chaos. It is on this ground that liberalism accused socialism as guilty of destroying individuality by promoting a paternalistic expansion of the public sector subordinating individual initiative to the notion of the equality of groups. Since the question of individual freedom is essential to the question of a free society, Noonan warns that any socialist strategy that hopes to have any resonance must take this criticism of the public/private distinction with the utmost seriousness.⁶³⁵

Yet, it is well known that methodological individualism has been subjected to sustained criticism. It has been argued that the abstract individual, often taken as the basic building block for the purposes of social analysis, is a deficient and overly-simplistic conception. The conception of the individual provided by classical liberalism is criticized by socialism as lacking concrete socio-material difference. Avoiding any responsibilities to society, the capitalists conveniently resort to individualism to argue that each citizen has to stand on his own feet and take care of himself, when the capitalist alone of all individuals is the most able to take care of himself. Individualism reduces society to simply an aggregate of individuals and idealizes the brutal irresponsible criminality of the capitalist. It also wrongly treats collectivities as simply aggregates of individuals by ignoring the troubled identities of individuals and the constitutive role of society in constructing them.⁶³⁶

Communitarian writings, on the other hand, treat individuals as mere

⁶³⁵ Jeff Noonan, 'Socialism, Individuality and the Public/Private Distinction' (2000) 12(3) *Rethinking Marxism* 23.

⁶³⁶ See generally, Patrick Gardiner (ed), *Theories of History: Readings from Classical and Contemporary Sources* (Free Press 1959); John O'Neill (ed), *Modes of Individualism and Collectivism* (Heinemann 1973); Alan Ryan (ed), *The Philosophy of Social Explanation* (Oxford University Press 1973).

artifacts and privilege the significance of collective entities, though they have also been criticized as lapsing into collectivist reductionism.⁶³⁷ Nevertheless, what is at stake is the question of whether the current simplified version of individualism obscures the way in which the individual is embedded in the various associations of society.

In order to answer this question, it is important to distinguish individualism as a value from individualism as a social mechanism.⁶³⁸ Individualism as value was not an invention of the nineteenth century. It has its roots in the open and sharp conflict between the Church and the Roman lawyers in the medieval period. The 'individualist-spirit'-charged Roman law had been taught throughout Europe from the thirteenth century, replacing the moral influence of the Church with civil power and secular law. Writing on the topic of the highly developed property rights of women, legal historian FW Maitland argued that England 'long ago' had chosen her 'individualist path'.⁶³⁹ Following Maitland, Mcfarlane identifies that a key feature of the English socioeconomic structure has long been a stress on the rights and privileges of the individual as against the wider group or the state, which later has spread all over the world. This peculiar individualism is not only reflected in the idea of the individual's direct communication with God or in the concept of individual private property,⁶⁴⁰ but is also reflected in the economic freedom that is inherent in the English common law.⁶⁴¹

⁶³⁷ See Michael Sandel, *Liberalism and the Limits of Justice* (Cambridge University Press 1982) (critique of Rawls).

⁶³⁸ See generally PS Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford University Press 1979).

⁶³⁹ Frederick Pollock and Frederic William Maitland, *The History of English Law before the Time of Edward I* (Liberty 2013) 433.

⁶⁴⁰ Crawford Brough Macpherson, *The Political Theory of Possessive Individualism: Hobbes to Locke* (Oxford University Press 1964).

⁶⁴¹ FA Hayek, 'The Origins of the Rule of Law' in *The Constitution of Liberty* (Routledge 1960); 'The Changing Concept of Law' in *Law, Legislation and Liberty* (Routledge and Kegan Paul 1973).

Specifically, in the phase of feudalism, approximately from the eighth century to the thirteenth century, England was in a position very similar to the rest of Europe, where a large diverse agrarian civilization broke into small competing quasi-states, unified under Christianity while preserving their differences. It was a period of balanced tension between the Church and the State, accompanied by rapid technological, artistic and intellectual growth. Commerce was encouraged, as were intermediary bodies such as trade guilds and town governments. However, in the next 500 years, while everything in continental Europe seemed to gravitate upwards (with the exception of Holland), moving towards the trapping and mechanisms of absolutism, England somehow escaped this centripetal force and managed to maintain a unique devolution of power.⁶⁴² The three great tendencies that swept across most of Europe did not occur in England, namely political absolutism and centralization with an incontestable ruler above the law, the ecclesiastical infusion into the lay authorities, and the stratification in the terms of caste-like birth privileges for the 'nobility'. At times, there were attempts at monarchical aggrandizement, but they either failed or provoked serious reactions, such as the Magna Carta and Elizabethan Parliament. There was no large central bureaucracy, no standing army and few hired mercenaries. The deep conflict between the State and the Church remained, and neither of them was strong enough to subdue the other until the Reformation placed the individual at the heart of his religion, which finally became a private matter excluded from political and economic life. As the country grew steadily wealthier, an unusual 'proto-class system' emerged which was based on wealth and achieved status rather than the 'proto-caste or estate system' of Europe that was based on blood. Instead of the normal pattern of a few enormously privileged individuals and a great mass of illiterate agrarian producers, in England there was a huge bourgeoisie placed at the middle level which enjoyed great fluidity. As Macfarlane

⁶⁴² Macfarlane (n 634) 7-9.

concluded, 'all these are both signs and associated features of the absence of the normal tendency for power to corrupt'.⁶⁴³

Yet it was during the nineteenth century that individualism reached its climax in England by emerging as a social mechanism. Individualism in this sense is taken to describe a historical reality – that society was rapidly becoming highly atomistic in its social organization as a consequence of the Industrial Revolution. This new social mechanism might be best embodied in the personal experience of the urban industrial worker. They used to work at home with the family (kinship relations), but now had to engage in impersonal, financial and contractual relationships with the factory owners. Industrial workers also found themselves involved in various contractual relationships with urban landlords and shop owners. This change was famously described by Henry Maine as the movement 'from status to contract'.⁶⁴⁴ However, Maine's theories of movement of all societies from community to association and from status to contract might seriously oversimplify what really happened in England. As Atiyah observes, 'it is commonly the case that even the most percipient of men only observe a movement when it has virtually run its course'.⁶⁴⁵ According to Atiyah, even in Maine's time the extreme individualism of England had been greatly modified. Atiyah also suggests that the creation of new institutions, especially those that were formed by the industrialized workers themselves, such as combinations or unions, had been intentionally restricted during this age in order to suppress worker bargaining power and ward off revolution.⁶⁴⁶ Nonetheless, ever since John Stuart Mill's attack on Jeremy Bentham's utilitarianism, which by then was the embodiment of political individualism, the weakness of liberal individualism has been identified with Bentham's narrowly selfish, narrowly rationalist, version of it.

⁶⁴³ *ibid.*

⁶⁴⁴ Henry Maine, *Ancient Law* (J Murray 1861) ch IX.

⁶⁴⁵ Atiyah (n 638).

⁶⁴⁶ *ibid* 257, 259.

Doubts about individualism were prevalent even in the heyday of individualism in the nineteenth century. Reflecting upon the failure of the French Revolution of 1789, many theorists in this period became very critical of the corrosive individualism of the time. Some even argued for a restoration of religious and political authorities. The general condolence of the disappearance of community, as the mediator between the state and the individual, among intellectuals could be observed in the nineteenth century. In fact, individualism was already a term of opprobrium that had been widely used by the early anti-revolutionary conservatives. As the militant Catholic conservative Louis Veillot wrote:

The evil which plagues France is not unknown; everyone agrees in giving it the same name: individualism ... since society is the union of minds and interests, and individualism is division carried to the infinite degree. All for each, each for all, that is society; each for himself, and thus each against all, that is individualism.⁶⁴⁷

In the nineteenth century, Alexis de Tocqueville predicted the dark future of individualism when he wrote:

After having thus taken each individual one by one into his powerful hands, and having molded him as it pleases, the sovereign power extends its arms over the entire society; it covers the surface of society with a network of small, complicated, minute, and uniform rules, which the most original minds and the most vigorous souls cannot break through to go beyond the crowd; it does not break wills, but it softens them, bends them and directs them; it rarely force action, but it constantly opposes your acting; it does not destroy, it prevents birth; it does not tyrannize, it hinders, it represses, it enervates, it extinguishes, it stupefies, and finally it reduces each nation to being nothing more than a flock of timid and industrious animals, of which the government is the shepherd.⁶⁴⁸

The current liberal public/private distinction, however, is precisely built on its deep commitment to the ideology of individualism. The abstraction of

⁶⁴⁷ Quoted in George H Smith and Marilyn Moore, *Individualism: A Reader* (Cato Institute 2015) 16.

⁶⁴⁸ Alexis de Tocqueville, *Democracy in America* (first printed at New York 1838, University of Chicago Press 2002) ch 6, 'What Sort of Despotism Democratic Nations Have to Fear'.

the self-interested natural person, premised by individualism, constitutes the ontological unit of the liberal discourse, which relies on the public/private distinction to restrain the state in order to ensure a free society for individual to pursue maximum personal interest. The corporation is defined by law as a subject that is analogous to that of a natural person, standing against the state. Individualism thus offers the ultimate criteria for assessing the functioning of the public/private distinction as far as the role of the state in society is concerned. Since the liberal public/private distinction is identical to the adoption of individualism, and accordingly to the devaluation of community, the increasing problem of the public/private distinction thus echoes the prevalence of collectivism recently. The increasing disaggregation of the state from a unique, unified entity into a loose coalition of independent collectivities is undeniable. The problematic character of the public/private distinction once again reflects the difficulty in fitting corporations into the traditional private legal subject of the individual by ignoring the apparent social power they have acquired and the crucial role they have played in uniting the society.

Indeed, as Michael Walzer has pointed out, what the dysfunction of the public/private distinction has exposed is precisely the failure of the liberal theorists in recognizing the real constitutive effect of the public/private distinction, or in a more preferred term, 'the liberal art of separation', in constructing social reality.⁶⁴⁹ Liberal theorists are obsessed with individualist version of the public/private distinction, which focuses on how to protect freedom and equality of private subjects, namely individuals and corporations, from the public force of the state. What they failed to realize is that, on the one hand, political tyranny is not the only form of tyranny since freedom and equality can also be threatened by

⁶⁴⁹ See Michael Walzer, 'Liberalism and the Art of Separation' (1984) 12 Political Theory 315.

private power via vast wealth and ownership.⁶⁵⁰ The result is that society is currently suffering from the abuse of market power and capitalists.⁶⁵¹ Walzer suggests that the real power of the public/private distinction is that it separates society into relatively isolated and autonomous social settings, each of which are operating with their own internal logic, practices and integrity. In this way, freedom and equality are ensured because success in one institutional setting cannot be converted into success in another. As he states, 'this is the socialist form of the old liberal hope that individuals secure in their own circles won't invade the circles of others'.⁶⁵²

At this point, we might well recall how Tocqueville prescribed the decentralized social power as the perfect means to regulate the government administration, rather than relying purely on the legal control of public law. Struck by the invisibility of administrative power in the United States, Tocqueville argued that in a thoroughly decentralized democracy (based upon his idealized view of American democracy), the administration was difficult to distinguish from other associations and the distinction between public and private ultimately disappeared.⁶⁵³ More importantly, in such society, a precious free 'moeurs' would arise, which is a precious personal capacity that promoted both self-reliance and the habit of free association of all kinds, not only political association but also other forms of association, ranging from the industrial and commercial to the religious and moral.

⁶⁵⁰ As Walzer has argued, 'limited government is the great success of the art of separation, but that very success opens the way for what political scientists call "private government", and it is with the critique of private government that the leftist complaint against liberalism properly begins.' *ibid.*

⁶⁵¹ Walzer has identified three ways in which the private power overrides the limits of free market: first, radical inequality of wealth results in coerciveness, rendering exchanges only 'formally free'; second, market power, such as corporate structures, generates quasi-government patterns of command and obedience; and thirdly, capital (vast wealth and ownership) converts readily into the coercive power of the state. *ibid.* Also see Charles E Lindblom, *Politics and Markets* (Basic Books 1977), especially ch V.

⁶⁵² *ibid.*

⁶⁵³ Alexis de Tocqueville, *Democracy in America* (first published 1853, Saunders and Otley 1840) ch 5.

Rather than recovering a socialist conception of individuality, or emphasizing the moral worth of the individual by situating it in community, what is needed, therefore, is a reconfiguration of the analogy between the corporation and the individual. The corporation, perhaps, is more similar to the state than to the individual, especially when taking those increasing social responsibilities of the corporation into account. The traditional laissez-faire has assumed that as long as the market offers sufficient alternatives, and all the information about the products and the services is open and transparent, the consumer knows how to make the best choice. This assumption is increasingly untenable, as the improvability of the 'buying skill' of the consumers is in fact rather limited due to the complexity and the invisible closeness of many matured industries, and in some extreme cases even the safety of the consumer is in danger. In addition, the general 'social conscience' of the corporations for improving employment, environmental protection and social equality have also been the subject of increasing attention. The case for the multinational corporations are complicated, as they often bears the extra responsibility for reforming developing countries, ranging from economic models, democratic institutions and other humanitarian issues.

The essence of corporateness

If the state and the corporation are of the same genus, as opposite to the individual, then what is assumed to be the defining character that shared by both of them, and that separates them from the other groups that are also consisted by individuals? One might argue that both the state and the corporation represent a common ownership of the property, which is different from either individual property or organizations without collective property. In other words, it is a 'socialist' form of property. But this kind of view can be confusing, since once being created both the state and the corporation 'own' their properties in their own name, having

their rights and duties independent from the founders. And they have the separate personalities permanently until their ultimate deaths (if there is one). Therefore, simplifying them as a special form of property ownership would be a detrimental and pernicious reading of them that not only annihilates their existence discursively but also demoralizes their personalities. Fortunately, the clue to find the genuine tributes that characterize both the state and the corporation could be detected in Maitland's monumental lectures of *Township and Borough*.

Township and Borough has become one of those enduring classics that many talk but few read. A current resurgent interest in it indicates that more than anachronistic value, it bears a grand initiation of some pioneering political thoughts in understanding modern state and government by visualizing it as a similar form of corporation. The most enduring theme of *Township and Borough*, perhaps could be detected in the following passage:

But, to return to our pastures. Are not 'the green commons' of the village too common to be owned by a community? Perhaps I put the question ill: but in one form or another it should be put, for popular expositions of the village community will sometimes leave this question in the happy gaze of 'collective ownership.' Now I am very ready to believe that haze is its native atmosphere, and that, when we have plucked it out and inspected it in the modern daylight, we must once more tenderly put it back into the medieval muddle. That seems to me a work which Dr Gierke has been admirably performing in his fascinating book. Only let us know that haze is haze. May be there is an element of co-ownership in the case and an element of corporate ownership. May be our ancestors did not distinguish the all which is plurality from the all which is unity. But we must. If we do not, we ought to applaud the common-councillor who says that the property of a municipal corporation is bona fide 'their' property.⁶⁵⁴

In an attempt to illustrate the process of urbanization, Maitland has set himself to explain the evolution among the townsmen and their unprecedented form of unity that inhered in the corporate personality of

⁶⁵⁴ FW Maitland, *Township and Borough: The Ford Lectures 1897* (Cambridge University Press 2011) 31–32.

the township. This new kind of unity, according to Maitland, could be observed by tracing the emergence of a series of conceptual dichotomies, which included the contrasts between the 'plurality' and the 'unity', between the 'public' and the 'common', between *dominium* and *proprietas*, and finally between the 'corporate ownership' and the 'collective ownership' that has been identified in above passage. All of these conceptual dichotomies exemplified the inaugurating divergence between the two forms of unity, inherited respectively in village and in township: they were the form of *corporateness* and the form of *commonness*.

In fact these two forms of unity, namely the unity in the form of commonness and the unity in the form of corporateness, have already co-existed in the medieval *communitas*, though it proved to be exceedingly hard to disengage them clearly. In the village, the element of unity was appeared as 'a mere power of government and regulation', which embodied in the so-called 'local authority,' an organ of subordinate government.⁶⁵⁵ It is well-know that in England, the term 'borough' has been traditionally applied to refer to both incorporated cities and the incorporated villages. Yet, it was hard for the village to transform from its original kind of unity to the kind of unity that characterized by a proprietary corporation. Because, on the one hand, the line between public and private has not yet been drawn, nor been felt. On the other hand, the village was centered on the lord: Maitland has assumed that if the village had become lordless they might perhaps in course of time have exhibited some decisive symptoms of corporate unity. But he didn't think the village would finally evolve into any corporation, as 'the community was too automatic to be autonomous, too homogeneous to be highly organized, too deeply immersed in commonness to be clearly corporate, too plural to be legal unit, too few to be one.'⁶⁵⁶ After all, the

⁶⁵⁵ *ibid* 33-34.

⁶⁵⁶ *ibid*.

real corporation was no doubt only started in urban life. As Maitland wrote, 'corporateness came of urban life.'⁶⁵⁷

Maitland's vivid depiction of the corporate elements of the township reveals how the 'business side' of the communal life proved to be crucial in formulating the 'corporate' kind of unity that differentiated the town from the village, such as the debts, the property, the profit and so on. Later in another article, he regards this as the focal point in bridging the state and the corporation together. As he has argued, the same genus of the state and the corporation would reveal itself whenever there is an inquiry contemplating at the 'business side' of the state, that is the national debts, national property and so on.⁶⁵⁸ Indeed, it might be well recalled how the stocks of the East India Company has been widely acquired by the public, and how the Company in turn lent those money from the stocks to the government. The liquidation of capital was just one of the myriad ways in which the 'business side' of the state might interact with the 'business side' of the corporation, and the 'business side' of the individual.

Maitland's insightful observation continues to be relevance in current political life. Reading into Maitland, David Runciman argues that recognizing the corporate identity of the state is crucial in explaining the nature of the modern welfare state, as it helps to answer the basic question of how the state could own anything and how individual has a share in it.⁶⁵⁹ Indeed, the political theory of state proposed by Maitland is

⁶⁵⁷ *ibid.*

⁶⁵⁸ Frederic W Maitland, 'Crown as Corporation' (1901) 17 LQ Rev. 131.

⁶⁵⁹ David Runciman, 'Is the State a Corporation?' (2000) 35 Government and Opposition 90. However, Runciman argues that recognizing the corporate identity of state has little to do with the questions about the role of corporations in political life (political questions such as corporatism, or the powers of multinationals). According to him, it is a question of whether the state has its own separate identity over and above the identities of its separate members. In this sense, although Runciman has claimed to apply Maitland's understanding of the state in illustrating the nature of the welfare state. He in fact identifies Maitland's theory as similar to those traditional images of the state that depicted by Hobbes and Spinoza, which conceived the state as a 'body politic' in

quite visionary. By signifying the importance of financial relationship between the state and the people in bonding them together, he proposed an unprecedented understanding of the state that is more modern, secular, and technical, or borrowing Max Weber's term, it is a 'disenchanted' interpretation of the modern state. For Maitland, this financial aspect of the State, or 'the business side of the State', not only resembles closely to the operation of the corporation, but also needs the decisive and mediate help from the latter in the solidarity and liquidation of the financial relationship between the state and the people. What Maitland has envisioned and underscored is the inevitable assimilation in terms of rationality and the close financial connection between the state and the corporation in modern society. And he believes that this would require some revolutionary understanding of the modern state by recognizing its similarity with the corporations especially by examining and comparing their financial sheets. The current problematic of the public/private distinction might just be a prelude to the apocalyptic overturn of the obsolete individualism that underpins the current mainstream understanding of the state's role in society. The orthodox liberal depiction of the state has long been hidden behind a screen that has been supplied by the public/private distinction and individualism. The screen, on the one hand, allows it to be immune from a clear rationalization and normalization of its financial duties and responsibilities. On the other hand, it glorifies the state with various political theories of nationalism, mysticism and romanticism of all sorts. At this point, the screen is doomed to collapse, as all of these apparently lost their old charms and good justifications.

possession of a single personality distinct from the separate persons of its sovereign and its subject. Also see Thomas Hobbs, *Leviathan* (first published 1651, Richard Tuck ed, Cambridge University Press 1991); Benedic de Spinoza, *Political Treatise* (trans R. H. M. Elwes, Dover Publications 1951).

BIBLIOGRAPHY

- Allison JWF, *A Continental Distinction in the Common Law: A Historical and Comparative Perspective on English Public Law* (Oxford University Press 1996)
- Aman AC, *The Democracy Deficit: Taming Globalization Through Law Reform* (NYU Press 2004)
- Anderson P, *Passages from Antiquity to Feudalism* (Verso 1978)
- , *Lineages of the Absolutist State* (Verso 1993)
- Arendt H, *The Human Condition* (The University of Chicago Press 1958)
- Armitage D, *The Ideological Origins of the British Empire* (Cambridge University Press 2000)
- Atiyah PS, *The Rise and Fall of Freedom of Contract* (Clarendon Press, 1979)
- Ball T, *James Madison* (Routledge 2017)
- Ball T, Farr J and Hanson RL (eds), *Political Innovation and Conceptual Change* (Cambridge University Press 1989)
- Barker SE, *The Political Thought of Plato and Aristotle* (Dover Publications 1959)
- Barnes VF, *Land Tenure in English Colonial Charters of the Seventeenth Century* (Yale University Press 1931)
- Bastiat F, de Huszar GB and Hayek FA, *Selected Essays on Political Economy* (Van Nostrand Princeton 1964)
- Bawn K, ‘Choosing Strategies to Control the Bureaucracy: Statutory Constraints, Oversight, and the Committee System’ (1997) 13 *The Journal of Law, Economics, and Organization* 101
- Bayart JF, Ellis S and Hibou B, *The Criminalization of the State in Africa* (James Currey Publishers 1999)
- Benn SI and Gaus GF (eds), *Public and Private in Social Life* (Croom Helm 1983)
- Benton LA and Ford L, *Rage for Order: The British Empire and the Origins of International Law, 1800-1850* (Harvard University Press 2016)
- Bobbio N, *Democracy and Dictatorship: The Nature and Limits of State Power* (Peter Kennealy tr, New Ed edition, Polity 1989)
- Bowen HV, *The Business of Empire: The East India Company and Imperial Britain, 1756–1833* (Cambridge University Press 2005)
- Bozeman B, *All Organizations Are Public: Comparing Public and Private Organizations* (Beard Books 2004)
- , *Public Values and Public Interest: Counterbalancing Economic Individualism* (Georgetown University Press 2007)

Brandeis LD, *The Unpublished Opinions of Mr. Justice Brandeis: The Supreme Court at Work* (Belknap Press of Harvard University Press 1957)

Brebner JB, 'Laissez Faire and State Intervention in Nineteenth-Century Britain' (1948) 8 *The journal of economic history* 59

Brooks H, Liebman L and Schelling C (eds), *Public-Private Partnership: New Opportunities for Meeting Social Needs* (1st US-1st Printing edition, Ballinger Publishing Company 1984)

Bruyn FD, 'Edmund Burke's Gothic Romance: The Portrayal of Warren Hastings in Burke's Writings and Speeches on India' (1987) 29 *Criticism* 415

Bryson JM, Crosby BC and Bloomberg L, *Public Value and Public Administration* (Georgetown University Press 2015)

Bull H and Watson A, *The Expansion of International Society* (Oxford University Press 2017)

Burke E, *Reflections on the Revolution in France* (1790)

——, *Party, Parliament and the American Crisis, 1766/1774* (Clarendon Press 1981)

——, *The Writings and Speeches of Edmund Burke*, vol VI (PJ Marshall ed, Clarendon Press ; Oxford University Press 1981)

——, *Thoughts and Details on Scarcity, Originally Presented to the Right Hon. William Pitt: In the Month of November, 1795 (Classic Reprint)* (Fb&c Limited 2017)

Cane P, *Administrative Law* (Oxford University Press 2011)

Canning JP, 'The Corporation in the Political Thought of the Italian Jurists of the Thirteenth and Fourteenth Centuries' (1980) 1 *History of Political Thought* 9

——, 'Law, Sovereignty and Corporation Theory, 1300-1450' [1988] *The Cambridge history of medieval political thought*, c 454

Casini L, "'Down the Rabbit-Hole': The Projection of the Public/Private Distinction beyond the State' (2014) 12 *International Journal of Constitutional Law* 402

Castiglione D, Sharpe L and Sharpe H of GD and R in GLL, *Shifting the Boundaries: Transformation of the Languages of Public and Private in the Eighteenth Century* (University of Exeter Press 1995)

Cavanagh E, 'Corporations and Business Associations from the Commercial Revolution to the Age of Discovery: Trade, Jurisdiction and the State, 1200–1600' (2016) 14 *History Compass* 493

Cerny PG, *The Changing Architecture of Politics: Structure, Agency and the Future of the State* (Sage 1990)

——, 'Paradoxes of the Competition State: The Dynamics of Political Globalization' (1997) 32 *Government and opposition* 251

Chandler AD, *Managerial Hierarchies: Comparative Perspectives on the Rise of Modern Industrial Enterprise* (First Edition edition, Harvard University Press 1980)

Chesterman S, *Private Security, Public Order: The Outsourcing of Public Services and Its Limits* (OUP Oxford 2009)

Chesterman S and Lehnardt C (eds), *From Mercenaries to Market: The Rise and Regulation of Private Military Companies* (OUP Oxford 2007)

Ciepley D, 'Beyond Public and Private: Toward a Political Theory of the Corporation' (2013) 107 *American Political Science Review* 139

——, 'Is the US Government a Corporation? The Corporate Origins of Modern Constitutionalism' (2017) 111 *American Political Science Review* 418

Cohen JL and Arato A, *Civil Society and Political Theory* (MIT press 1994)

——, *Civil Society and Political Theory* (MIT Press 1994)

Constant B, 'The Liberty of the Ancients Compared with That of the Moderns' (1988) 325 *Political writings*

Crack AM, 'Transcending Borders? Reassessing Public Spheres in a Networked World' (2007) 4 *Globalizations* 341

Craig PP, *Public Law and Democracy in the United Kingdom and the United States of America* (OUP Oxford 2001)

Craven M, 'Between Law and History: The Berlin Conference of 1884-1885 and the Logic of Free Trade' (2015) 3 *London Review of International Law* 31

Cutler AC (ed), *Private Authority and International Affairs* (State Univ of New York Press 1999)

——, 'Critical Reflections on the Westphalian Assumptions of International Law and Organization: A Crisis of Legitimacy' (2001) 27 *Review of International Studies* 133

Cutler AC, Haufler V and Porter T, *Private Authority and International Affairs* (SUNY Press 1999)

Dan-Cohen M, 'Between Selves and Collectivities: Toward a Jurisprudence of Identity' (1994) 61 *The University of Chicago Law Review* 1213

Darby P, *Three Faces of Imperialism: British and American Approaches to Asia and Africa, 1870 - 1970* (Yale Univ Pr 1987)

David W. Mundell, 'Legal Nature of Federal and Provincial Executive Governments: Some Comments on Transactions between Them' (1960) 2 *Osgoode Hall Law Journal* 56

Davis JP, *Corporations: A Study of the Origin and Development of Great Business Combinations and of Their Relation to the Authority of the State*, vol 1 (Beard Books 2000)

De Tocqueville A, *The Old Regime and the French Revolution* (Anchor 1955)

Dewey J, 'Review of Corporate Personality: A Study in Jurisprudence' (1931) 40 *The Yale Law Journal* 1338

Dicey AV, *Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century* (first published 1905, Macmillan & Co, Ltd 1963)

- , *Introduction to the Study of the Law of the Constitution* (first published 1885, Liberty Fund 1982)
- Dillon JF, *Commentaries on the Law of Municipal Corporations*, vol 1 (5th edn, Little, Brown & Co 1911)
- Dirks NB, *The Scandal of Empire* (Harvard University Press 2009)
- Dunn J, *The Political Thought of John Locke: An Historical Account of the Argument of the 'Two Treatises of Government'* (Cambridge University Press 1982)
- Durkheim É, *Montesquieu: His Contribution to the Establishment of Political Science* (Berghahn Books 1997)
- Dworkin R, *Law's Empire* (Harvard University Press 1986)
- Elias N, *The Civilizing Process: Sociogenetic and Psychogenetic Investigations* (Wiley 2000)
- Elshtain JB, *Public Man, Private Woman: Women in Social and Political Thought* (Princeton University Press 1981)
- Erikson E, *Between Monopoly and Free Trade: The English East India Company, 1600-1757* (Princeton University Press 2014)
- Fairbanks RB, Mooney-Melvin P and Miller ZL, *Making Sense of the City: Local Government, Civic Culture, and Community Life in Urban America* (Ohio State University Press 2001)
- Fairfield P, *Public/Private* (Rowman & Littlefield 2005)
- Faulkner D, 'Public Services, Citizenship, and the State—the British Experience 1967-97' [1998] *Public Services and Citizenship in European Law Public and Labour Law Perspectives*, Oxford 35
- Fleur E. Johns, 'The Invisibility of the Transnational Corporation: An Analysis of International Law and Legal Theory' (1994) 19 *Melbourne University Law Review* 893
- Foucault M, *The Birth of Biopolitics: Lectures at the Collège de France, 1978-1979* (Springer 2008)
- , *Security, Territory, Population: Lectures at the Collège de France, 1977-1978* (Palgrave Macmillan 2009)
- Freedland MR and Sciarra S (eds), *Public Services and Citizenship in European Law: Public and Labour Law Perspectives* (Oxford University Press 1998)
- Freeman J, 'The Private Role in the Public Governance' (2000) 75 *New York University Law Review* 543
- , 'Extending Public Law Norms Through Privatization' (2003) 116 *Harvard Law Review* 1285
- Frug GE, 'The City as a Legal Concept' in Lloyd Rodwin and Robert M Hollister (eds), *Cities of the Mind: Images and Themes of the City in the Social Sciences* (Springer US 1984)
- Gierke O von, *Political Theories of the Middle Age* (The Lawbook Exchange, Ltd 2002)

Glasser TL and Salmon CT, *Public Opinion and the Communication of Consent* (Guilford Press 1995)

Godfrey M, *Law and Authority in British Legal History, 1200-1900* (Cambridge University Press 2016)

Goffman E, *Behavior in Public Places* (Simon and Schuster 2008)

——, *Relations in Public* (Transaction Publishers 2009)

Goldsmith M, *Private Vices, Public Benefits: Bernard Mandeville's Social and Political Thought* (Cybereditions 2002)

Goodman D, 'Public Sphere and Private Life: Toward a Synthesis of Current Historiographical Approaches to the Old Regime' (1992) 31 *History and Theory* 1

Grewe WG and Byers M, *The Epochs of International Law* (Walter de Gruyter 2000)

Grotius H, *The Rights of War and Peace* (CreateSpace Independent Publishing Platform 2016)

Habermas J, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* (Polity 1992)

——, 'The Public Sphere: An Encyclopedia Article (1964)' [2010] *The idea of the public sphere: A reader* 114

——, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (John Wiley & Sons 2015)

Habermas J, Crossley N and Roberts JM (eds), *After Habermas: New Perspectives on the Public Sphere* (Blackwell Publishing: Sociological Review 2004)

Habermas J, Lennox S and Lennox F, 'The Public Sphere: An Encyclopedia Article' (1974) *New German Critique* 49

Hadfield GK, 'Bias in the Evolution of Legal Rules' (1991) 80 *Geo. Lj* 583

Halévy E and Everett CW, *The Growth of Philosophic Radicalism* (Macmillan 1928)

Hall S, Held D and McLennan G, *The Idea of the Modern State* (Open University Press 1987)

Hallis F, *Corporate Personality: A Study in Jurisprudence* (Oxford University Press 1930)

Hamowy R, 'FA Hayek and the Common Law' (2003) 23 *Cato J.* 241

Hamson CJ, *Executive Discretion and Judicial Control: An Aspect of the French Conseil D'Etat* (Hyperion Press 1979)

Handler JF, *Down from Bureaucracy: The Ambiguity of Privatization and Empowerment* (Princeton University Press 1996)

Harrington J, *Harrington: 'The Commonwealth of Oceana' and 'A System of Politics'* (Cambridge University Press 1992)

Harris R, 'The Transplantation of the Legal Discourse on Corporate Personality Theories: From German Codification to British Political Pluralism and American Big Business' (2006) 63 Wash. & Lee L. Rev. 1421

——, *Industrializing English Law: Entrepreneurship and Business Organization, 1720 - 1844* (Cambridge University Press 2010)

Hart HM and others, *The Legal Process: Basic Problems in the Making and Application of Law* (Foundation Press 1994)

Hayek FA, *Individualism and Economic Order* (University of Chicago Press 1980)

——, *The Constitution of Liberty* (Routledge 2014)

Hayek FA, *The Constitution of Liberty* (Routledge 2014)

——, *The Road to Serfdom: Text and Documents: The Definitive Edition* (Routledge 2014)

——, 'The Principles of a Liberal Social Order' [1966] *Il politico* 601

Hickman KE and Pierce RJ, *Administrative Law Treatise: 2017 Cumulative Supplement / Kristin E. Hickman (Harlan Albert Rogers Professor of Law, University of Minnesota), Richard J. Pierce, Jr. (Lyle T. Alverson Professor of Law, George Washington University)*. (Aspen Law & Business 2016)

Holland R, 'Britain, Commonwealth and the End of Empire' in Vernon Bogdanor (ed), *The British constitution in the twentieth century* (Oxford University Press for the British Academy 2004)

Holmes S, *Benjamin Constant and the Making of Modern Liberalism* (Yale University Press New Haven 1984)

Horwitz MJ, 'The History of the Public/Private Distinction' (1982) 130 *University of Pennsylvania Law Review* 1423

Hume D, *The Letters of David Hume* (Oxford University Press 2011)

Hundert EJ, *The Enlightenment's Fable: Bernard Mandeville and the Discovery of Society* (Cambridge University Press 2005)

Ittersum MJV, *Profit and Principle: Hugo Grotius, Natural Rights Theories and the Rise of Dutch Power in the East Indies, 1595-1615* (Brill 2006)

Joseph B, *Reading the East India Company 1720-1840: Colonial Currencies of Gender* (University of Chicago Press 2004)

Kairys D, *The Politics of Law: A Progressive Critique* (3Rev Ed edition, Basic Books 1998)

Kantorowicz EH, *The King's Two Bodies: A Study in Mediaeval Political Theology* (Princeton University Press 1957)

Keck ME and Sikkink K, *Activists beyond Borders: Advocacy Networks in International Politics* (Cornell University Press 2014)

Kennedy D, 'Stages of the Decline of the Public/Private Distinction' (1981) 130 *University of Pennsylvania Law Review* 1349

- Kraus M and Joyce DD, *The Writing of American History* (University of Oklahoma Press 1990)
- Landes JB, 'The Public and the Private Sphere: A Feminist Reconsideration' in Johanna Meehan, *Feminists Read Habermas* (Routledge 2013)
- , *Women and the Public Sphere in the Age of the French Revolution* (Cornell University Press 1988)
- Latour B, *The Making of Law: An Ethnography of the Conseil d'Etat* (Alain Pottage tr, John Wiley & Sons 2013)
- Lindblom CE, *Politics and Markets: The World's Political-Economic Systems* (Basic Books 1977)
- Lindley MF, *The Acquisition and Government of Backward Territory in International Law* (1969)
- Lippmann W, *The Phantom Public* (Routledge 2017)
- Locke J, *Second Treatise of Government* (first published 1689, Hackett Publishing 1980)
- Lovejoy DS, *The Glorious Revolution in America* (Wesleyan University Press 2011)
- Macfarlane A, *The Making of the Modern World: Visions from the West and East* (Springer 2001)
- Macpherson CB, *The Political Theory of Possessive Individualism: Hobbes to Locke* (Oxford University Press 1964)
- Maitland FW, 'Corporation Sole' (1900) 16 LQ Rev. 335
- , 'Crown as Corporation' (1901) 17 LQ Rev. 131
- , 'Moral Personality and Legal Personality' (1905) 6 Journal of the Society of Comparative Legislation 192
- , *The Collected Papers of F. W. Maitland* (1911)
- , *Domesday Book and Beyond: Three Essays in the Early History of England* (Cambridge University Press 1987)
- , *The Constitutional History of England: A Course of Lectures Delivered* (The Lawbook Exchange, Ltd 2001)
- , *State, Trust, and Corporation* (David Runciman and Magnus Ryan eds, Cambridge University Press 2003)
- , *Selected Historical Essays of F. W. Maitland* (Cambridge University Press 2008)
- , *Township and Borough: The Ford Lectures 1897: With an Appendix of Notes Relating to the History of Cambridge* (Cambridge University Press 2011)
- Mandeville B, *The Fable of the Bees: Or, Private Vices, Public Benefits* (C Bathurst 1795)
- Marshall E and Sensoy Ö, *Rethinking Popular Culture and Media* (Rethinking Schools 2011)
- McQuillin E, *The Law of Municipal Corporations* (Callaghan & Company 1945)

Michaels JD, *Constitutional Coup: Privatization's Threat to the American Republic* (Harvard University Press 2017)

Mill JS, *Principles of Political Economy* (John W Parker 1848)

Minow M, *Partners, Not Rivals: Privatization and the Public Good* (Beacon Press 2002)

Mitchell WC, 'The Backward Art of Spending Money' (1912) 2 *The American Economic Review* 269

Mnookin RH, 'The Public/Private Dichotomy: Political Disagreement and Academic Repudiation' (1982) 130 *University of Pennsylvania Law Review* 1429

——, 'The Public/Private Dichotomy: Political Disagreement and Academic Repudiation' (1982) 130 *University of Pennsylvania Law Review* 1429

Montesquieu CBD, *The Spirit of Laws* (first published 1784, Cosimo Classics 2011)

Moore MH, *Recognizing Public Value* (Harvard University Press 2013)

Morawetz V, *A Treatise on the Law of Private Corporations, Volume 1* (Bibliolife DBA of Bibilio Bazaar II LLC 2015)

Morrison J, *The Advantages of an Alliance with the Great Mogul* (1774)

Muchlinski P, *Multinational Enterprises and the Law* (Oxford University Press 2007)

Nanz P and Steffek J, 'Global Governance, Participation and the Public Sphere' (2004) 39 *Government and opposition* 314

Newmyer R, 'Justice Joseph Story's Doctrine of "Public and Private Corporations" and the Rise of the American Business Corporation' (1976) 25 *DePaul Law Review* 825

Noel cox, 'The Control of Advice of the Crown and the Development of Executive Independence in New Zealand' (2001) 13 *Bond Law Review* 166

Olson M, *The Logic of Collective Action* (Harvard University Press 2009)

Osborne D and Gaebler T, *Reinventing Government: How the Entrepreneurial Spirit Is Transforming the Public Sector* (Perseus Books,US 1992)

Paul EF, 'Laissez Faire in Nineteenth-Century Britain: Fact or Myth?' (1980) 3 *Literature of Liberty: A Review of Contemporary Liberal Thought* 1

Pocock JGA, *Virtue, Commerce, and History: Essays on Political Thought and History, Chiefly in the Eighteenth Century* (Cambridge University Press 1985)

——, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century* (Cambridge University Press 1987)

——, *Politics, Language, and Time: Essays on Political Thought and History* (University of Chicago Press 1989)

——, *The Discovery of Islands* (Cambridge University Press 2005)

- , *Political Thought and History: Essays on Theory and Method* (Cambridge University Press 2009)
- , *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton University Press 2016)
- Poggi G, *The State: Its Nature, Development and Prospects* (John Wiley & Sons 2013)
- Pollock F and Maitland FW, *The History of English Law before the Time of Edward I* (2013)
- Proudhon PJ, *Property Is Theft!* (AK Press 2011)
- Rawls J, *A Theory of Justice* (reissue edition, Harvard University Press 2005)
- , *Political Liberalism* (Columbia University Press 2005)
- Ripstein A, *Force and Freedom* (Harvard University Press 2010)
- Rodin J and Steinberg SP, 'Introduction: Incivility and Public Discourse' (2003) *Public Discourse in America: Conversation and Community in the Twenty-First Century* 1
- , *Public Discourse in America: Conversation and Community in the Twenty-First Century* (University of Pennsylvania Press 2003)
- Rose N, 'Beyond the Public/Private Division: Law, Power and the Family', *Law and Families* (Routledge 2017)
- Rosenberg N, 'Some Institutional Aspects of the Wealth of Nations' (1960) 68 *Journal of Political Economy* 557
- Runciman D, 'Is the State a Corporation' (2000) 35 *Government and Opposition* 90
- , *Pluralism and the Personality of the State* (Cambridge University Press 1997)
- Scheuerman WE, 'Global Governance without Global Government? Habermas on Postnational Democracy' (2008) 36 *Political Theory* 133
- Schmitt C, *Political Theology: Four Chapters on the Concept of Sovereignty* (University of Chicago Press 2005)
- Schoenhard PM, 'A Three-Dimensional Approach to the Public-Private Distinction' (2008) 2008 *Utah Law Review* 635
- Schotter A, *Free Market Economics: A Crit. Appraisal* (St Martin's Pr 1985)
- Schudson M, *Rethinking Popular Culture: Contemporary Perspectives in Cultural Studies* (Recording for the Blind & Dyslexic 2008)
- Shaw A, *Municipal Government in Great Britain* (T Fisher Unwin 1895)
- , *Municipal Government in Continental Europe* (first published 1895, Fb&c Limited 2017)
- Smith A, *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776)
- Smith GH and Moore M, *Individualism: A Reader* (Cato Institute 2015)

- Stein P, Thomas JAC and Lewis ADE, *Studies in Justinian's Institutes: In Memory of J.A.C. Thomas* (Sweet & Maxwell 1983)
- Taylor HO, *A Treatise on the Law of Private Corporations* (Creative Media Partners, LLC 2015)
- The Parliamentary History of England, from the Earliest Period to the Year 1803*, vol XVII (1813)
- Thomas JC, *Citizen, Customer, Partner: Engaging the Public in Public Management: Engaging the Public in Public Management* (Routledge 2014)
- Thurow LC, *Zero-Sum Society: Distribution and the Possibilities for Economic Change* (Basic Books 1980)
- , *The Zero-Sum Society: Distribution And The Possibilities For Change* (Basic Books 2008)
- Tocqueville A de, *Democracy in America* (Saunders and Otley 1840)
- , *The Old Regime and the French Revolution* (Courier Corporation 2012)
- Tomkins A, *Public Law* (OUP Oxford 2003)
- Toninelli PA and Toninelli PM, *The Rise and Fall of State-Owned Enterprise in the Western World*, vol 1 (Cambridge University Press 2000)
- , *The Rise and Fall of State-Owned Enterprise in the Western World* (Cambridge University Press 2000)
- Touraine A, *What Is Democracy?* (Routledge 2018)
- Turkel G, 'The Public/Private Distinction: Approaches to the Critique of Legal Ideology' (1988) 22 *Law & Society Review* 801
- Verkuil PR, 'Privatizing Due Process' (2005) 57 *Administrative Law Review* 963
- , 'Public Law Limitations on Privatization of Government Functions' (2005) 84 *North Carolina Law Review* 397
- , *Outsourcing Sovereignty: Why Privatization of Government Functions Threatens Democracy and What We Can Do about It* (1 edition, Cambridge University Press 2007)
- , *Valuing Bureaucracy: The Case for Professional Government* (2nd Revised ed. edition, Cambridge University Press 2017)
- Vickery A, 'Golden Age to Separate Spheres? A Review of the Categories and Chronology of English Women's History' (1993) 36 *The Historical Journal* 383
- Victor Morawetz, *A Treatise on the Law of Private Corporations* (Little, Brown 1886)
- Vile MJC, *Constitutionalism and the Separation of Powers* (Liberty Fund 1998)
- Viner J, 'Adam Smith and Laissez Faire' (1927) 35 *Journal of Political Economy* 198
- , 'The Intellectual History of Laissez Faire' (1960) 3 *The Journal of Law and Economics* 45

Viner J and Irwin DA, *Essays on the Intellectual History of Economics* (Princeton University Press 1991)

Savigny FK and Rattigan WH, *Jural Relations: Or, The Roman Law of Persons as Subjects of Jural Relations: Being a Translation of the Second Book of Savigny's System of Modern Roman Law* (Hyperion Press 1884)

Walzer M, 'Liberalism and the Art of Separation' (1984) 12 Political Theory 315

Wapner P, 'Politics beyond the State Environmental Activism and World Civic Politics' (1995) 47 World Politics 311

Watson A, 'The Structure of Blackstone's Commentaries' (1988) 97 The Yale Law Journal 795

Watson G, *The English Ideology* (Allen Lane 1973)

Weinrib EJ, *Corrective Justice* (OUP Oxford 2012)

Weintraub J and Kumar K, *Public and Private in Thought and Practice: Perspectives on a Grand Dichotomy* (University of Chicago Press 1997)

Weintraub JA, 'The Theory and Politics of the Public/Private Distinction' in Krishan Kumar (ed), *Public and private in thought and practice: perspectives on a grand dichotomy* (University of Chicago Press 1997)

Westlake J, *The Collected Papers of John Westlake on Public International Law* (Cambridge University Press 2014)

Williston S, 'History of the Law of Business Corporations before 1800. I' (1888) 2 Harvard Law Review 105

Wood GS, *The Creation of the American Republic, 1776-1787* (UNC Press Books 2011)

Zaret D, *Origins of Democratic Culture: Printing, Petitions, and the Public Sphere in Early-Modern England* (Princeton University Press 2000)