# The Personality of Public Authorities

This paper is about when associations, and in particular associations that are part of the state, should be treated as legal persons. I distinguish two forms of association – those that render coherent the agency of their members and those that are group agents – and argue that only the latter should be treated as persons. Following this, I discuss the conditions under which associations that are part of the state can legitimately be group agents.

## 1 Introduction

There is something puzzling about situations where public authorities are legal persons under private law. Here are two such situations.

1. The City of Toronto owns a lot of land: parks, offices, water infrastructure, bus depots and so on. Sometimes people protest on City property. The City can treat the protesters as trespassing against it as a landowner.[1] To be a trespasser, you just have to be there without the owner's consent.

2. The Northern Pipeline Authority was set up to regulate the Alaska Highway Gas Pipeline in northern Canada. It is an agency of the federal Crown and has not been given legal personality expressly by statute. Nevertheless, it can hire its own employees, entering contracts with them.[2]

While these examples are part of Canadian law, similar examples can be found in most modern legal systems. As a matter of positive law, public authorities can, in some circumstances, be legal persons; they can own property, enter contracts, commit and suffer torts, and so on.

There's something puzzling about these situations. Legal persons stand in private law relations with each other. Private law relations are typically thought of as appropriate to persons who do not have legal authority (though they may have factual power) over each other. Given that public authorities have authority over private persons, how can they can stand in private law relations with them?[3] Put differently, the state has a vertical relationship to its subjects; it governs us and acts on our behalf. Legal persons have horizontal relationships with each other, acting with and against each other. How can a public authority, which acts on my behalf, enter a contract with me, or exclude me from 'its' land?

This puzzle does not stem from a general difficulty about how the state can be subject to law. Of course, some have thought that the state, being sovereign, has to be legally unconstrained; and certainly, if the state were legally unconstrained, it would be problematic for it to be subject to private law. But it would be equally problematic for it to be subject to public law, for example administrative law, because public law, as much as private law, is a legal constraint on the state.

[1] *Stewart v. Toronto (Police Services Board)*, 2020 ONCA 255; see also *Cotton v United States*, 52 US 229 (1850)
[2] *Northern Pipeline Agency v. Perehinec*, [1983] 2 SCR 513
[3] As Hans Kelsen observed (1945, 202), this also poses a problem for demarcating private law: 'The difficulty in distinguishing between public and private law resides precisely in the fact that the relation between the State and its subjects can have not only a "public" but a "private" character'.

By contrast, the puzzle I am interested in arises even if we reject the thought that the state must be legally unconstrained; it is specifically about how the state can stand in private law relations with its subjects.[4]

One part of the puzzle, then, is how it can ever be appropriate for a public authority to be a legal person. Another part of the puzzle is to say *when* it is appropriate.

Consider the examples I started with. To my mind, it's unproblematic that employment by a public authority falls under the same rules as employment by a private company, at least where the employee is doing a job that could also be done in a private company. If such an employee is terminated by a public authority, the employee should be entitled to the same compensation as if they had been terminated by a private company, and the authority should not be able to raise any special immunity to such claims. By the same token, the authority should be able to terminate such employees under the same conditions as a private company, rather than being held to a public law standard of justification.[5] Here, the relation between the authority and the employee just is a relation between two legal persons.

By contrast, it is troubling that a public authority can exclude protesters arbitrarily in the same way as a private owner. This is not to say that the public authority can never exclude anyone from its land. But it should have to justify its decision to those excluded, in a way private owners do not. It seems inadequate to conceive of the relation between the protester and the authority simply as a relation between two legal persons: this would leave unexplained the basis for such a justificatory requirement. Thus, sometimes it seems appropriate for a public authority to be a legal person, and sometimes it does not. But what makes the difference?

In practice, it matters a great deal whether a given public authority is a legal person. On the one hand, it affects the legal powers the public authority has. Only if it is a legal person can a public authority own property and enter contracts in its own right. On the other hand, it affects the way the public authority can be held accountable by members of the public. Only if it is a legal person can a public authority be sued directly in private law (absent statutory intervention). Claimants often attempt to sue a department, tribunal or board only to be told that in the eyes of private law, the purported defendant does not even exist.[6] But while this matters in practice, there is little reflection in the cases about why some public authorities are persons and others are not.

There are, I think, two ways one might try to eliminate the puzzle. First, one might suggest that the positive law is wrong to ever treat public authorities as legal persons. While it would mean significant revisions to the positive law, this option has found occasional support in the cases. In *Paradis Honey*, Canada's Federal Court of Appeal held that it 'makes no sense' to regulate public authorities under 'an analytical framework built for private parties'.[7] Second, one might propose a pluralist theory of legal personality. On such a view, the basis for conferring legal personality on a public authority is not the same as the basis for conferring it on a private association. For example, it might be that private associations are legal persons for rights-based reasons, but we

[4] For further discussion of the subjection of the sovereign to law, see Kelsen (1945, 197) and Shapiro (2013, 75).
[5] Those who are involved in governmental functions, such as judges and other officials, are entitled to a higher degree of protection. See n. 27 below.
[6] See *Hollinger Bus Lines Limited v Ontario Labour Relations Board*, [1952] OR 366 (CA); *Smith v Human Rights Commission (NB)* (1997), 185 NBR (2d) 301 (CA); *Whalley v Royal Canadian Mounted Police Public Complaints Commission*, 2009 NSCA 122; *Gratton-Masuy Environmental Technologies Inc v Ontario*, 2010 ONCA 501.
[7] *Paradis Honey Ltd. v Canada*, 2015 FCA 89, at para 127.

extend personality to public authorities for consequentialist reasons. If so, public authorities should be treated as legal persons whenever this leads to the best consequences.

I'm not going to argue against these approaches at this point. Rather, I'm going to propose a framework for thinking about the legal personality of associations generally, and then consider how this framework applies to the state. If my framework is right, then the positive law is correct in sometimes treating public authorities as legal persons, and the basis for doing so is the same as the basis for conferring personality on private associations.

The main idea in my framework is that there are two forms of associations, and that whether an association should be treated as a person depends on which form of association it is. So, we will have to ask: what form of association is the state?

Before I begin, a word on terminology. I'm going to use the word 'group' to refer to a collection of human beings that can persist through changes in membership. That is, a group can remain the same even if some of its members depart or new members join. Not all significant collections of human beings are groups (consider 'the members of the Toronto Raptors in 2018'). I'm going to use 'association' to refer to a group that functions, for the most part, by requiring its members to follow certain rules. Examples include a political party with its constitution, a corporation with its internal rules, or the state with its laws. Not all groups are associations. A group may instead function primarily on the basis of personal attachment among its members (as in a family) or on the basis of commitment to the wishes of an individual (as in a cult).

I said that associations 'function' for the most part by requiring their members to follow certain rules. The functioning I am interested in is that associations coordinate the conduct of human beings. That is, they guide their members to act in some ways and not others, forming patterns in human conduct. There are other functions that some associations carry out, of course – providing social contact, or allowing for in-groups to differentiate themselves from out-groups – but I am not addressing these here. Some groups do not function at all, in this sense, being defined merely by a common characteristic (Tollefsen 2015, 3).

Finally, I take the state to be an involuntary association partly composed of a number of smaller associations, which I will refer to as 'public authorities'. The state is involuntary in that most people have no choice whether to be members of it. Public authorities include municipalities, branches of government (for example, legislatures), ministries and miscellaneous agencies, tribunals and regulators (for example, the Office québécois de la langue française). I'll refer to associations which individuals are free to leave – for example, unions, churches, clubs or political parties – as 'voluntary associations'.

## 2 Two forms of association

In this section, I distinguish two forms of association based on the way they relate to the purposes or ends of their members. An association may either coordinate its members' pursuit of their own ends, or it may coordinate members in collective pursuit of the association's ends. The distinction I am drawing is, I think, at the heart of similar distinctions drawn by Lon Fuller and Michael Oakeshott, and I will refer to their discussions in what follows; however, both Fuller and Oakeshott attach further characteristics to these forms of association that I do not discuss, so I am not claiming that my taxonomy exactly lines up with theirs.

## 2.1 Civil and enterprise association

The first form of association coordinates its members' pursuit of their own ends. The background problem here is that when we pursue our ends, the means we choose may conflict with each other. For example, we both have to write a term paper today; I choose to work at the desk by the library window, and so do you. Our choices are incompatible. The first form of association prevents or resolves such conflicts by requiring its members to follow certain rules in pursuing their ends. These rules do not tell the members what ends to pursue, but constrain the means they can take in pursuing them, such that the means members choose are compatible. (One such rule might be: whoever sits at the desk first gets to work there for the day.)

Oakeshott refers to something like this as 'civil association', writing that it specifies 'conditions to be subscribed to in seeking self-chosen satisfactions and in performing self-chosen actions' (1991, 158). Civil association, for Oakeshott, is defined by the absence of a common purpose; its rules do not tell us what to do, but ('adverbially') tell us how to do it. Fuller refers to this as the 'legal principle', writing that the law 'does not tell a man what he should do to accomplish specific ends set by the lawgiver; it furnishes him with baselines against which to organize his life with his fellows' (1981, 254).

The second form of association coordinates members in collective pursuit of the association's ends. The background problem here is that sometimes we may want to pursue some end as a collective, but the means we choose may fail to 'mesh' with each other (Shapiro 2013, 178). Suppose we all decide to set up a dinner club, with everyone agreeing to bring some item; without further planning, we may end up with ten bottles of wine and no food (cf Isaacs 2011, 47; Shapiro 2013, 129). The second form of association aims to pre-empt this kind of thing by requiring its members to follow certain rules in pursuing the collective ends. (For example, one person might be assigned to plan the dinner, and everyone else might bring what they are told to bring.) Along similar lines, Oakeshott refers to 'enterprise association', which he defines as 'common substantive action in pursuit of an agreed common purpose' (1991, 157). The rules of enterprise association are 'instrumental to the achievement of a substantive end' (1991, 140; cf. 114-115). Fuller discusses a similar idea of 'shared commitment', defining it as association around the pursuit of a particular purpose or purposes (1981, 85).

In the rest of my discussion, I'm going to borrow Oakeshott's suggestive terminology of 'civil' and 'enterprise' association, and sometimes I will say that members are associating 'civilly' or 'as an enterprise'. However, as mentioned, I'm not purporting to give an accurate interpretation of his own views of the distinction.

## 2.2 Associations and group agency

Another way to frame the distinction is in terms of agency. An agent is an entity capable of having and rationally pursuing ends. I'm going to suggest that enterprise association constitutes its members as a group agent – that is, a group that meets the conditions of being an agent – while civil association need not.

In ordinary language, we often talk about groups as agents. We say, 'The Conservative party is seeking to reach new immigrants', or 'the university believes that raising tuition is justifiable'. It might be argued that such language is imprecise or metaphorical. But it is so commonplace and so basic to our ways of thinking about groups that we should consider whether

we can simply take it at face value. Recent work on group agency suggests that we can do so without commitment to any mysterious 'group consciousness' or entities existing independently of their members.

While there are several different accounts of group agency, I am going to adopt Philip Pettit's account. He proposes that a group constitutes an agent when it manifests 'a purposive-representational pattern' in its conduct: a group agent has to (i) have group representations; (ii) have group purposes; and (iii) engage in group actions that make sense given its representations and purposes (Pettit 2009, 68; Pettit & List 2011; Tollefsen 2015). The third requirement means that group agents must display some degree of rationality; their actions don't have to be fully rational, but they do have to tend to be rational, and have some ability to recognize and correct deviations from rationality. For example, we may see the Conservatives' political messaging as a rational attempt to pursue the goal of reaching new immigrants in light of their beliefs about new immigrants' political preferences. Meeting conditions (i), (ii) and (iii) depends on how the group's conduct is best interpreted; it does not require the existence of a conscious point of view other than those of the members, nor of an entity independent of the members.

For present purposes, the important point is that when individuals associate in an enterprise – following a set of rules in order to pursue the association's ends – we can interpret their conduct as group action, attributing it to the group in roughly the same way we attribute actions to individuals. Importantly, it may be that some actions are attributable to the group but not to each or all of its members individually. This may be because the action in question is conceptually not the kind of thing that individuals can do: only a group, not an individual, can win a hockey tournament, or go on strike.[8]

Or it may be because of problems about aggregating judgments. To return to the dinner club, suppose that A, B, C, D and E have agreed to attend. A, B and C want the dinner to be vegetarian, while D and E do not; C, D and E want the dinner to be extremely spicy, while A and B do not. If the voters decide what to eat by taking successive votes on dietary restrictions and spice tolerance, the resulting extremely spicy and vegetarian meal cannot be attributed to A, B, D or E individually; each of A, B, D and E, if allowed to vote on the result directly, would not have voted for this meal. Nor can it be attributed to C alone – it's not as if C could dictate the result. The natural thing to say is that the decision was made by the group as a whole (Pettit 2007, 194ff).

By contrast, when individuals associate civilly, they need not constitute a group agent. They are pursuing their own ends, not some collective end, so they need not meet Pettit's second condition of having group purposes. When the library sets out the rule that whoever sits down first gets the seat, the users of the library who follow this rule are associating under a rule. But we do not constitute a group agent: I am working on my paper, you are working on yours, and we have no common project.

Stating this point requires some care, however. Associations can overlap, and one association may be contained within another. The individuals associating civilly need not constitute a group agent, but it is possible that some smaller group of rule-makers may constitute

[8] As Dickson CJ and Wilson J wrote (dissenting) in *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 SCR 313 at 367, 'There will, however, be occasions when no analogy involving individuals can be found for associational activity, or when a comparison between groups and individuals fails to capture the essence of a possible violation of associational rights. This is precisely the situation in this case. There is no individual equivalent to a strike. The refusal to work by one individual does not parallel a collective refusal to work. The latter is qualitatively rather than quantitatively different.' See also Rawls (1955, 25).

such an agent. For example, the library may have a committee whose job is to identify problems facing library users and come up with rules to deal with them. The committee may well be a group agent pursuing this end, though the users as a whole are not a group agent at all. This possibility will turn out to be relevant when we turn to the state.

### 2.3 Objections

The distinction between two forms of association may raise certain objections. First, it may be argued that the two forms are not mutually exclusive: an association may instantiate both forms if, by following its rules in pursuing their own ends, members thereby collectively pursue the association's ends. I agree that civil and enterprise association are not mutually exclusive, but the space for overlap is narrow. There are, I think, only two situations in which this may happen. (1) If, as an empirical matter, individuals' pursuit of their ends reliably has the effect of furthering the association's end. (2) If the association's ends are defined in terms of facilitating the members' pursuit of their ends – we could call this a 'thin' end.

An example of (1) is a free-market economy, on the empirical assumption that when everybody pursues their own economic interests, we collectively pursue some economic good, such as efficiency or prosperity. An example of (2) is an association whose end is *that its members be able to compatibly pursue their own ends*. By definition, such an association achieves its ends when its members are able to pursue their own ends compatibly.

There may be room for doubt even about (1) and (2). In both cases, individuals do not *set out* to pursue the association's ends. My decision to set up a coffee-shop may help the economy, but that is not my goal; I would still have set up the coffee-shop if it turned out that it was, on balance, harmful to the economy. So it could be said that these are not genuine instances of group agency. However, I don't think this objection goes very far. It depends on the assumption that, in genuine group agency, each member of the group has the association's end as their own end. As Shapiro has argued, modern institutions such as corporations, universities and states are characterized by *massively shared agency* – agency shared among large numbers of people, may of whom do not share the association's ends (2013, 149). These people take part in the association, and thus its agency, for their own purposes (such as making a living). So I do not want to assume that, because individuals don't set out to pursue the association's ends in (1) and (2), these fail to count as genuine instances of group agency. All I will say is that, given how narrow the space for overlap is, the distinction between civil and enterprise association still stands. It doesn't have to be exclusive to track an important difference.

A second objection that might be raised is that the two forms of association do not exhaust the field. There could be an association whose rules neither rendered compatible its members' pursuit of their own ends nor guided them in pursuing the association's ends. Such an association might, for example, constrain the means that members are allowed to take in order to increase the chances of conflict between them. However, I'm not sure this possibility matters very much, as I'm not sure there are any long-lasting and consequential examples of it. This description could, in a somewhat strained way, be applied to many games (the rules of musical chairs, for example, render incompatible the players' pursuit of the otherwise compatible end of all sitting down in chairs), but it might be better to say that the players are pursuing a common end by way of competition (Nguyen 2017; Suits 2005). It could be that some involuntary associations meet the description: for example, a *Hunger Games*-style situation aims to render incompatible its

members' pursuit of their own ends. But I doubt that there is much of interest to say about such associations, except that they should not exist and should be abolished if they do. Thus, in the rest of the discussion I'll proceed as if the two forms of association set out earlier are the only two that need to be addressed.

## 3 Associations and personality

With this distinction in hand, we can turn to personality. My suggestion will be that in civil association, personality should be attributed to the members, while in enterprise association, personality should be attributed to the association itself (though it may also be attributed to members).

### 3.1 Some preliminary comments on personality

What is a person? I'm not going to try to offer a definition, but will discuss some characteristics that are paradigmatic of personality, and then consider how they apply in the context of associations. To start, I take it that the concept of a person is both a relational and a relative concept. A person is related *to* other persons *under* a set of rules, whether moral or legal. Personality is relational in that a person must be related to other persons. This does not mean that someone who lives alone on an island ceases to be a person. Rather, they continue to be a moral person given that they are related to others under moral rules (though they may not have any duties under the circumstances); we might say that they are a potential legal person in virtue of the fact that, if others were to show up, they would be related to those others under legal rules. Personality is relative in that a person is related to other persons under a set of rules. This makes it possible for an entity to be a person under one set of rules but not under another. For example, some entity might be a legal person but not a moral person, or vice versa.

Moreover, a person is capable of acting and of being acted upon by other persons in a normatively significant way. The normative significance of persons' interactions is determined by the rules that relate them. Following Keith Graham, Neil MacCormick and Visa Kurki, we might distinguish the *active* and *passive* dimensions of personality – the roles of persons as agents and patients (Graham 2002, ch. 3; MacCormick 2007, 78; Kurki 2019, 95). The active dimension is that a person's behaviour towards others counts as normatively significant action in a way that the behaviour of a non-person does not. A person's action can be properly attributed to them, and they can be held responsible for it. A human being might be held responsible for breaking my window; a bird or a rock is not. The passive dimension of personality is that a person's choices and actions are capable of being interfered with by others, and we count this a bad thing. Human beings are generally taken to have the freedom to determine how to live their lives, while animals are not. Even if we think that freedom is outweighed by other considerations, an interference with freedom is still regrettable.

A paradigmatic person, then, is related to other persons under a set of rules that reflect both the active and the passive dimensions of personality. (There are also non-paradigmatic cases (Pietrzykowski 2017). In theory, we might have a category of entities that could wrong others but not be wronged themselves, or vice versa.) This idea of personality is a very general one. It is more general than the ideas of a moral person or a legal person, both of which specify the active and

passive dimensions in distinctive ways. However, it is already enough to see that personality plays different roles in associations, depending on their form.

### 3.2 How the two forms of association relate to personality

Civil association treats its members as persons. The members are related to each other under the rules, and the rules define the scope of their freedom of action in pursuing their ends and the consequences for exceeding that scope. In this way, the rules reflect both the active dimension of personality (in specifying consequences for members who act in ways that are incompatible with other members' pursuit of their ends) and the passive dimension (in protecting members' ability to pursue their ends). This is, I think, why Oakeshott says that civil association confers on its members a 'persona' (1983; Dyzenhaus 2015).

By contrast, an association that is enterprise in form *is* itself prima facie to be treated as a person. This follows from the claim, which I discussed earlier, that enterprise association constitutes its members as a group agent. Group agency supports attributing to enterprise associations both the active and the passive dimensions of personality.

To start with the active dimension, I've argued that an association may be properly held responsible for wrongs to other persons which its members are not, or not fully, responsible for. To take a trivial example, recall our dinner club. Imagine that a sixth person, F, is invited to the party, and that F is unable or unwilling to eat any of the extremely spicy vegetarian food (F will only brave spices for meat). When F asks who is responsible for the unfortunate choice of menu, none of the members on their own should assent; rather, the answer has to be 'all of us, together'. As Pettit puts it, holding only the members responsible for their own contributions in the context of group agency 'may leave a deficit in the accounting books' (2007, 194). Note that the same is not true in civil association. Lacking collective purposes, a civil association does not act as a group agent. So it doesn't make sense to hold the association responsible in its own right for the actions of its members, even taken all together.

Turning to the passive dimension, I also want to suggest, more tentatively, that an enterprise association can be wronged by interfering with its pursuit of its ends. I don't want to say, here, that enterprise associations and individuals are the same in all respects, or that their interests must weigh the same. However, it is natural to think that some kinds of association should be free to decide how to pursue their ends. For example, we tend to think that a political party should be free to determine its own platform, that a church should be free to decide its own doctrine, and that a university should be free to decide what courses to run and how.[9] Even if that freedom is outweighed by other considerations, the interference is regrettable.

The same is not true in civil association. We might regret interference with the freedom of the members, but given that the association itself does not choose and pursue ends, it cannot be wronged by interfering with its pursuit of its ends. This is not to say that it is impossible to interfere with a civil association in a way that is normatively objectionable: certainly one can interfere with a civil association's coordination of its members' conduct under rules. One might, for example, prevent the association from enforcing its rules, or create confusion about what those rules are, or

[9] This thought was at the heart of English political pluralism, as represented by writers such as JN Figgis, GDH Cole and HJ Laski. The pluralists also drew the inference that groups can be persons. For representative excerpts, see Hirst (1993) and for discussion, see Nicholls (1994).

try to replace them with a different set of rules. Or one might breach the rules in a way that shows disregard for the whole activity of coordinating members' conduct under rules. All of these kinds of actions may be wrong in the broad sense of violating a norm. However, they are not *wrongs* in the narrow sense of interfering with the association's pursuit of its ends.

Putting these points together, I would suggest that associations that coordinate their members' conduct in pursuit of the association's ends have a prima facie claim to personality: they can wrong other persons and can also be wronged themselves by interfering with their freedom to pursue their ends. By contrast, associations that coordinate their members' conduct in pursuing their own ends do not have such a claim to personality. All this said, I would add that an enterprise association's claim to personality is more easily defeasible than that of an individual. This may be because enterprise associations tend to have high-level fixed ends: education, say, or profit. This means that an assessment of the value of their ends may affect the weight of their right to freely pursue those ends. If we think that profit is not a good end to pursue, then we may be less concerned about interference with a company's freedom to act. At the limit, if an association's ends are harmful (say, crime), we may think its freedom to act has no weight at all. By contrast, individuals do not have fixed ends, but are always free to revise their ends. So their freedom of act is not tied in the same way to an assessment of the value of their ends.

There is more that could be said here, but I'm going to move on to apply these ideas to the treatment of associations within the legal system.

## 4 The relation between the two forms of association and the legal system

So far, I've distinguished two forms of association and suggested that civil association treats its members as persons, while an enterprise association has a prima facie claim to be treated as a person. I now want to argue that the framework I have set out so far should guide the attribution of legal personality in the legal system. To do this, I need to explain how the normative framework I've set out so far relates to the legal system.

I am going to make two interrelated claims. The first is that private law constitutes civil association among those subject to it. Given that personality is always relative to a set of rules, and – as I argued earlier – civil association treats its members as persons, we should expect there to be some kind of personality that applies specifically to those subject to private law. The second claim, then, is that being a bearer of private law powers, rights and duties is a kind of legal personality.

### 4.1 Private law as civil association

To establish that those subject to private law are in civil association with each other, I need to show that private law coordinates those subject to it in pursuing their own ends, but does not guide them in pursuing some collective end. To keep things contained, I'll focus on the rules of property and contract. I'm going to argue that, given the characteristic formality of these rules, persons who are related to each other under the rules are in civil association.

Property and contract law confer certain powers on persons. These include the power to exclude others from your property, the power to transfer your property to others, and the power to enter contracts with others. Property and contract law confer these powers by recognizing certain actions as valid exercises of these powers, and ultimately by coercive enforcement of the valid exercise of these powers. If A, the owner of Greenacre, refuses to allow B into Greenacre, the law

recognizes this as a valid exercise of a power to exclude, and will impose a sanction on B, should B enter Greenacre. If A and B enter an agreement that meets the conditions for contract-formation, the law recognizes this as a valid exercise of their power to enter contracts, and will impose a sanction on B, should B breach the contract.

The rules that constitute these powers are, by and large, formal or 'adverbial'. Whether A's action is a valid exercise of a power does not depend on what end A is pursuing or whether the end is a good one. If A owns Greenacre, A can exclude B from Greenacre for any reason, or no reason at all. Property lacks an 'internal norm' (Ripstein 2017, 244). Similarly, if A and B enter a contract, then, subject to some exceptions, they can agree on whatever terms they want, even if those terms are not good for society at large, or if they are good for C and bad for D.

The formality of these rules means that they do not tell those subject to them what ends to pursue. If A owns land, private law does not tell A what to do with the land. Nor does it tell A and B what contractual terms to enter into. Rather, the rules constrain the way that those subject to them pursue their ends, in such a way that their actions are rendered compatible. For example, A is permitted to use A's own property to pursue A's ends, and B is permitted to use B's own property to pursue B's ends, but A is not permitted to use B's property. While I haven't offered anything like a comprehensive treatment, this suggests that private law constitutes civil association among those subject to it.

### 4.2 Legal personality as personality relative to private law

A legal person is sometimes said to be any bearer of rights or duties. However, as Kurki has argued, if we hope to track the distinctions drawn by positive law, then not just any set of rights or duties is enough to constitute a legal person (2019, ch. 2). Many entities bear rights or duties but are not legal persons, as far as positive law is concerned. For example, a government department owes duties under administrative law, but it is not a legal person.

Kurki himself proposes an assemblage of rights and duties, including basic protections for life, liberty and bodily integrity, the capacity to own property, status as a potential victim in criminal law, the capacity to enter contracts, standing, and potential liability in criminal and tort law, as constitutive of personality in the legal system generally (2019, 95-96). I am not sure that there is a unified concept of legal personality that applies in the legal system generally; in any event, I am going to make a narrower claim. I suggest that as far as private law is concerned, a legal person is a bearer of private law powers, rights and duties: a potential owner of property, party to contracts, doer or sufferer of torts and so on, together with some necessarily incidental procedural rights, like the right to appear in your own name in a court proceeding.

To show that this is an instance of the concept of personality discussed earlier, I have to show that legal personality relates legal persons to other legal persons under a set of rules that reflect both active and passive dimensions. Now, it is clear that legal personality relates persons to persons. Persons can transfer property to other persons; persons can enter contracts with persons; only a person can commit a tort against another person. The rules that govern legal persons in private law also reflect the active and passive dimensions of personality. Those rules permit us to hold persons responsible for wrongs to others, while non-persons cannot be held responsible in the same ways. And, as I argued above, they protect legal persons' freedom to pursue their ends against interference from others.

It may be helpful to restate things in a more intuitive way. Let me start by addressing the grounds for attributing legal personality and then consider the point of the concept.

As to the grounds, I've suggested that a legal person is a potential bearer of the various powers, rights and duties that make up private law. If we think of private law as a network of legal relations, legal persons are the nodes in this network. They are the places where different legal relations intersect. Suppose that A bought Greenacre last year, and last month A entered a contract to allow B to park her car on Greenacre, and last week A refused to allow B to park her car on Greenacre. The fact that it is the same legal person A who did all these things is why B gained a license to park her car on Greenacre (if she had entered this contract with C instead, she would have gained no such right), and it is why A is now in breach of contract with B (if it had been D who refused to allow B to park her car, A would not be in breach) (Kurki 2019, 96). It is also why, today, B is entitled to a remedy against A, perhaps to be paid for out of the value of Greenacre. Asking whether some entity is a legal person (in this sense) is equivalent to asking whether it is a node in this network of private law relations.[10]

Now, what is the point of having such a concept? What purpose does it serve in our legal thinking? In my view, legal personality picks out the class of individuals and associations whose pursuit of their ends private law aims to facilitate. Let me unpack this a little. HLA Hart wrote:

> Legal rules defining the ways in which valid contracts or wills or marriages are made do not require persons to act in certain ways whether they wish to or not. Such laws do not impose duties or obligations. Instead, they provide individuals with *facilities* for realizing their wishes… (1961, 27)

These laws give us facilities for realizing our wishes: *our* wishes, not wishes set out in advance for us by the law. This is reflected in the fact, emphasized earlier, that property and contract law are, to a large extent, neutral among the ends that we may use them to pursue: property law doesn't much care what I do with my property, and contract law doesn't much care what I and my counterparty contract on. It seems plausible to see this facilitation as the aim of private law. But whose pursuit of their ends is private law aiming to facilitate? The answer, I suggest, is: legal persons (cf Finnis 2011, 19).

## 5 Legal personality for voluntary associations

Let's take stock. The question we are pursuing is: when, if ever, should public authorities be treated as legal persons? So far, we have made some headway on this question. First: that there are two kinds of associations, and that personality relates differently to them. A civil association treats its members as persons, while an enterprise association is prima facie to be treated as a person. Second: that legal personality in private law is an instance of this broader structure. In particular, private law relates those subject to it in civil association, and those so related are legal persons.

[10] You might wonder which is more fundamental, the network or the nodes. Is A capable of standing in these legal relations because A is a legal person, or is A a legal person because A is capable of standing in these legal relations? In my view, neither side is more fundamental. The concepts of *person*, *property*, *contract* and so on form what Christopher Peacocke (1992) calls a "local holism": each is partly constituted by its relations to the others.

Next, we should ask when associations are properly treated as legal persons. The answer that suggests itself is that enterprise associations are prima facie to be treated as legal persons, while civil associations are not. As a result, public authorities are properly treated as legal persons only when they are enterprise associations. This is the answer I am going to develop. I begin with voluntary associations and then consider the state.

### 5.1 Corporations and quasi-corporations as enterprise associations

Corporations are perhaps the most obvious enterprise associations. A corporation sets rules for its members (employees, officers and so on), and in following these rules, the members collectively act in pursuit of the corporation's ends (French 1979). For a business corporation, these ends typically involve maximizing profit, but one might also have a non-profit corporation whose ends involved, say, education or protecting the environment.

The idea that corporations are enterprise associations, and should therefore be treated as legal persons, seems plausible. But given that incorporation is typically a matter of simply registering in accordance with a statute, courts do not need to ask on a case by case basis whether a given association ought to be recognized as a corporation. As a result, there is less case law to use in determining whether this idea holds up as an interpretation of corporate law.[11] Instead of relying on corporate law, then, I propose to turn to associations other than corporations, and consider cases where courts have said that such associations *ought* to be treated as legal persons despite not being incorporated. (Sometimes these associations are referred to as 'quasi-corporations'.) I will suggest that these cases are best understood as attempting to extend legal personality to enterprise associations.

In the *Taff Vale* case, the House of Lords considered whether an injunction could be ordered against a union, which was neither a corporation nor an individual.[12] Granting such an injunction would mean extending to the union at least some characteristics of legal personality. In considering this question, Lord MacNaghten made the following comment on an argument made by the union:

> Mr. Haldane, indeed, was bold enough to say that if a wrong was committed by a body of persons, acting in concert, who were too numerous to be made defendants in an action, the person injured would be without remedy, unless he could fasten upon the individuals who with their own hands were actually doing the wrong. Then he was asked, what would he say to such a case as this: Suppose there were a manufactory belonging to a co-operative society, unregistered, and composed of a great number of persons (as there well might be, but for the provision in the Companies Act making illegal an unregistered trading society consisting of more than twenty members), and suppose such a manufactory were poisoning a stream or fouling the atmosphere to the injury of its neighbours, might it do so with impunity? Mr. Haldane said Yes, you must pounce upon the individual offenders. It seems

[11] Rock (2006) argues that corporate form, including legal personality, is a response to the difficulties about judgment aggregation discussed by Pettit. Put differently, corporate legal personality reflects the status of the corporation as an agent in its own right. Rock contrasts corporations with groups that choose to remain 'aggregate', such as 'a small law firm in which each lawyer has separate clients or a real estate agency in which the agents work on a straight commission'; in my terms, these might be more civil than enterprise.

[12] *Taff Vale Railway Co v Amalgamated Society of Railway Servants*, [1901] UKHL 1; see also *Bonsor v Musicians' Union*, [1955] 3 All ER 518 (HL).

> to me that this is a reduction to absurdity. I should be sorry to think that the law was so powerless…

The court found that the union was suable. Following this case, other courts have been willing to find legal personality in an association even where it has not been expressly conferred by statute. In Canada, unions and political parties have been held to have it.[13]

What is it that makes an association apt for legal personality, according to these courts? In the comment I quoted above, Lord MacNaghten refers to 'a body of persons, acting in concert'. Another way to put this is that legal personality is appropriately attributed to an association to the extent that members associate as an enterprise. The characteristics of group agents that I discussed earlier explain why legal personality is necessary here. First, a group agent may wrong others, without the wrong being attributable to the members individually. The manufactory discussed by Lord MacNaghten might be responsible for poisoning the stream, but it might be that none of the members individually could have made any difference to the outcome. It might also be that none of the members individually wanted to take all of the actions that would poison the stream, but that this was the only compromise the group could agree on. Thus, each member could honestly say that if it were up to him, the stream would have remained pristine. In this context, it may be impossible to 'pounce upon the individual offenders'.

Second, a group agent may be wronged by interfering with its pursuit of its ends. This is reflected in the fact that, when an association is found to have legal personality, it follows that the association is capable of holding property and entering contracts. As I argued earlier, these powers do not dictate which ends those who have them pursue; instead, they protect the person's pursuit of their ends, whatever they happen to be. Thus, by recognizing the legal personality of an association, we protect its pursuit of its ends.[14]

Pulling these points together, we can see that courts have recognized enterprise associations as having both the active and the passive dimensions of legal personality, and that these factors have led courts to favour recognizing such associations as having legal personality.

### 5.2 Objections

There are a few ways one might object to this view. First, it could be argued that legal personality is entirely in the gift of the legislature. Courts in cases like *Berry* and *Taff Vale* frame their conclusions as an interpretation of what the legislature must have intended, not as a free-standing recognition of legal personality solely on the basis that the association is an enterprise. So, it could be argued that these cases only show that under various statutes, the legislature intended (according to courts) to confer legal personality on specific associations. However, in considering this objection, we have to distinguish between the legislature's power to confer legal personality and the normative constraints on when it does so. I agree that the legislature has the power to confer legal personality as it chooses; my view is that there are normative constraints on when it does so: in other words, it *should* grant personality to some associations and not others.

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[13] *Berry v Pulley*, 2002 SCC 40; *Ahenakew v MacKay* (2004), 71 OR (3d) 130 (CA)

[14] See also *Berry*, at para 47. Before they were recognized as legal persons, unions were treated in Canada as complexes of contracts among their members. For an example of how this obstructed their ability to self-determine, see *Astgen v Smith*, [1970] 1 OR 129-167 (CA), which held that two unions could only merge with unanimous agreement.

Now, on the assumption that legislatures tend to do what they should, courts may look to the applicable normative constraints as a guide to what a legislature intended.[15] In cases like *Berry* and *Taff Vale*, courts are guided by the relevant normative constraint – that legal personality should be conferred on enterprise associations and not others – in deciding whether a legislature intended to confer legal personality on an association, despite not saying so expressly.[16]

A second objection is that legal personality should be attributed to all voluntary associations (i.e. all voluntary rule-governed groups), not just to enterprise associations. One response to this would be to claim that all voluntary associations are enterprise in form, but I don't want to say this; in fact, I think that there are voluntary associations that are civil in form, and that they are important. I just don't think they should be treated as legal persons.

One instance of voluntary civil association occurs when private law powers are used to set out the rules under which a group of people will interact with each other in pursuing their own ends. An example of this is where property rights in land are used to set out the rules that govern interactions between people on the land, and then individuals are invited onto the land to pursue their own purposes. Consider a quasi-public space – a mall, or a privately owned park or square in a city. The people who enter the space are not all there to pursue some common end; rather, they are there to shop, to work, to meet friends, to protest, to transit through. But the ways they pursue their own ends may conflict with each other, so the owner of the space may set out rules that apply to all who enter – perhaps it is prohibited to block a path or play music so loud it drives others away. In following these rules, the people in the space are associating civilly.[17]

A civil association like this should not be treated as a legal person (though the owner of the quasi-public space may be one). Particular users of the quasi-public space might wrong others, but given that there is no common end they are all pursuing, there is no basis for attributing that wrong to the association as a whole rather than the members individually. And because the association constituted by all the users of the space is not capable of acting, it cannot be wronged by interference with its pursuit of its ends. Of course, it may still be the victim of normatively objectionable conduct: someone might prevent the owner of the space from enforcing the rules, or tear down the signs telling the users what the rules are. Or someone might try to appropriate the space so that it is no longer a place where individuals can all pursue their own purposes.[18] But none of these are interferences with the association's pursuit of a collective end; conferring legal personality on the users of the space collectively would not be the right way of addressing them, because they are not properly addressed as private law wrongs. Rather, they undermine or preclude civil association among the users of the space; to the extent that civil association is a good thing, or even a need for human beings, conduct that undermines or precludes it is objectionable.

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[15] For example, on the assumption that legislatures should not violate fundamental rights, a court may infer that the legislature did not intend to: *R v Secretary of State for the Home Department; Ex parte Simms*, [1999] UKHL 33.

[16] Miller and Pojanowski write that 'the attribution of personality to artificial persons is not premised on recognition of their natural moral status and/or capacities' (2020, 330) and that '[a]rtificial persons do not have lives to plan or existential meaning to find' (333). While I don't want to say that associations are 'natural' or have 'lives', I do think they have moral status and capacities and can plan their pursuits, and that these pursuits may have meaning which deserves protection. The attribution of personality is premised on recognition of these facts, together with the fact that an association's pursuits may also wrong others. See also Graham (2001).

[17] See also Laskin CJ, dissenting in *Harrison v Carswell*, [1976] 2 SCR 200.

[18] For something like this idea in the case of a public space, see *Batty v. City of Toronto*, 2011 ONSC 6862 and Essert (2022, 76). The role of the public authority in these cases might be played, in the case of a private space, by its owner.

Hans Kelsen wrote that a legal person is the personified unity of a set of legal norms (1945, 93). ('Legal norms', in Kelsen's sense, may include the rules of a corporation or other association.) We can now see that Kelsen's claim needs to be qualified. A legal person is not the personified unity of just any set of rules. Rather, a legal person is the personified unity of a set of rules that constitutes an agent – thus, in the case of an association, an enterprise. Where a set of rules constitutes civil association among those subject to it, it is not properly 'personified'.

Third, one might argue that not all enterprise associations should be treated as legal persons. For example, a criminal organization might be an enterprise association, but should not be treated as a legal person. But my claim is that enterprise associations are prima facie to be treated as legal persons, not that they always must be. This entitlement may be outweighed by other reasons in particular contexts. In addition, as I noted earlier, the weight we give to an association's freedom to act might vary depending on the value of its ends; an end like crime might have no weight at all. Finally, however, we shouldn't exclude the possibility that it will sometimes make sense to personify such an organization – for example, if its victims wish to sue the organization in tort.

## 6 The state and its constituent associations

In this section, I turn to the state. I'm going to argue that public authorities can instantiate both civil and enterprise association, and that our conferral of legal personality on them should track this distinction, as with voluntary associations.[19] However, the fact that our relations to the state are largely involuntary leads to some additional constraints.

### 6.1 The state as civil association

It may seem obvious that the state instantiates civil association. This claim is, however, ambiguous, depending on whether we understand the state as subject-inclusive or subject-exclusive. A subject-inclusive state is a state understood as including all citizens and other subjects among its members; a subject-exclusive state is a state understood as including only officials and employees among its members, but not subjects generally (Lawford-Smith 2019, ch. 2). If the state is understood in a subject-inclusive way, the claim that the state instantiates civil association means that when a state exists and sets up a system of private law, the members of the state are related to one another in civil association. If the state is understood in a subject-exclusive way, the claim means that the state plays the role of maintaining civil association among its subjects (as the library committee discussed earlier has the role of maintaining civil association among library users). This distinction between subject-inclusive and subject-exclusive states will be useful later on; for now, when I say that the state instantiates civil association, I mean the conjunction of these claims.

One recent theory of law may cast doubt on the claim that the state instantiates civil association. This is Shapiro's view that law is social planning, where planning involves organizing behaviour by pre-empting the need for those subject to the plan to decide how to act. Shapiro is somewhat unclear on whether social planning always coordinates conduct in pursuit of a collective end. In one place, he suggests that social planning is sometimes necessary to ensure that we do not conflict in pursuing our own ends (Shapiro 2013, 155; see also Waldron 2011); in another place, he describes law as a 'universal means', that is, a means that can be used to plan the pursuit of any

[19] Oakeshott also concluded that the state was 'ambiguous' between the two forms of association (Friedman 1989).

end (Shapiro 2013, 173), but presumably always some end. If law is social planning, and if social planning always involves pursuing a collective end, then the state does not instantiate civil association, or at least does so only accidentally.[20]

Can this be right? Consider a state limited to enforcing private law (cf. Nozick 1974). While its subjects would be associating under a set of rules, they would not be pursuing a collective end. Now, either Shapiro must deny that this state has social planning, and thus law, or he must accept that social planning need not coordinate conduct in pursuit of a collective end. The former view is implausible, and on the latter view, Shapiro's thesis is consistent with the state's instantiating civil association.

### 6.2 The state as civil association *and nothing else*

Granting that the state instantiates civil association, some make the stronger claim that this is all it should do: it should never instantiate enterprise association. It would follow that the state can never be a legal person, at least as far as my arguments are concerned. I'm going to elaborate on this claim and offer some reasons for doubt about it, setting out two situations in which the state can be an enterprise.

In articulating a Kantian view of the state, Arthur Ripstein writes (2009, 196):

> [A] unilateral will always has some particular end, some matter of choice. The omnilateral will is different, because all that it provides is a form of choice, by providing procedures through which laws can be made, applied, and enforced. To return to Kant's initial example, when the state authorizes the acquisition of private property, it does not make the having of property, or the accumulation of wealth, its purpose. Its purpose is to enable individual human beings to have things as their own as against each other […]. When the state acts to sustain a rightful condition, […] it does not have the happiness of its citizens or the gross national product as its end; it only acts to preserve the formal conditions through which people can rule themselves.

On this interpretation of Kant's view, the state does not have 'some particular end' for which it acts, but rather aims to 'sustain a rightful condition', that is, a condition in which persons are able to pursue their ends without being subject to the will of others.

It follows from this that either the state can never be an enterprise association at all, or else it can only be one with a 'thin' end, namely to sustain civil association.[21] As Jacob Weinrib writes, articulating the latter version of the view (2016, 58):

> [T]he juridical situation of a private person differs from that of government. […] Unlike a private person, a government lacks the right to determine its own end. Government enters the world with a single obligatory end, the realization of a system of law that conforms to

[20] For other views on which the state must be an agent, see Endicott (2021) and McNulty (2022).

[21] I don't see a conflict between Ripstein's and Weinrib's versions of the view. Rather, in the passages above, they use 'end' differently. Both agree that the state can have an end if 'end' includes the thin end of sustaining civil association; both agree that the state cannot have an end if 'end' means a substantive end that is not a means to, or partly constitutive of, the thin end.

> the terms of its own justification. While private persons may direct their means toward the fulfilment of their own self-determined ends, the publicly authoritative means of government do not exist apart from their obligatory end.

The justification for the state is that without it, there is no way for us to interact as free and equal individuals – without the possibility of being subject to another's will. So, for Weinrib, the state comes into existence to set up civil association. While individuals and voluntary associations can choose their ends as well as, within limits, their means, the state can choose its means, but not its ends. The state's end is civil association.

This means that, even in a democratic state, the subjects of the state can choose how they will pursue civil association, but they can't choose to pursue other ends instead of, or alongside, civil association. This makes for a significant contrast with the practice of modern states. Often, such states pursue a number of ends, including equality of resources, the promotion of industry, environmental protection, and space exploration. Such states also pursue commercial ends – running businesses in order to make profits. The Kantian theory is, therefore, compatible only with a more limited form of democracy than some other theories of liberalism. It allows for collective decision-making on the means for pursuing civil association, but not of other ends, except when they are ways of achieving civil association.

The latter qualification is important. I am not suggesting that a state that instantiates only civil association has to be a minimal state. Positive provision of public goods and services by the state might be necessary to allow all subjects to pursue their ends without interference from others: it might be necessary to have roads, welfare provision, public schools and medical care, for example. It may also turn out that civil association requires some degree of equality of resources, promotion of industry, and environmental protection. All of these things are permissible for the state insofar as they are ways of achieving civil association. In short, 'there is … ample room for welfare concerns within the civil condition, once the idea of civil association is brought down to earth' (Nardin 2020).

Still, it remains the case that these things are permissible *only* insofar as they are ways of achieving civil association; to the extent that they go beyond being a means to civil association, they really are ruled out. This is a major limitation. To take one example, consider luck egalitarian accounts of distributive justice (Cohen 1989). According to the luck egalitarian, distributive justice requires that resources be distributed equally to all, subject only to differences that do not stem from 'brute luck'. So if A has more wealth than B because A works harder, this may be just, but if A has more wealth than B because A was born with it, or because A was born with greater talents, this is unjust. Now, suppose that some democratic state decides to set up a system of luck-egalitarian redistribution. For Kantians, this can only be legitimate if, and to the extent that, luck-egalitarian redistribution is a means to civil association. And, even on strong assumptions about how unequal resources can give some people power over others, it seems doubtful that every deviation from luck-egalitarian distributive justice is inconsistent with civil association. (After all, luck egalitarianism is grounded in an ideal of moral non-arbitrariness which has no necessary relation to civil association.) Some luck-egalitarian redistributions will be exercises of state

coercion which are not means to the end of civil association. It seems, then, that full luck-egalitarian redistribution is ruled out in advance.[22]

It is true, of course, that the idea of civil association is indeterminate, requiring states to specify how it will be pursued in a given context, and leaving room for different specifications in different places and times (Weinrib 2022, 17). Borrowing from Aquinas, we could say that a state must render determinate the idea of civil association in much the way that 'a craftsman must narrow down the general form *house* to this or that specific shape for a house' (*Summa Theologica* I-II, q. 90 a. 2). This does leave some room for democratic choice, but the point can only be pushed so far. The more we emphasize the indeterminacy of civil association, the harder it is to exclude illiberal legislation on the basis that it is not a means to civil association. At the limit, if we allow the state to stipulate that its ends are means to civil association, then the claim that the state has to pursue civil association becomes trivial. Moreover, it remains the case that legislation which is not plausibly a means to civil association is excluded.

I think this limitation is counterintuitive, but I'm not suggesting that on its own it is enough to lead us to reject the Kantian account of the state. Indeed, the ability of the Kantian account to robustly exclude illiberal legislation is also an advantage (Pallikkathayil 2016), one which should not be lightly abandoned. Rather, I suggest we look more closely at the justification for the account to see whether we can find room for the state as an enterprise.

### 6.3 The state as enterprise association

The justification for the Kantian account is that civil association is the only way the state can legitimately require its subjects to follow its rules. The state is not a club that all subjects have chosen to join. It is an involuntary association.[23] As such, it faces a question of legitimacy that voluntary associations do not. The thought is that it is not legitimate to co-opt individuals into pursuing some end that is not their own, but it can be legitimate to require individuals to follow rules that render compatible their pursuit of their own ends, leaving them free to choose what those ends are. So the state should only be a civil association, not an enterprise, and therefore not a legal person. We have reconstructed the first part of the puzzle we started with: how it can ever be appropriate for a public authority to be a legal person.

Supposing the argument is valid, we will have to reject one or more of its premises if we are to make room for the state as an enterprise. There are several implicit premises that might be doubted.

One implicit premise of this argument is that there is no end that all subjects can be guaranteed in advance to have (aside from the 'thin' end of being able to pursue your ends, no matter what they are). If there were such an end, it would be legitimate for the state to pursue it as

[22] Similarly, in Ernest Weinrib's treatment of this issue, the sole basis on which the state can pursue distributive justice is to mitigate the dependence created by a system of private rights: 'so far as distributive justice is concerned, the reason for attending to basic material needs is not that such needs are inconsistent with persons' welfare, but that under the conditions of human existence reciprocal freedom cannot be realized unless they are alleviated. … [T]he system of rights, through its protection of acquired rights under private law, creates the systemic possibility of dependence that must then be systemically addressed' (2022, 107). While the legislature has 'broad latitude', this is because 'different programmes of distribution can aim at the amelioration or prevention of dependence in different ways' (emphasis added) (2022, 112). It does not include distribution that has some other aim.

[23] On the conditions that would have to be met for the state to be a voluntary association, see Otsuka (2003, ch. 5).

an enterprise association. The fact that the state is an involuntary association would be no obstacle, as all subjects would be pursuing an end that was their own. While there is room to question this premise, this is a challenging route, and not the one I'm going to take. As Hilary Kornblith writes in a different context (1993, 367):

> any attempt to gain universal applicability by appeal to goals that all humans in fact have will almost certainly run afoul of the facts. Human beings are a very diverse lot; some of us are quite strange. It is hard to imagine making a plausible case for any particular goal or activity which is genuinely universally valued.

No matter which end we have in mind, can we rule out in advance the possibility that some will reject it, making it illegitimate to co-opt them into pursuing it?

Another implicit premise of the argument is that, if the state is an enterprise association, it is co-opting subjects into pursuing ends that are not their own. This may seem to follow from the nature of an enterprise association: if the state is an involuntary association, and it coordinates members into pursuing its ends, is it not co-opting them? But we should go slowly here.

The state 'co-opts' subjects into pursuing its ends, in a way that would be illegitimate, when it requires subjects to follow rules that engage them in the pursuit of an end that is not their own. This opens up two possible ways a state can be an enterprise but avoid co-opting: either it does not require subjects to follow rules that engage them in pursuing its end, or it ensures that the end is, in fact, shared by its subjects. As I will explain, the first way turns on the distinction between subject-inclusive and subject-exclusive conceptions of the state. A subject-inclusive state can, under certain conditions, be an enterprise association without co-opting its subjects; this is what happens when the state is a legal person. The second way turns on the possibility of a decision-making procedure that ensures acceptance of the group's ends.

### 6.3.1 The state as a legal person

The first way is taken when the state acts as an association alongside other associations and individuals. For example, the state may operate an industry on a commercial basis, or set up Crown corporations to do so. These situations have been recognized by courts in a line of cases parallel to the cases about unions and political parties I discussed earlier. In these cases, courts recognize public authorities as legal persons, despite their not having been expressly incorporated by statute.

In *Perehinec*, one of the cases we began with, the Northern Pipeline Agency had been set up as an agency of the federal Crown to regulate a pipeline in northern Canada. The question was whether the Agency could be sued in its own right for breach of contract. This depended on whether the Agency was a legal person, capable of entering contracts in its own right with employees, despite not being expressly incorporated by statute. In deciding that the Agency was a legal person, the Supreme Court of Canada wrote:

> [W]hether or not the statute had expressly made the Agency a body corporate, there can be no doubt that in the world of realities the plaintiff-respondent entered into a hiring arrangement with the Agency and not with the Crown. […] [I]t is a necessary concomitant that the Agency would thereby be empowered to enforce those hiring arrangements and that the other party to the agreement would be able to enforce the arrangement as against

> the Agency. Even though this Agency is not by explicit language in the statute creating it made expressly liable to suit, it is by necessary implication an entity which can be sued in an action for damages.[24]

The Court added that the Agency was 'as much an entity within its own sphere of operations as is a trade union'.[25]

The Agency in *Perehinec* was an enterprise association, but it did not require subjects to follow its rules unless they had agreed to. The statute setting up the Agency did not, for example, conscript anyone to work for the Agency. Rather, the Agency had to hire its own employees under contract law; they chose to work for the Agency, just as they might have chosen to work for another employer. As a result, no one was co-opted into pursuing the Agency's ends.

This point rests on the distinction between the subject-inclusive and subject-exclusive state. While the Agency was an enterprise association, its membership did not extend to all subjects; the only people required to follow the Agency's rules were employees, members of the subject-*exclusive* state. The subject-exclusive state is a voluntary association, or rather a series of voluntary associations: agencies, state-owned enterprises and so on, each with their own employees (Mack 2006, 263). This makes it less problematic for the associations that compose the subject-exclusive state to pursue their own ends. In situations like this, a public authority such as the Agency relates to its own employees as an enterprise association, but it relates to its involuntary subjects as a person alongside them in civil association. It does not require them to pursue its ends.

Recognizing the state as a legal person in these contexts means holding it to the same legal standards as any other legal person. In *Dunsmuir*, a public employee had been terminated and sought to challenge the termination on the ground that he had not been given procedural fairness. In deciding whether Dunsmuir was entitled to procedural fairness, the Supreme Court of Canada observed that in settings like this, the state 'is acting much as an ordinary citizen would, engaging in mutually beneficial commercial relations with individual and corporate actors'.[26] Importantly, the basis for the relationship between the government and Dunsmuir was contractual. Thus, the employment relationship 'should be viewed as any other private law employment relationship', without an additional public law duty of procedural fairness.[27]

However, this explanation does not apply where the state is setting rules that all subjects have to follow. Such rules apply to the subject-inclusive state, and the subject-inclusive state is an involuntary association. If the rules coordinate members in pursuit of a collective end, therefore, there is a risk of co-opting. This explains why courts tend to find that public authorities engaged

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[24] *Perehinec*, at 537-538

[25] *Ibid* at 539. See also *Westlake et al v The Queen in right of the Province of Ontario*, [1971] 3 OR 533 (CA) and *Teal Cedar Products Ltd v British Columbia*, 2019 BCCA 194; *Bank of Montreal v Bole*, [1931] 1 WWR 203 (Sask QB); *Public Service Alliance of Canada v Francis*, [1982] 2 SCR 72

[26] *Dunsmuir v New Brunswick*, 2008 SCC 9, at para 103, citing *Wells v Newfoundland*, [1999] 3 SCR 199, at para 22

[27] *Dunsmuir*, at para 122; *Air Canada v Toronto Port Authority and Porter Airlines Inc*, 2011 FCA 347 at para 52. Compare *U.S. v. Winstar Corp.*, 518 U. S. 839 (1996) at 880, 892-893. The explanation in *Dunsmuir* would not hold where the employee was really an official carrying out governing functions, such as a judge or the head of a national bank. In such cases, terminating the employee will often be a way of interfering with these functions – for example, influencing court decisions or monetary policy – and thus a way of shaping the rules which all subjects have to follow. Officials are often entitled to public law protections such as security of tenure, protections which are not so much for the benefit of the official as for the benefit of the public.

in making rules for the public – boards, tribunals, commissions and so on – are not legal persons.[28] In carrying out their rulemaking activities, bodies like these are contributing to sustaining civil association, not pursuing substantive ends alongside other subjects.

This also explains why, in the second case we began with, we found it troubling for the City of Toronto to use its property rights to exclude protesters arbitrarily from City property. In doing so, the City is using its powers as a legal person outside of the conditions under which those powers are legitimate. To be clear, my claim is not that public authorities never have the right to exclude people in such situations. Rather, in situations where they are making rules for members of the subject-inclusive state, public authorities should be subject to public law standards of justification. For example, their decision to exclude protesters from the park might be judicially reviewable for reasonableness and procedural fairness. The public authority only acts illegitimately when it claims the right to exclude arbitrarily, like any other legal person.

Of course, many public authorities cannot easily be classified as either civil or enterprise across the board. Many of them maintain civil association in some moments of their activity, and pursue substantive ends in others. My claim is that it is legitimate for public authorities to act as enterprise associations, and so to be legal persons, when subjection to their rules is voluntary rather than involuntary.[29] The upshot is that, if the state can create an enterprise association whose relation to the public is voluntary – for example, a state-owned enterprise – then that association should be treated as a legal person.

There might be a concern about the state's act of setting up the association in the first place. In setting up the association, the state has exercised its legislative powers. This may seem to suggest that the state-owned enterprise is, in all of its actions, an expression of the subject-inclusive state. Moreover, state-owned enterprises are often funded with taxpayer money. Doesn't this effectively conscript taxpayers into supporting whatever ends the association chooses to pursue?

I think we can maintain the distinction between the act of setting up the association and the acts of the association. Even if setting up the association is an act of the subject-inclusive state, the subsequent acts of the association are not. Members of the public are not required to follow the rules and participate in the agency of the association. They interact with it as a person alongside

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[28] See the cases cited in note 6 above. The distinction I am drawing is related to one that appeared in Canadian public law thinking in the 1970s and 1980s. Two reports proposed to distinguish administrative agencies, which perform administrative or judicial functions, from public enterprises, which produce goods or services for commercial purposes (Lambert 1979, chs 19-20; Linden 1985, 16-23). The latter report argues that administrative agencies should have special immunities, but public enterprises should not. This may be a corollary of the dubious legal personality of administrative agencies. Similarly, Canadian courts have held that a Crown agency may not be able to exercise an immunity where it is really acting on behalf of a private person: *Marek v. Cieslak* (1974), 4 OR (2d) 348 (SC); the Crown itself may not be able to exercise a special power in a context where the Crown is acting as an ordinary employer: *Nova Scotia Government Employees Association et al. v. Civil Service Commission of Nova Scotia et al.*, [1981] 1 SCR 211. The distinction I am drawing may also be at the root of the proprietary/governmental distinction in US municipal law and the 'dualité domaniale' in French civil law.

[29] This ambiguity often arises in cases involving speech by state employees, as has been recognized in American jurisprudence. While constitutional protections might not apply to speech pursuant to employment (*Garcetti v. Ceballos*, 547 U.S. 410 (2006)), employees do have a right to speak as citizens on matters of public concern. Many restrictions which are aimed at managing employees have the effect of constraining their speech as citizens. In these contexts courts ask whether the restriction was justified: *Pickering v. Board of Education*, 391 U.S. 563 (1968); *Connick v. Myers*, 461 U.S. 138 (1983); *Lane v. Franks*, 573 U.S. 228 (2014).

them in civil association.[30] However, this objection does show that the act of setting up such an association has to meet public standards of justification.

It might, relatedly, be argued that any exercise of property rights by a public authority is involuntary: unlike in contract, subjects are bound by the property rights of the public authority whether or not they agree. But it is equally true that subjects are bound by the property rights of private owners whether or not they agree. Conversely, contract law can also be used to make rules for members of the public, as when the government requires people to enter contracts with it on specified terms in order to participate in a government program.[31] So the distinction between voluntary and involuntary does not coincide with the distinction between contract and property.

### 6.3.2 Rawls on the Exchange Branch

The second way that the state can avoid co-opting is to ensure that the end it is pursuing is, in fact, shared by all of its subjects. This may seem to return to the earlier possibility of an end that all subjects are guaranteed to have. But what I have in mind here is different: a procedure which ensures that the end is shared by all subjects. Let me explain.

In *A Theory of Justice*, Rawls sets out two principles that he takes to characterize justice and then sketches the institutions that would satisfy these principles. These institutions include four 'branches' of government tasked with matters of resource distribution: the 'allocative', 'stabilization', 'transfer' and 'distributive' branches. Following this, Rawls adds the following curious remark. Supposing that the distribution of resources is just,

> It does not follow, however, that citizens should not decide to make further public expenditures. […] If a sufficiently large number of them find the marginal benefits of public goods greater than that of goods available through the market, it is appropriate that ways should be found for government to provide them. […] Let us suppose, then, that there is a fifth branch of government, the exchange branch, which consists of a special representative body taking note of the various social interests and their preferences for public goods. It is authorized by the constitution to consider only such bills as provide for government activities independent from what justice requires, and these are to be enacted only when they satisfy Wicksell's unanimity criterion. (Rawls 1999, 249)

Under Wicksell's criterion, a proposed public expenditure is voted on together with a description of how it will be paid for. A proposal is accepted only if it gains (approximately) unanimous approval. It will do so only if it makes some better off and none worse off (by their own lights), in other words if it is a Pareto improvement. In Wicksell's words,

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[30] This does require that the state not use its state-owned enterprises as tools for governing, for example shaping the economy. As a practical matter, this concern is most likely to arise in economies where the state owns a large enough proportion to be able to make such an impact. Brus and Laski (1989) argue that market socialism requires 'the renunciation by the state of all interest and involvement in enterprises' activity, except the return on and growth of assets (135-136), in short, the 'separation of the state as an owner from the state as an authority' (138).

[31] See *Canada (Attorney General) v Mavi*, 2011 SCC 30 at paras 47-50, where certain contracts were held to be 'creatures of statute' and therefore subject to public law standards of justification, as well as the cases discussed in *Connick*, at paras 10-11, where requiring public employees to swear a loyalty oath and reveal their political affiliations was held to violate their 'rights to participate in public affairs'.

> Provided the expenditure in question holds out any prospect at all of creating utility exceeding costs, it will always be theoretically possible, and approximately so in practice, to find a distribution of costs such that all parties regard the expenditure as beneficial and may therefore approve it unanimously. … It is a matter of comparatively little importance if perchance some individual secures a somewhat greater gain than another so long as everyone gains and no-one can feel exploited from this very elementary point of view. (Wicksell 1958, 89-90)

As Rawls explains, 'if the public good is an efficient use of social resources, there must be some scheme for distributing the extra taxes among different kinds of taxpayers that will gain unanimous approval' (Rawls 1999, 250). This may require a tax scheme under which those who benefit more from the public good also pay a greater share of its cost (Miller 2004, 132; Patten 2019, 159). An expanded procedure may be to package together multiple ends, along with how they will be attained, such that everybody is willing to agree to the whole package, even if they wouldn't agree to each of its elements on their own (Miller 2004, 133, 141-145).

The intuitive thought is that expenditures not required by civil association are nevertheless allowed if everybody agrees to them. If everybody agrees, nobody is co-opted into pursuing an end that is not their own. A modern state, on this picture, is guided by two justificatory principles. First, it has to legislate and provide the goods required by civil association. Second, as an enterprise association, it is permitted to provide additional goods when the decision to do so results from a procedure designed to ensure universal agreement. The state is (necessarily) a regulator of society and (potentially) a co-operative organization that can be used to pursue ends that make everybody better off.

In the case of ends attaining which requires not (only) spending money but also legally requiring or prohibiting certain conduct, Rawls' solution seems only to permit imposing the rules on those who agree with them (Patten 2019, 161). This is as much as saying that it does not permit coercive legislation at all; such legislation has to be justified as required by civil association. However, Rawls' solution does permit states to pursue public goods beyond those which are required by civil association. As such, it can justify many of the straightforwardly productive activities of modern welfare states (Heath 2020, 154, 162-164).

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