

PHILANTHROPY, LAW, AND
ASSOCIATIONAL LIBERTY:
A FEW REMARKS ON GIERKE'S
GENOSSENSCHAFTSRECHT

Steven Grosby

For only those organizations which emerge from the initiative and formative powers of their own members enhance the individual existence of their members. . . . It is as impossible to make a gift of independence in the economic sphere as it is in any other.
—Otto von Gierke, *Rechtsgeschichte der deutschen Genossenschaft*¹

Initiative and Philanthropy

The intimate and necessary relation between philanthropy and associational liberty has long been recognized. Perhaps best-known today are those numerous observations about the relation to be found in Tocqueville's *Democracy in America*. Examples include, "the most natural right of man, after that of acting on his own, is that of combining his efforts with those of his fellows and acting together," and, when he does so, the resulting "reciprocal action of one person upon another" "renews ideas, enlarges the heart, and develops understanding" such that the individuals "help one another" (1966, 193, 515, 511). The philanthropic orientation of action, expressed above as the enlarging of the heart and the developing of the understanding when one helps both oneself and another person, was seen by Tocqueville to be a corollary of the necessary, "natural" associational activity of one individual acting together with another. Key to this formulation of the relation—albeit a formulation pieced together from several extracts from *Democracy in America* but which nonetheless is faithful to Tocqueville's argument—is the recognition that the cultivation and expansion of both one's solicitude for another and one's attention to one's surroundings arise from the initiative to undertake, with others, the setting right of a perceived deficiency in a state of affairs.

Grosby, Steven. 2012. Philanthropy, Law, and Associational Liberty: A Few Remarks on Gierke's Genossenschaftsrecht. *Conversations on Philanthropy IX*: 53-73. ISSN 1552-9592 ©The Philanthropic Enterprise.

Less well-known than Tocqueville's *Democracy in America* but certainly historically and legally more illuminating about the consequences of individuals acting together as members of groups of various kinds is the work of Otto von Gierke on association or, as *Genossenschaft* is usually translated, "fellowship." In the first volume, published in 1868, of his magisterial four-volume *Das deutsche Genossenschaftsrecht*, completed in 1913, Gierke (1990, 22) provides us with a succinct formulation of the relation between philanthropy and associational liberty: the motivation for the formation of free associations is to be found in the "self-help of the people." Similar to Tocqueville's observations, Gierke argues that the philanthropic orientation of action is expressed when the attempt is made—through the initiative of either the individual or, of particular interest to Gierke, individuals as members of groups acting in concert with one another—to address a perceived deficiency in a state of affairs. For Tocqueville, the transformation of the individual that is associated with our understanding of the term "philanthropy" was evoked through phrases such as "enlarges the heart," "extension of the mental horizon," and "forcing the individual out of himself" (1966, 243-44, 511). For Gierke, that transformation was expressed through phrases like "enhance individual existence," as in the above quotation from volume one of *Das deutsche Genossenschaftsrecht*, and, more generally, through the idea (or *pace* Gierke and Frederic Maitland, the social and legal reality) of group (or corporate) personality developed throughout Gierke's work (see Maitland 1903; 1904; Pollock and Maitland 1898) and especially the arguments of his Rektor's address of 1902, *The Nature of Human Associations* (1935b). For both Tocqueville and Gierke, integral to philanthropy, *qua* philanthropy, is the freedom of the individual to act, by himself but especially in association with others—a freedom of action implied by the term "initiative." Gierke's quotation with which this essay began asserts succinctly the necessity of this relation between the initiative of the action of associational liberty and the philanthropic gift. The gift cannot bestow initiative, but philanthropically-oriented action may open space for or help elicit initiative.

Although initiative is surely key to both Tocqueville's and Gierke's understandings of philanthropic action and while we may, with very little reflection, agree with them that it is, the question remains, why is it key? Evidently there is an underlying philosophical anthropology to the relation between, on the one hand, initiative and, on the other, the "enlarging of the heart" or the "enhancement of individual existence" of philanthropic action. One assumes that

this focus on the importance of initiative to the development of character must take as its point of departure an openness to the world as constitutive of human nature, *qua* human. To frustrate that openness, irrespective of however seemingly noble the goal of doing so may appear to be, is to undermine the important part of initiative in what it means to be human. Being open to the world is a beckoning to experiment, but it is a summons arising out of, or at least resonating within, the self to take initiative in forming a relation with one's surroundings. Thus, the corollary to acknowledging that openness is to recognize an anthropologically compelling engagement with—in the sense of modification of—one's environment. That is, the making of one's environment is a characteristic human activity, hence the significance of initiative. Finally, to take the initiative to modify one's environment is to take responsibility for that environment through one's action, and to take responsibility is to enhance one's existence: the enhancement of both one's self because one has taken the initiative to act, more often than not in concert with others, and the expansion of the self because of the now-established active relation with what has become, as a result, your environment. One's environment should be understood as including not merely one's modified physical surroundings but also one's modified *geistige* surroundings as a member of the emerging and sometimes consolidating association of individuals who have acted together to set right a perceived deficiency. This latter modification of one's intellectual, moral, or cultural understanding of oneself and others, and one's relation to others and the physical surroundings—expressed, once again, in Tocqueville's and Gierke's respective phrases “enlarges the heart” and “enhance the individual existence”—was of particular interest to Gierke and deserves more attention, especially in seeking a more accurate understanding of philanthropy.

The recognition of the significance of initiative for human character, expressed in the above quotation from volume one of Gierke's *Das deutsche Genossenschaftsrecht*, was also recognized by Tocqueville, when he wrote, “men must walk in freedom, responsible for their acts” (1966, 92). Thus, an alternative formulation of the evident, underlying philosophical anthropology is that the human character is enervated if responsibility for one's action is ceded to another, irrespective of the motivation for doing so. And here exists, in principle, the difference between philanthropy and charity. Both may involve help or assistance and gift-giving for a noncommercial public benefit, but the focus of philanthropy is on facilitating the conditions for the initiative of self-help to address a perceived deficiency in a state of affairs, whereas charity cannot avoid cultivating passivity

by focusing on addressing the perceived deficiency itself, however noble the intention of doing so. More will have to be said about the legal frameworks that evidently correspond to this distinction between philanthropy and charity. More will also have to be said about that legal framework which, according to Gierke (and Maitland), is necessary for facilitating conditions of self-help because, by facilitating those conditions, problems arise concerning the scope or latitude of that self-help. However, before examining those legal frameworks, a brief and regrettably superficial discussion of the place of associations or fellowships in Gierke's work is required.

Associations and the State

There have, of course, always been natural or given associations, the purpose of which was largely self-help. Most notable is the family, but there are also those territorially constituted residential associations of varying sizes that Pollock and Maitland called "land communities" (1898, 510). The word "community" is generally and unfortunately used today without any precision whatsoever; it is used here to refer to those associations whose constitutive relations are perceived as being given or natural—that is, one's membership in the group is not a result of voluntary decision but rather, for example, through (the significance attributed to) birth. Furthermore, one's choices, as a member of a community—*Gemeinschaft*—are noticeably circumscribed by the traditions of the association. It is still the individual who decides and acts, but those decisions and actions largely (though of course never entirely) follow a traditional, even if occasionally conflict-ridden, pattern. (The latter is sometimes described by the term "culture.") Be that as it may, our attention is directed not to the "land community" of the township or the borough that "has come into being no one knows when, and exists no one knows why" (Pollock 1898, 510) but mostly to the free or manifestly voluntary association. I note, however, the very important, factually complicated phenomenon, acknowledged by Gierke, that these two forms of association—the natural or given and the voluntary—have often been and continue to be combined in various ways. Because insufficient attention is paid to this combination, a few observations about it are in order before turning our attention to examples of voluntary associations from different historical periods.

Examples of such a combination were the towns of the eleventh and twelfth centuries, where the "givenness" of the residential association becomes the "free union" of the city commonwealth such that individual communal fellowship is

transformed into free citizenship (Gierke 1990, 19, 32). The complication of this development exists in the fact that varying aspects of the character of the relations of the earlier, given association (or, as often designated, “community”) persist, are transformed, or reemerge with the later, voluntary association. To take another, geographically more extensive example, if we understand the “nation” to refer to a form of relation the referent of which is “the given,” e.g. birth in the land, then we have the combination of these two forms of associations, the given or natural and the voluntary, when the nation becomes a national state through a willed compact (of one form or another) and law. In this example, the combination or intermingling of two different forms of relation would be, one, the patriotic attachment to one’s own land, with two, adherence to the “rule of law,” or—expressing the same combination in different terms—one, recognition of an individual as one’s “fellow national,” with two, the impersonality of a contractual relation with the same individual in the marketplace. Much unnecessary confusion has resulted from an unthinking adherence to a theoretically antiquated, *unequivocal* historical contrast between antique status (the given or natural) and modern contract (the voluntary).

Excursus: Gierke and Tönnies

“Voluntary” in the sense of willed or, in contrast to the natural or given, even “arbitrary,” *gewillkürte*; or to use Ferdinand Tönnies’ description of two forms of volition, *Kürwille*, an active volition, in contrast to the given or natural, *Wesenwille*. One understandably views the development of Tönnies’ categories of volition and the associations that, according to Tönnies, correspond to each in his *Gemeinschaft und Gesellschaft* (1940) as being derived from his investigation into Hobbes and Spinoza, given the argument of *Gemeinschaft und Gesellschaft*. However, the influence of Gierke on Tönnies’ formulation of the categories *Gemeinschaft* and *Gesellschaft* is, it seems to me, quite likely, given formulations of Gierke such as “these two forms of fellowship (the voluntary and the natural or given) must be regarded as the prototype and nursery for two groups of associations” (1990, 19). Of course, we know that Tönnies had read at least the first two volumes of *Das deutsche Genossenschaftsrecht*, as he quotes from volume two in *Gemeinschaft und Gesellschaft*. A thoughtful comparison of Gierke’s and Tönnies’ understandings of association, one that draws attention to Gierke’s more subtle approach, would be rewarding. While, as noted above, Gierke acknowledged

that these two forms of volition and their corresponding associations could be and were combined, the degree to which depended upon a particular historical period, Tönnies, at least in his influential *Gemeinschaft und Gesellschaft*, historically segregated the earlier *Gemeinschaft*, with its *Wesenwille*, from the later *Gesellschaft*, with its *Kürwille*. In the literature of historical jurisprudence, Tönnies' historical segregation parallels Henry Sumner Maine's (1970) historical contrast between status and contract, as argued in chapter 5 of his *Ancient Law*. For a recent comment on the burden of Tönnies' influential but, in my view, misguided historical segregation of these two types of association on our understanding of philanthropy, see Grosby (2009).

Having made these brief observations about the empirical combination of these two forms of associations and their corresponding relations, let us return to our discussion of voluntary associations. Examples of historically early and legally recognized voluntary associations were, according to Gierke, the ancient Roman burial associations (*collegia tenuiorum*) and the "free unions" of the early Germanic guilds, including among the latter the London peace guilds (for example, during the reign of King Athelstan, 925-40 A.D.), the *Judicia civitatis Lundoniae*, and other related developments of legal protection and pledges of peace, such as the *frithborgas* (see the Laws of Edward the Confessor).² Likely influenced by Gierke's research, Pollock and Maitland further observed that the early English borough was the ground upon which the voluntary associations of the early guilds flourished—for example, a borough's "knight-gild," which was constituted by men who had not grown up together as members of the community and hence presumably came together voluntarily, and which likely served as a model for the subsequent "merchant-gild" (1898, 191, 639).

These free unions or voluntary associations were, according to Gierke (1990, 26-27), acknowledged in a particular way by the State in England (and Denmark and areas north of the Frankish kingdom) that resulted in a combination of two types of legal and political order: "Fellowship" (*Genossenschaft*) and "Lordship" (*Herrschaft*). "Fellowship" refers to right-and-duty bearing associations, the capacity for which is inherent to the group—that is, an organization with an independent "legal personality." "Lordship" indicates that rights and duties come from above—that is, the legal existence of an association is conceded, granted, or even created by the Lord, Emperor, or State. (The historically modern expression and extension of *Herrschaft* is, in Gierke's categories, the *Polizeistaat*, an authoritarian moral State—authoritarian moral because the source of the rights and duties between individuals is inevitably or logically the State.)

Examples of the political expression of the legal order of Fellowship in early English history were the hundreds and the shires.³ Later political expressions would be forms of federalism. In this regard, one recalls that it was Gierke (1939) who brought back from obscurity the work of Johannes Althusius.⁴ Nevertheless, however noteworthy were such theoretical developments as Althusius' *Politica* and historical developments such as the Netherlands of the seventeenth century, it was English constitutional history that earned Gierke's (1990, 27) description of having achieved the compromise between the continued existence of the concept of Fellowship and the principle of Lordship.

To observe that the legal order of Fellowship indicates that voluntary associations, as right-and-duty bearing organizations, have, as such, independent legal personalities means that the early guilds, for example, had their own laws and courts, possessed their own capital, and, as guilds, entered into contracts (Gierke 1900, 52, 56).⁵ Perhaps one gets a better idea of what Gierke was referring to by an order of independent legal personalities of free associations (*Genossenschaft*) in contrast to an order of dependency (*Herrschaft*) by considering, as examples today of free association, the Church and (increasingly less so during the last fifty years) the university as independent "juristic persons": organizations that have their own laws and courts and whose existence does not depend upon the state's concession or initiative. Another, even if modified, example of the legal order of "Fellowship" historically later than the guild, discussed by Gierke (1900, 196-204), was the joint-stock company, an organization with its own articles of association, its own capital, and capable of entering into contracts, being taxed, and being sued. The existence of the "economic fellowship" of the joint-stock company was abetted by what, for Gierke (1990, 224), were important legal developments such as the English Companies Act of 1862, where, without requiring approval by any organ of the State, "seven members can, if they observe the legal formalities, obtain the rights of corporations and protection of the law (see also Maitland 1904, 206; Maitland 1900, xxxviii, where the 1862 Act is referred to as the "Magna Carta of co-operative enterprise").

Perhaps one, once again, gets a better idea of what Gierke understood as the legal order (if not the sociological order) of "Fellowship" by considering the characteristic English protective legal screen behind which all manner of groups flourished, the trust (Maitland 1900, xxix). For our purposes here, we need not go into the likely origins of the English trust, and in any event the history of the trust and its relation to corporation was examined by Maitland (1904, 157 and following;

see also Pollock and Maitland 1898, Vol.2, 228-233 and the “Note on the phrase ‘*ad opus*’ and the Early History of the Use,” 233-39). What is relevant for our purposes here in discussing the relation between associational liberty and philanthropy is Maitland’s speculation as to why numerous associations did not take advantage of the 1862 Companies Act (1904, 206-08). Maitland thought that the reason for still preferring the trust, despite its *ad hoc* character, was that “there is a widespread, though not very definite belief, that by placing itself under an incorporating *Gesetz* (law), however liberal and elastic that *Gesetz* may be (such as the Companies Act), a *Verein* (association) would forfeit some of its liberty, some of its autonomy, and would not be so completely the mistress of its own destiny as it is when it has asked nothing and obtained nothing from the State” (1904, 207). In other words, one takes it for granted that incorporation sooner or later opens the door at least to the “red tape” of regulation, and, even more to be avoided, taxation.

Now, for our purposes the significance of Maitland’s speculation about why there should persist a preference for the trust comes into focus when we recall Gierke’s understanding of the modern State as being authoritarian moral (a *Polizeistaat*). This characterization of the modern State is important for this brief discussion of associational liberty because the trust has been a vehicle for a number of different associations whose purpose can be loosely described as being “moral,” that is, organized not to carry on a business with a view of profit—for example, and especially, the English “charities.” The problem here is that the moral goals of the modern State (its assumed responsibility for the public welfare) could come into conflict with those of the “charities.” The latter is to be understood as where “any goal which any reasonable person could regard as directly beneficial to the public or some large and indefinite class of men is a ‘charitable’ purpose” (Maitland 1904, 178). Here we see that a legal development has taken place, for the trust for a person has also now become a trust for a goal. Be that as it may, herein lies the problem: What is to be the relation, if any, between the freedom to create and maintain these presumably independent, moral vehicles of associations for pursuit of a non-commercial purpose—the charitable trust—and the modern State which views as its goal the welfare of its citizens? (Insofar as these associations are truly independent, we may refer to them not only as a “charitable trust” but also as a “philanthropic trust.”) If we assume that Gierke’s description of the paternalistic character of the modern State is accurate, then of course the welfare of the citizens is understood as only the State understands it.

The problem can now be formulated as follows: On what legal basis is the independence of the association to be secured or safeguarded? Here we have returned to the contrasting legal and political orders of *Genossenschaft* and *Herrschaft*, but we do so now having drawn attention to a few examples from the history of English associational liberty that further allow us to contrast two legal traditions: on the one hand, English common law, which has acknowledged the continual existence of independent associations in compromise with the principle of the sovereignty of the State; and on the other, as Tocqueville (1998, 258) described it, that tool of “absolute power,” “a law of servitude,” continental law—that is, Roman law and its reception (see van Caenegum 2002).

Roman Law and Common Law

According to Gierke (1990, 115), Roman law encouraged the tendency of the authoritarian State to elevate itself above the law because only private law was recognized as genuine law while public law was essentially administrative; that is, associations (the *collegia*) were, in the final analysis, considered to be a part of the State and, as such, could be eliminated by the State at any time (see Gierke 1977, 130). Thus, like Tocqueville, Gierke concluded that state absolutism found support in Roman ideas.

Contributing to that support of absolutism was, according to Gierke (1977, 128-129), “the Romans’ unfamiliarity with the concept of true autonomy for associations.” It may, however, have been that during the history of pre-imperial Rome *collegia* could, in fact, be freely founded.⁶ In support of this possibility, he cites Gaius’ reference to the Twelve Tables, in particular Table VIII, in the *Digest* (47.22.4): “by virtue of the law [the Twelve Tables] they have the power to make any agreement for themselves that they desire, provided public law is not thereby infringed.”⁷ Even if that were so, however, whatever latitude may have existed during the Republic to form associations was subsequently severely curtailed by the insistence that the existence of any association was dependent on the consent of the State (for example, in the Lex Julia, specifically the *Lex Municipalis*). Thus, even the above-mentioned burial guilds, as *collegia licita*, “were subject to constant supervision, [being] permitted only one monthly meeting, and were administratively suspended in the event they transcended their prescribed functions” (Gierke 1977, 128).

The problem of legally securing associational liberty now appears this way: Are or are not corporations entities with their own rights and duties? That is, are or are not corporations legally “persons”? If, on the one hand, corporations (and

unincorporated associations) are legally persons, they have various rights and duties and spheres of action separate from the authority of the State. On the other hand, the insistence that corporations are not legally real means that their “reality” or “legal personality” has been artificially created (or conceded) by the State. In the latter case, it is difficult for any association to avoid having its independence called into question sooner or later. After all, if they are not real or legally persons, they do not actually bear rights and duties, and all the more so if the legal existence of any association depends on the concession (or recognition) of the State.

Now, what should be analyzed in some detail at this point in a discussion of Gierke’s *Genossenschaft* is the Romanist theory of the association as a fictitious person, *persona ficta*, as clearly formulated by Sinibaldo Fieschi (1243), later Pope Innocent IV. This involves the insistence that because only individuals are legal persons, corporations must be granted or conceded a fictitious legal personality by the law of the State. Those who are familiar with the problem the legal doctrine of the *persona ficta* poses to associational autonomy will have realized that I have already suggested difficulties with its understanding of legal personality by following Gierke and Maitland in observing that associations (specifically corporations) are to some degree real because they formulate their own regulations, enforce them, enter into contracts, can sue and be sued, and so forth.⁸ As Maitland put the problem (rightly, it seems to me), “If there is to be association, if there is to be group-formation, the problem of personality cannot be evaded” (1903, 230-31). Be that as it may, I wish to leave for a later time further discussion of some of the implications of the reality of corporate personality and the character or nature of human association (and in particular the argument of Gierke’s 1902 Rektor’s Address, “The Nature of Human Associations,” 1935b). For our purposes here, it will suffice to draw attention to the more obvious threats to associational autonomy, and hence to the initiative of philanthropic action, posed by Roman law and its reception.

If, in fact, the people are understood to have conferred on the king (emperor or State) their entire sovereignty and authority (*Institutes* 1.2.6) and if what is pleasing to the king has the force of law (*Digest* 1.4.1)—for otherwise the sovereign is not sovereign—then the law conceding “personality” or legal existence to the otherwise artificial association can ultimately be only the king’s (or emperor’s or State’s) law.⁹ Furthermore, if the sovereign is to be sovereign, the king cannot, at least in principle, be bound by the laws of the realm (*Digest* 1.3.31).¹⁰ This is how the Romanist *Lex Regia* was often understood, especially by

the opponents of the reception of Roman law, the defenders of the common law. Given these propositions from Roman law, how is a true autonomy of associations possible? Now, when we also recall that, for example, in England during the fifteenth century, the king, abetted by the arguments of the legists about the *collegia illicita* of Roman law, had begun to interfere with the creation of voluntary associations or guilds by requiring a royal license, “not out of any juristic necessity, any theory of personality, but by political expedience and financial needs” (Pollock and Maitland 1898, 669-70), we realize that the foundation has been laid to eliminate the autonomy of those associations that, for the champion of an absolute State, are “like worms in the entrails of a natural man” (Hobbes 1962, 245). Will or will not corporations have liberty to dispute with the sovereign power? Once again, on what basis could the independent associations secure their existence, given these legal propositions?

One response in the tradition of common law to this threat to associational liberty posed by the reception of Roman law in the service of the increasing authority of the modern State occurs at the very end of Volume One of Pollock and Maitland’s *The History of English Law Before the Time of Edward I* (1898). In a series of measured observations that rightly seek to put aside the fashionable but nonetheless heuristically unproductive contrast between an early medieval “communalism” and “individualism,” Pollock and Maitland acknowledge, rightly it seems to me, the consolidation of an English national State during the thirteenth century. (At least that is how I understand their concluding remarks to Volume One.) Thus, no longer is the local community a community “because it is a self sufficient organism, but because it is a subordinate member of a greater community, of a nation. The nation is not a system of federated communities; the king is above all and has a direct hold on every individual” (688). Here we see clearly Pollock and Maitland’s sober recognition of the historical, and perhaps unavoidable, fact of *Herrschaft*. However, they continue with the qualification to *Herrschaft*, so crucial to the common law, that in the English legal and political tradition the king was bound by the law of the realm: “But above the king himself . . . is the greatest of all communities, (quoting Bracton) ‘the university of the realm’” (1898, 688). Thus the sovereign is not the author of the law but the guardian of the law. This tradition encompasses not only “the birth of the England of the Magna Carta and the first parliaments” (1898, 688) but also, as Gierke observed, the coexistence of the liberty of associations with the principle of sovereignty. It is a coexistence in which the king (or emperor or State) is but one

estate (or association) among others, all of which are subject to the laws and, as such, where each of these estates (or associations) can have legal claim upon another. (These laws are sometimes understood as immemorial, or natural, or, *pace* Hayek's writings on the rule of law, as public opinion.)¹¹

I suppose that these few remarks on Gierke's *Genossenschaftsrecht* come down to this observation: we are accustomed to acknowledging an inviolate basis for private property, based on either natural right or an immemorial public opinion, as a necessary criterion for liberty. But as liberty also requires association, above all philanthropic association, also necessary is a similar basis for the existence of associations. Considerable difficulties arise, however, and before briefly examining them in the remarks that conclude this paper, a few further comments on the relation between English common law and the reception of Roman law may be useful or at least interesting.

The acuteness of the struggle of the jurist of the common law against the reception of the Roman *Lex Regia* can be seen in John Selden's most interesting, if complicated, introductory commentary *Ad Fletam Dissertatio* (1647) to the edition of the anonymous early fourteenth century manuscript *Fleta*. The difficulty that faced Selden, as a defender (or articulator) of the tradition of common law, was how to account for those instances of the reception of Roman law found within the national legal tradition, especially when those instances involved that threat to associational liberties, the *Lex Regia*. Likely influenced by the work of his contemporary Edward Coke, Selden was well aware, as a jurist of the common law, that the significance of earlier legal judgments was not a matter of literary embellishment but rather of providing a confirmation on which the interpretation of the law may depend (1647, 6).¹² Thus, all the more important was the problem for Selden of how a defender of the tradition of English common law should understand the evident accommodation to the *Lex Regia* found in that tradition in three earlier legal treatises—Bracton's *De Legibus et Consuetudinibus Angliae* (composed around the middle of the thirteenth century, during the reign of Henry III), Thornton's *Summa* (composed during the late thirteenth century, during the reign of Edward I), and the *Fleta*. Even if Selden (1647, 157,161) was correct in observing that although frequent citations of Roman law are found during the reign of Edward II (1307-27), by the beginning of the reign of Edward III it had fallen into neglect (excluding, of course, Roman canon law; see Helmholz 1990, 1-27), the apparent putative Romanism of Bracton (and Thornton and *Fleta*), conveyed by the apparent accommodation to the *Lex Regia*, could not but be an

interpretative battleground during the political and legal conflicts of the sixteenth and obviously especially seventeenth centuries. One need only recall the conflicts during that period over the scope of royal prerogative, for example, the evident suspension of common law in the *Five Knights' Case* (1627), or the legal justification of the Star Chamber.

The difficulty for Selden was that these three works interpreted the *Digest* as stating “what pleases the prince has the force of law *in accordance with* the *Lex Regia* enacted concerning his power” (my emphasis, 1647, 29). Selden thought that this apparent restatement of *Digest* 1.4.1 was in fact a peculiar interpretation, because in these three works “*cum*” is translated as a proposition, *in accordance with*, and not, as it should be, as a conjunction, *since*. The implication of this peculiar interpretative restatement for Bracton, Thornton, and the *Fleta* was that “nothing is to be determined [by the prince] of the prerogative except as allowed by the characteristic sense of the various stipulations of the *Lex Regia*,” and especially so as in these works the interpretation is followed by “a passage concerning our remarkable characteristic of administering justice according to law and legislating in assemblies of Estates.” Selden continued by noting that all three works omit entirely that the *Lex Regia* continues in the *Digest*, and is presented in the *Institutes*, with the clause “all their power and authority conceded by the people (to the prince)” (1647, 29). In other words, according to Selden what is remarkable about this interpretation is that it is so completely at variance with the universal understanding of the *Lex Regia*—a variation to be explained, so Selden argued, as a misguided attempt to provide a distinctly English version of the *Lex Regia*.

Selden concluded that during the thirteenth and part of the fourteenth centuries, especially during the reign of Edward II, among English lawyers there prevailed “some kind of use of imperial law” (1647, 39). Nonetheless, “in the famous question of prerogative, as debated in this country, Ulpian’s opinion on the *Lex Regia* could not in itself have any weight,” since it “is interpreted, or misinterpreted, by our three authors only in so far as consistent or at least not inconsistent with our immemorial customs. Indeed, the correct interpretation of that maxim, in so far as it is a part of civil law, is entirely opposed to the English constitution” (39).¹³

Rule of Law and Self-Government

Let us return to the assertion of the common law that above the king (or emperor or State) is the law of the land—a law that recognizes, either through legislation like the Companies Act of 1862 or legal vehicles like the trust, a significant degree of autonomy of right-and-duty-bearing associations. At one, clearly unsatisfactory, level, there is not much more to be said, for no one, at least explicitly, wishes for a restoration of an institution like the Star Chamber, and no one wishes, at least explicitly, to stultify an important part of human character by quashing the initiative of voluntary association. And so there exist numerous associations that, as independent and bearing legal personality, make their own regulations and enforce those regulations specific to the purpose of the association. The Church, for example, establishes criteria for who can be a priest and under what circumstances a priest would be defrocked. A university establishes the criteria for appointment of teachers and under what circumstances they can be removed. And a philanthropic trust establishes and decides on the scope and administration of a charitable purpose. Each association has its own rights and duties, and each has its own law (and court), the result being a society consisting of a pastiche of “special law.” Insofar as a society consists of heterogeneous bodies of special law (sometimes referred to as “particularistic law”), the relation of philanthropy, law, and associational liberty becomes one where a number of associations are free from regulation by the State. Formulated in different terms, it is a society where philanthropy is freely undertaken and where, as a consequence, the self is enhanced with attendant responsibility for one’s actions. In this situation, one has—to return to a characterization introduced above at the end of the first section—a wide scope or latitude of associational freedom.

As I, following Gierke and Maitland (and Selden), have drawn attention to the early modern recognition of the threat that the reception of Roman law posed to a society of a pastiche of special law arising from substantial associational autonomy, perhaps it is appropriate and useful to turn to a description of a few of the legal implications of how one aspect of such a society appeared in late fifteenth century England (see Strauss 1986, 122-123). The Church had jurisdiction over marriage, probate, defamation, perjury, and of course tithes (certainly so, if *iure divino*). It also had jurisdiction over those crimes considered to be spiritual: fornication, sorcery, and simony. Within these jurisdictional areas, the Church courts followed Roman canon law. Needless to say, property law, including contracts and claims of debt, fell within the jurisdiction of the common law and

the State's courts (see Helmholz 1990). Now, if we indulge in a peculiar historical anachronism for the sake of pursuing a better understanding of a potential problem by overlaying this partial description of the different legal jurisdictions of the late fifteenth century on the demand today made by some in England for a jurisdictional legitimacy of *Shari'ah*, we get a good idea of some of the complicated implications of a patchwork of distinct associations, each of which has its own, but possibly competing, special law.

The problem thus becomes a question of the scope or latitude of the special law, the relation not only between the special law of one association and that of another but especially between the special law of an association and the law of the land. Can, for example, special or particularistic law take precedence over the law of the land, or, as argued by Roman law and others, such as Hobbes, must the validity of a special law, insofar as it exists at all, be subject to the consent of the State? To formulate the problem of this relation in a dramatic fashion and putting aside for a moment the authority of the State, can a society of some degree of cultural cohesiveness (n.b., herein lies a problem) tolerate associations within its boundaries acting in a way that may be viewed as being disruptive or potentially disruptive to its existence? (Of course, how one understands "disruptive" is often the rub.)

The acuity of the problem may be lessened in several different ways. One is by not approaching the relation between special law and the law of the land theoretically but instead by insisting that it be understood historically. That is, as the relation has achieved approximate formulation and stability through the gradual development of a consensus—for example, how federalism has evolved in the United States. However, to proceed even this way is still to turn one's back on the merit of Gierke's assessment of the moral authoritarianism of the modern, supervisory State which, as such, declares not only that there is a "public welfare" but also that there can be only one understanding of what that public welfare is—its own. It is a declaration that is based on what Gierke (1990, 72-91) described as the legal development of a "law of the land," where the land, having become the "territory" of a national state (see Grosby 1995), has achieved an "invisible unity" such that it now has its own political and legal-moral personality.¹⁴ Thus, one now speaks of the "public good" of the (national) territory. However, if sovereignty can only be understood as having absolute power, then this "public welfare" of the territory has to be expressed as the State's "monopolized care of the common good" (Gierke 1990, 98)—a solicitude that, as such, must, at a minimum, look askance at any independent philanthropic initiative.

Conclusion

For Gierke (1900, 39), this development of a monopolized conception of the public good was not only modern, for the “act of alienation performed by the people in the *Lex Regia* was for Positive Law the basis of the modern, as well as of the ancient, Empire.” With Gierke one does not have anything like a perspective of “ancients versus moderns”; for in antiquity, political thought asserts that the end of man is that virtue only made possible in and through the State, and today political thought asserts that the public good is only made possible in and through the State. This is why in Gierke’s work we find the category “antique-modern thought.” Thus, for Gierke both ancient and modern political thought stand opposed to the freedom of the autonomous association.

The principle of sovereignty strives toward the realization of not only the absolute State but also, as the articulator of and guardian for the common good, the supervisory State. Moreover, if in fact *salus publica lex suprema est* (supported by the assertion that the public good requires the priority of the State’s claim, so *Digest* 49.14.46),¹⁵ then the sovereign’s breach of the law becomes possible if he or she judges the public good to be at stake (Gierke 1990, 110).

Nevertheless, Gierke was well aware that the development of this state of affairs so distressing to associational liberty paralleled “one of the greatest deeds of history”: the political emancipation of the individual. One part of this political emancipation was legal equality of all, and both were “the beneficial consequence(s) of the destruction of the medieval corporations” (113). Here is where we come upon a most vexing paradox. We know that opposition to tyranny requires the predictable “rule of law” in contrast to the capricious rule of men. We further know that the three classic requirements of the rule of law are that the laws must be general, equal, and certain (see, for example, Hayek 1955, 34-36). So, how is the criterion of equality of the law—the law must be the same for all—to be reconciled with the special law of an independent association? Is it the case that the rule of law must require a strong prejudice against any and all bodies of special law? Here is our paradox: liberty requires the rule of law, but it also requires the independence of associations; and the latter achieve significance when those associations have in fact their own legal personality, including their own special law. The paradox deserves to be formulated as angularly as possible, for otherwise “the quest for community” is not much of a quest, having lost its legal and political significance.

An angular formulation also forces one not to view Roman law as simply an alien, albeit orderly, incursion against the associational liberty of the native,

common law, for the idea of sovereignty contains within itself the expectation that all should be subject to the same authority, same law, and same courts. Thus, as Gierke acknowledged, one consequence of the reception of Roman law was to sweep away the discriminatory privileges of the Middle Ages. This expectation bears with it a procedural and seemingly unavoidable, substantive rationality in legal development. Of course, the realization of that rational expectation of the rule of law has also resulted in the individual remaining a minor to the end of his days because the State both defines what his welfare consists of and provides for it, and because his political freedom and legal equality is, for the most part, as a passive subject, the latter only aggravated by the centralization of government. And now we come upon another paradox. Must the rigorous, logical extension of the rule of law undermine self-government because that extension must sooner or later sweep aside the freely constituted, philanthropic association of self-help?

It may be possible, as Gierke thought, to formulate in response to this paradox a basic law that would make handling in a productive way this relation between special law and the rule of law's equality before the law, or, put in different terms, the relation between associational autonomy (*Genossenschaft*) and sovereignty (*Herrschaft*). This is a second way of lessening the acuity of the problem of this relation. In fact, Gierke's *Genossenschaftsrecht* and associational liberty rest upon the formulation of such a law—for example, a Bill of Rights. The rub here is the subsequent interpretation of the relation of those rights of the individual to any substantial expression of associational autonomy. Regardless of whether one is hopeful about realizing this possibility, I think it is clear that Gierke was more right than not about the character of the modern State. He was also correct when he observed that “the vigorous, unfettered building of associations is not only useful but indispensable if the individual and the collectivity are to have their lives shaped into a harmonious whole. For the individual, it counteracts the danger of isolation and fragmentation; at the same time, it [the unfettered building of associations] is a powerful confederate and effective balance [that is, a corrective] for a free state” (Gierke 1990, 170).

NOTES

- ¹ See page 216, volume 1 of *Das deutsche Genossenschaftsrecht*, much of which appears in English (Gierke 1990). English translations of sections of the other volumes of *Das deutsche Genossenschaftsrecht* appear in Gierke 1900, 1935a, 1958, 1977. For other works by Gierke translated into English, see 1935b, 1939. Of the secondary literature on Gierke, I cite here only Runciman (1997) because of its discussion of Maitland and its analysis of the challenge of Gierke and Maitland to Hobbes.
- ² Note, however, the still valid comments of qualification about the Laws of Edward the Confessor in Pollock and Maitland (1898, 103-04). See also Plucknett (2010, 256).
- ³ For a discussion, influenced by Gierke's work, of the juristic personality of the corporation in early English history, see Pollock and Maitland (1898, 486-510).
- ⁴ In fact only the first three of the nine chapters of Gierke (1939) deal directly with the politics and jurisprudence of Althusius. The later chapters—for example, on “the idea of federalism,” “the idea of the legal state,” “the doctrine of popular sovereignty,” and “religious elements in the theory of the State”—are quite important in themselves.
- ⁵ Or as Max Weber (1978, 711) formulated it, “the problem of juristic personality has usually appeared in legal history in close association with the problem of the capacity of organizations, especially public ones, to sue and be sued.” If sued, the question arises as to the scope of liability, that is, the property of each individual member or only that of the corporation? Pollock and Maitland (1898, 488) put the question of the personality of the corporation this way: “The core of the matter seems to be that for more or less numerous purposes some organized group of men is treated as a unit which has rights and duties *other than* the rights and duties of all or any of its members” (my emphasis).
- ⁶ So Mommsen's view; see note 181 (Gierke 1977, 129). I note here only one among a number of possibilities to account for such apparent discrepancies—so the argument of François Hotman in *Antitribonianus* (1567)—that the *Corpus Iuris* was a distortion of earlier Roman law, having been an imperial product crafted by Greeks and Byzantines. To pursue this possibility, overstated it seems to me, would take us too far afield.
- ⁷ *his autem potestatem facit lex pactionem quam velint sibe ferre, dum ne quid ex publica lege corrumpant.*

- ⁸ For the bearing of this observation on the early English borough, see Pollock and Maitland (1898, 676-88).
- ⁹ As widely observed and as part of another political tradition, *Institutes* 1.2.6 can be understood to imply that the *princeps* is only a representative of the people. *Digest* 1.4.1, “*Quod principi placuit, legis habet vigorem.*” For this alternative political tradition, see Gierke (1939) and Kantorowicz (1965, 158-59).
- ¹⁰ *Digest* 1.3.31, “*Princeps legibus solutus est.*” Whatever Ulpian may have intended by “*princeps legibus solutus est*”—for example, perhaps only that the state could in certain circumstances put aside private or police laws—the early modern tradition of common law took the statement to be an argument for absolutism, and so it was intended by its proponents at that time.
- ¹¹ Each of these understandings of the law is not without difficulties. For example, regarding the immemorial character of the law, see note 2 above.
- ¹² “*Atque ita certe tam auctoritatem e qua juris interpretatio pendeat eos habere manifesto in disputationibus forensibus scholasticisque est agnoscendum quam ornamento esse.*” This recognized significance contributed to forgeries, the most famous of which was the Donation of Constantine. Thus the evaluation of sources (both philological and historical contexts) achieves paramount importance, contributing to the development of a historical outlook. For a good, brief summary of the significance of Coke’s work, see Plucknett (2010, 282-83).
- ¹³ At this point it is worth examining the possible reasons for the English attachment to the common law, although doing so here would lead us astray from the problems at hand. Nevertheless and briefly, Selden’s (1647, 164) explanation for the faithfulness to the common law centered on *qua gentis hujus genio*; while Maitland’s (1901, 23-26) account for the resistance to the reception focused on a more institutional reason, the Inns of Court, i.e. although civil law was taught in university, “medieval England had schools of national law.”
- ¹⁴ For this development, see, for example, Kantorowicz’s (1957, 232-72) discussion of “pro patria mori.” There is a long history of authoritarian absolutism in the name of the public good. For one early example, that of Bavaria during the 15th and 16th centuries, see Strauss (1986, 259-62).
- ¹⁵ *Fiscus semper habet ius pignoris.*

REFERENCES

- Gierke, Otto von. 1900 [1881]. *Political Theories of the Middle Ages* (from volume 3 of *Das deutsche Genossenschaftsrecht*). Translated and edited by Frederic William Maitland. Cambridge: Cambridge University Press.
- _____. 1935a [1868]. "Introduction to Volume 1 of *Das deutsche Genossenschaftsrecht*." In John D. Lewis, *The Genossenschaft-Theory of Otto von Gierke*. Madison: University of Wisconsin.
- _____. 1935b. "The Nature of Human Associations" (1902) and "The Basic Concepts of State Law and the Most Recent State-Law Theories" (1874). In John D. Lewis, *The Genossenschaft-Theory of Otto von Gierke*. Madison: University of Wisconsin.
- _____. 1939 [1878]. *The Development of Political Theory (Johannes Althusius und die Entwicklung der naturrechtlichen Staatstheorien)*. Translated and edited by Bernard Freyd. New York: W.W. Norton.
- _____. 1958 [1913]. *Natural Law and the Theory of Society 1500 to 1800* (from volume 4 of *Das deutsche Genossenschaftsrecht*). Translated and edited by Ernest Barker. Cambridge: Cambridge University Press.
- _____. 1977 [1881]. *Associations and Law: The Classical and Early Christian Stages* (from volume 3 of *Das deutsche Genossenschaftsrecht*). Translated and edited by George Heiman. Toronto: University of Toronto.
- _____. 1990 [1868]. *Community in Historical Perspective* (from volume 1 of *Das deutsche Genossenschaftsrecht*). Translated and edited by Antony Black. Cambridge: Cambridge University Press.
- Grosby, Steven. 1995. "Territoriality." *Nations and Nationalism*, 1(2): 143-62, reprinted in *Biblical Ideas of Nationality: Ancient and Modern*. Winona Lake, Eisenbrauns, 2002.
- _____. 2009. "Philanthropy and Human Action." *Conversations on Philanthropy*, VI: 1-14. ©2009 DonorsTrust.
- Hayek, F.A. 1955. *The Political Ideal of the Rule of Law*. Cairo: National Bank of Egypt.
- Helmholz, R. H. 1990. *Roman Canon Law in Reformation England*. Cambridge: Cambridge University Press.
- Hobbes, Thomas. 1962 [1651]. *Leviathan*. New York: Macmillan.
- Kantorowicz, Ernst H. 1957. *The King's Two Bodies: A Study in Mediaeval Political Theory*. Princeton: Princeton University Press.

- _____. 1965. *Selected Studies*. Locust Valley, NY: J. J. Augustin.
- Maine, Henry Sumner. 1970 [1861]. *Ancient Law*. Gloucester, MA: Peter Smith.
- Maitland, Frederic William. 1900. "Introduction." In Otto Gierke, *Political Theories of the Middle Ages*. Cambridge: Cambridge University Press.
- _____. 1901. *English Law and the Renaissance*. Cambridge: Cambridge University Press.
- _____. 1903. "Moral Personality and Legal Personality." In *Maitland: Selected Essays*, eds. H. D. Hazeltine, G. Lapsley, and P. H. Winfield. Cambridge: Cambridge University Press, 1936.
- _____. 1904. "Trust and Corporation," In *Maitland: Selected Essays*, eds. H. D. Hazeltine, G. Lapsley, and P. H. Winfield. Cambridge: Cambridge University Press, 1936.
- Plucknett, Theodore F. T. 2010 [1956]. *A Concise History of the Common Law*. Indianapolis: Liberty Fund.
- Pollock, Frederick and Maitland, Frederic William. 1898. *The History of English Law Before the Time of Edward I*, 2nd ed. Cambridge: Cambridge University Press.
- Runciman, David. 1997. *Pluralism and the Personality of the State*. Cambridge: Cambridge University Press.
- Selden, John. 1647 [1925]. *Ad Fletam Dissertatio*. Edited and translated by David Ogg. Cambridge: Cambridge University Press.
- Strauss, Gerald. 1986. *Law, Resistance, and the State: The Opposition to Roman Law in Reformation Germany*. Princeton: Princeton University Press.
- Tocqueville, Alexis de. 1966. *Democracy in America*. Edited by J.P. Mayer and translated by George Lawrence. New York: Harper and Row.
- _____. 1998. *The Old Regime and the Revolution*. Edited by François Furet and Françoise Mélonio and translated by Alan S. Kahan. Chicago: University of Chicago Press.
- Tönnies, Ferdinand. 1940 [1887]. *Gemeinschaft and Gesellschaft*. New York: American Book.
- Van Caenegum, R. C. 2002. *European Law in the Past and the Future: Unity and Diversity over Two Millennia*. Cambridge: Cambridge University Press.
- Weber, Max. 1978. *Economy and Society*. Berkeley: University of California.