



INSTITUTE FOR LAW AND FINANCE  
*Goethe-Universität Frankfurt am Main*

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*Theodor Baums*

**The Organ Doctrine**

**Origins, Developments and Actual Mean-  
ing in German Company Law**

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# The Organ Doctrine. Origins, Developments and Actual Meaning in German Company Law

*Theodor Baums*

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**The Organ Doctrine. Origins, Developments and Actual Meaning in German Company Law***Theodor Baums*<sup>1</sup>

*André Prüm* has asked me to talk about “*La Théorie de l’organe*” supposing that this is a German invention. Well, we cannot claim the authorship or copyright for that, but it is true that this doctrine is still dominating German doctrinal thinking in company law. Let me first look at the historical development and background of this theory and then ask for its actual meaning and practical consequences.

**I. Canon law and political philosophy**

The deepened thinking about legal personality dates back to the development of canon law in the middle ages. The church was thought as a “*corpus mysticum*”. The head of the church is *Jesus Christ* himself, his vicar on earth the pope. The bishops and priests are necessary organs like the limbs and organs of a body, and all faithful together form the visible part of this *corpus mysticum*. The church was compared with man’s natural body. In the words of *Thomas Aquinas*:

“*Just as the whole Church is styled one mystical body for its similarity to man’s natural body and for the diversity of actions corresponding to the diversity of limbs, so is Christ called the “head” of the Church.*”<sup>2</sup>

It was also *Thomas Aquinas* who spoke about the Church organism already in an almost juristic sense. The “*corpus mysticum*” developed into the “*corpus ecclesiae iuridicum*”, a “legal body”, still with organs and limbs, made up by visible members, but distinct from them, having its own personality.

The roots of this anthropomorphic view and its liturgical content as well as the gradual “secularization” of the theory of the “moral” or legal person have been brilliantly described by

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<sup>1</sup> Prof. Dr. Dres. h. c., Goethe-Universität Frankfurt am Main; *professeur associé*, University of Luxembourg. Oral contribution at the centenary of the Luxembourgian Companies’ Act at Esch-sur Alzette, Oct. 15 – 16, 2015. The text and style of the contribution have been kept, only some footnotes have been added which may be useful for the reader. The article has been published in: André Prüm (ed.), *Cent ans de droit luxembourgeois des sociétés*, Brüssel 2016, S. 289 ff.

<sup>2</sup> Thomas AQUINAS, *Summa theologica*, cit. Ernst H. KANTOROWICZ, *The King’s Two Bodies*, Princeton, 7<sup>th</sup> paperback printing, 1997, at p. 200.

*Ernst Kantorowicz* in his famous book “The King’s Two Bodies”.<sup>3</sup> *Kantorowicz* also shows how this influenced political theory and the thinking about the state. The state was thought of as a “body politic”. *John of Salisbury* in his *Policraticus*<sup>4</sup> and others created specific equivalents among parts of the body and parts of the state.<sup>5</sup>

At the top of the body politic is the king who is its head. Here the soul, reason, intelligence, and sensations reside. Therefore the head is the dominant organ to which all other parts of the human body as well as the body politic are subject. Next, associated with the vital human faculties of vision and hearing, the seneschals, bailiffs, provosts and other judges are compared to the eyes and the ears of the body politic. The counsellors and wise men are linked to the essential function of the heart. As defenders of the commonwealth, the knights are identified with the hands. Because of their constant voyages around the world, the merchants are associated with the legs. Finally, laborers, who work close to the earth and support the body, are its feet.

This anthropomorphic view of the state as a “body politic” made up by the monarch as the head and the citizens as its limbs and organs was still held in the 17<sup>th</sup> century as the frontispiece of the “Leviathan”, which decorated the famous book of *Thomas Hobbes*, shows.<sup>6</sup>



<sup>3</sup> Cf. KANTOROWICZ (Fn. 2), at p. 194 ff. – KANTOROWICZ, a German refugee, was familiar with German legal thinking. His book relies heavily on Otto VON GIERKE’S writings, cf. Fn. 15, below.

<sup>4</sup> John of SALISBURY, *Policraticus* I - IV. Ed. K. S. B. Keats-Rohan (*Corpus Christianorum Continuatio Medieualis*, 117), Turnhout 1993.

<sup>5</sup> KANTOROWICZ (Fn. 2), at p. 200, 207 ff.

<sup>6</sup> Thomas HOBBS, *Leviathan, or The Matter, Forme, & Power of a Common-Wealth ecclesiasticall and civill*, London 1651.

## II. Public entities and chartered companies as legal persons in the Ancien Régime

Jurists transferred these views to other public entities than the state.<sup>7</sup> Also the old chartered colonial companies, the predecessors of our public companies, were thought to be “corporations” (derived from “corpus”) or, in the Latin texts, “universitates”.<sup>8</sup>

Several important consequences followed from this. First, although the mystic, moral or legal person is made up by individuals it is not identical with them. Even if all present members die or quit the legal person and are substituted by other individuals the legal person itself continues to exist. This distinction allowed inter alia for the separation of the rights and property of the legal person and its present members.

A similar distinction between the organs of the legal person and the individuals who fulfill their functions at present evolved. Although the organ of a legal person cannot function without an individual holding the respective position, the organ or “office” was thought to be separate from this individual. Thus the king (or “the crown”) and the individual holding this post could be distinguished. The individual can act in his capacity as the nominated organ or as an individual. If the individual dies or quits the post, the organ admittedly cannot function without another individual as successor. But it is the individual who dies, “the king never dies.”<sup>9</sup> This differentiation laid the ground for the development of duties of the individual vis-à-vis the office. Famously the English parliament even decided that solely the natural body of *Charles Stuart* be executed (in 1649) without affecting seriously or doing irreparable harm to the King’s body politic.<sup>10</sup>

A second observation is worth to be kept in mind. Although there may be a dominant organ holding the supreme power and entitled to giving instructions to the other organs and limbs, even this dominant organ cannot achieve anything without the functioning of the others. Each organ has its distinct functions and realm which the others cannot take over. A municipal corporation, a guild of merchants and a university have various organs with different competencies. The notion that a general assembly of all members of such corporations could supersede all other organs, overturn their decisions and even fulfill their functions would not be in accordance with the traditional legal concept of such an “universitas ordinata”. It is this understanding of the different and independent

<sup>7</sup> KANTOROWICZ (Fn. 2), at p. 302 ff.

<sup>8</sup> Cf. HOBBS (Fn. 6), chap. 22, who calls the chartered companies “*Body politique (Person in Law)*” as opposed to “private bodies”; see also Gerard MALYNES, *Consuetudo, vel, Lex Mercatoria: or, the Ancient Law-Merchant*. 3<sup>rd</sup> ed. London 1686, part I chap. XLII p. 150 – 153, who divides the “associations” into “societies incorporated” on the one hand and “private partnerships” on the other.

<sup>9</sup> KANTOROWICZ (Fn. 2), at p. 314 ff.

<sup>10</sup> KANTOROWICZ (Fn. 2), at p. 23.

roles of the various organs of an incorporated company which still characterizes the concept of “independence” of the management and the supervisory board in German stock corporation law as will be shown below.

### III. French revolution and German political romanticism in the 19<sup>th</sup> century

The French revolution led to the abrupt and radical abolition of all privileged guilds, corporations and intermediary associations between the individual and the state. The principle of equality, the demand of the *physiocrats* for the freedom of the business under the same laws for everybody as well as negative experiences with chartered companies fostered this development.<sup>11</sup> The *société anonyme* of the French Code de Commerce of 1808 is no longer a privileged or chartered corporation, exempt from the application of general laws, but a “*société*” based on a partnership contract between its members like other forms of private partnerships.<sup>12</sup> The members (“*associés*”) of the company appoint the administrators for a certain period of time and can dismiss them. The administrators are only “*mandataires*” which implies that they can be given instructions by the members.<sup>13</sup>

This deconstruction of the old legal persons and the reduction of the formerly chartered corporations to a partnership contract between the members, the empowerment of the members to appointing and dismissing the administrators at will, and the treatment of those as mere mandataries or agents of the members met with fierce resistance and disapproval by German legal thinkers in the nineteenth century, both in public and in private law. Among others, *Friedrich Karl von Savigny*, the foremost scholar in private law, but also minister for legislation of the Prussian monarchy and president of the Prussian State’s Council, criticized the contemporary trend to accredit the general assembly of the members of an “*universitas ordinata*” with the supreme power in such legal persons: “*This doctrine is based on the tacit and completely arbitrary assumption of absolute democracy in the constitution of all corporations. Essentially it is the political doctrine of sovereignty of the people, transferred to the legal persons in private law.*”<sup>14</sup>

<sup>11</sup> Cf. Anne LEFEBRVE-TEILLARD, *La société anonyme au XIXe siècle*, Paris 1985; Jean HILAIRE, *Introduction historique au droit commercial*, Paris 1986.

<sup>12</sup> Cf. the reference in Art. 18 C. d. C. to the rules of general partnership law in Art. 1832 ff. C. d. C.

<sup>13</sup> Art. 31 C. d. C. reads as follows: “*Elle [sc. la société anonyme] est administrée par des mandataires à temps, révocables, associés ou non associés, salariés ou gratuits.*”

<sup>14</sup> Friedrich Karl VON SAVIGNY, *System des heutigen römischen Rechts*, Vol. 2, Berlin 1840, at p. 332 (translation by the author, T. B.). However, SAVIGNY himself did not treat the stock corporations as *universitates stricto sensu* but as associations of co-owners; cf. his remarks in: *Das Obligationenrecht als Teil des heutigen römischen Rechts*, Vol. 2, 1853, at p. 113 and FN 1.



It was in particular *Otto von Gierke* who devoted his research and writings to the analysis of the law of legal persons, corporations and associations in German law.<sup>15</sup> He found profound differences between the Roman law of the “universitas” and what he called “Genossenschaften” (not to be reduced to cooperatives) in “Germanic” law. In particular he dismissed the “mandate theory” of the administrators of companies as an individualistic view influenced by the Roman law tradition.

*Gierke's* theories present a striking syncretistic mixture of (at that time) modern sociological analysis and legal theory, obscured by political backwardness and a romantic devotion to alleged Germanic roots in medieval and modern law.<sup>16</sup> According to *Gierke* the legal person is a real supra-individual social entity acting through its organs, not a *persona ficta*. The individuals who are members of these organs and fulfill their respective functions are not individuals acting as agents or mandataries of the members of the legal person. Nor are they guardians of a mere “legal” or fictitious person which is not capable of acting itself. Rather, they are part of a supra-individual “social body” living through them. In a private corporation the nomination and dismissal of the administrators is an act of self-organization of the legal person, not to be compared with giving or withdrawing a mandate by the shareholders to their agents. The latter is an “individualistic” concept that shows that traditional Roman law and the theory of legal personality influenced by it were not capable of developing adequate terms and rules for real life phenomena.

*Gierke's* theories proved to be important in company law, not as a whole, but at least as regards the terminology (general meeting, administrative and supervisory boards as “organs” of the company) and the rejection of the mandate theory. This was supported both for technical and for other reasons. Technically, it seemed difficult to understand the relationship between the board members and the company as a mandate as this mandate could not be given by the legal person itself if that was thought to be not capable of acting without an organ.<sup>17</sup> But there were also practical observations and political reasons behind this development.

#### IV. Reality in big public companies and legislative reactions

<sup>15</sup> Otto VON GIERKE, *Rechtsgeschichte der deutschen Genossenschaft*, Berlin 1868; *Geschichte des deutschen Körperschaftsbegriffs*, Berlin 1873; *Die Staats- und Korporationslehre des Alterthums und des Mittelalters und ihre Aufnahme in Deutschland*, Berlin 1881; *Die Genossenschaftstheorie und die deutsche Rechtsprechung*, Berlin 1887; *Die Staats- und Korporationslehre der Neuzeit*, Berlin 1913.

<sup>16</sup> Cf. the discussion with further references in Theodor BAUMS, „Organstellung” und „Anstellungsverhältnis”, reprint in: Tim Florstedt et al. (eds.), *Theodor BAUMS, Beiträge zur Geschichte des Wirtschaftsrechts*, Tübingen, 2012, at p. 114, 137 ff.

<sup>17</sup> There were other problems with the mandate theory; cf. for the details Theodor BAUMS, *supra* fn. 16, at p. 121 ff.

One important practical reason why the mandate theory was rejected was that it seemed not to be compatible with the reality in big public companies where shareholders did not act as principals and the board members not as mandataries or agents of the shareholders. Long before the famous analysis of the public corporation by *Berle and Means*<sup>18</sup> the industrialist and political essayist (and later German foreign minister) *Walther Rathenau* described the reality of management and control in the modern public corporation and what he called the substitution of its foundation (“*Substitution des Grundes*”).<sup>19</sup> However, the conclusions to which he came were quite the opposite of those drawn by *Berle and Means*.

The legal framework for stock corporations does not fit the reality any longer. The big public corporation cannot be compared to a small family business with few capitalists as shareholders and be treated in the same way. The management of the big public corporation is not controlled by the supervisory board nor by its shareholders. In particular the small investor who does not hold on to his shares but trades on the stock exchange is not interested in the welfare of the company in the long run. But his rights to information, to vote and to challenge shareholders’ conclusions do not mirror this. Big companies are institutions of national interest to which the legal framework has to be adapted.

One reaction was the introduction of mandatory co-determination on the supervisory boards of companies as early as 1920. During the twenties legal doctrine developed the emerging theory of the “enterprise as such” (“*Unternehmen an sich*”) which does not belong to the shareholders and has not to pursue their interests exclusively but also those of its employees, its creditors, suppliers and clients as well as that of the nation as a whole.<sup>20</sup> This discussion found its legal acknowledgment in the legislation of the Nazi area in 1937. The new Stock Corporation Act confirmed the “leader principle” also for the stock corporation by stating: “*The management board has under its own responsibility to lead the corporation in such a way as the welfare of the enterprise and its followers [“Gefolgschaft”; employees] as well as the common benefit for the nation and the Reich require.*”<sup>21</sup>

The time-bound wording of this paragraph was repealed later, in 1965. But the principle that the management board leads the company under its own responsibility, and cannot be given instructions

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<sup>18</sup> Adolf A. BERLE/Gardiner MEANS, *The Modern Corporation and Private Property*, New York 1932. – The late *Stefan RIESENFELD*, University of California, Berkeley, told the author (T. B.) that BERLE/MEANS knew RATHENAU’s publication (cf. the text) but did not want to cite it for political reasons.

<sup>19</sup> *Walther RATHENAU*, *Vom Aktienwesen. Eine geschäftliche Betrachtung*. Berlin 1918.

<sup>20</sup> Cf. *Frank LAUX*, *Die Lehre vom Unternehmen an sich: Walther Rathenau und die aktienrechtliche Diskussion in der Weimarer Republik*, Berlin 1998.

<sup>21</sup> § 70 (1) Stock Corporation Act of Oct. 1, 1937.

by the supervisory board or the shareholders' meeting, was upheld.<sup>22</sup> The same is true for the orientation of the duties of the members of the management board and the supervisory board. They are bound by the "interest of the enterprise" (*Unternehmensinteresse*). The prime goal is not maximization of the shareholder value, but of the value of the enterprise in the interest of all stakeholders.

## V. Practical consequences and concluding remarks

German company law differentiates between two forms of corporations: The Stock Corporation (Aktiengesellschaft; AG)<sup>23</sup> and the Limited Liability Company (Gesellschaft mit beschränkter Haftung; GmbH).

The legal design of the AG is based on the clear delineation of the tasks of the management of the company on the one hand and the rights and duties of the shareholders who provide the equity capital on the other. The members of the management board are appointed and dismissed (only for cause) by the supervisory board, not by the shareholders meeting. In groups with (quasi-)parity codetermination (more than 2000 employees) this nomination or dismissal requires a 2/3 majority of the members of the supervisory board of the holding company which means that the candidates have to be acceptable for the employees, too.<sup>24</sup>

The management board leads the company under its own responsibility. It cannot be given instructions, neither by the supervisory board nor by the shareholders' meeting. For certain important transactions the statutes of the company or the rules of procedure for the executive board may require the consent of the supervisory board. As has been mentioned before the purpose or "*but social*" of the company is not shareholder wealth maximization but the promotion of the interests of the company as a whole and thereby of all stakeholders. As a practical matter this seems to give the management more leeway although it probably does not mean too much of a difference if compared with a shareholder-oriented system.

However, all this means that the members of the management board are not and cannot be considered to be mandataries or agents of the shareholders. They are members of an "organ" with

<sup>22</sup> Cf. §§ 76 (1), 111 (4) (1), 119 (2) Stock Corporation Act of 1965.

<sup>23</sup> There are variations (Kommanditgesellschaft auf Aktien/partnership limited by shares; Europäische Aktiengesellschaft/Societas Europaea) which are left out here.

<sup>24</sup> The Codetermination Act provides for a cumbersome procedure when shareholder and employees representatives on the supervisory board have a dissent. In the end the shareholders' representatives would prevail if they are united.

unique functions distinct from the tasks of the other organs (supervisory board, shareholders' meeting) of the corporation. The legal doctrine in Germany takes account of this by assuming that the relationship between the members of the management board and the company is not a mandate in the civil law sense where instructions could be given by the principal. Rather, the relationship is called "organ position" (Organstellung; Organverhältnis) which indicates that its holder is in a relatively independent, unique position. The organ position is accompanied by a private law contract containing the individual conditions of employment of the respective manager.

When observing this regulation one could draw the conclusion that not only the factual circumstances in big public companies (in Germany as elsewhere) but also their legal design in German company law make them *manager-dominated*. That is true only with two constraints. First, also in this legal setting factual circumstances do matter. If a shareholder holds the majority of the shares, he can exchange the shareholders' representatives on the supervisory board<sup>25</sup> and thus influence the behavior of the management or even try to exchange the members of the management board, too. Second, it has to be kept in mind that the final say about the fate of the company lies with the shareholders. They cannot only dissolve the company or transform it into a GmbH which is not manager-dominated (cf. below). The shareholders meeting can also, with a supermajority of  $\frac{3}{4}$  of the votes represented at the meeting, give its consent to a "domination agreement" ("Beherrschungsvertrag"). This allows the dominant shareholder (mostly the holding company of a group) to give the management board of the subsidiary instructions even if this subsidiary has the legal form of an AG. Of course this comes with obligations of the dominant company vis-à-vis the outside shareholders and the creditors of the subsidiary.

Let me add one remark in this context. If one reads modern financial theory books written by (mostly Anglo-Saxon) economists, or law and economic articles written by docile young European law scholars, you will see that the managers of a company are considered to be "agents" and the shareholders to be their "principals". That does not mirror the reality in big companies (as is well known and perhaps deplorable), but it also does not describe the regulation at least of a German stock corporation correctly.

The legal design of the *GmbH* is quite different from that of the AG. If one wants to call the AG management-controlled, the GmbH is by its legal design *shareholder-controlled*. The shareholders appoint the executives and may dismiss them at any time (apart from companies with parity-

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<sup>25</sup> Formally, the dismissal of shareholders' representatives (without cause) requires a  $\frac{3}{4}$  majority of the votes cast in the shareholders meeting. Frequently the statutes of the companies provide for a simple majority.

codetermination). The executives of the GmbH can be given instructions by the shareholders' meeting as regards the management of the company (even in codetermined companies). Legal doctrine also holds here that the shareholders meeting and the management of a GmbH are "organs" of the company. But that does not really fit well with the legal design of this form. Rather than being an organ of the corporation, the shareholders *dominate* the legal person when acting on behalf of it by, e. g., imposing a manager on it. Also the managers are here, other than in the AG, mandataries who may be given instructions. The meaning of the organ theory here is only that there is a legal requirement that a GmbH has to have an executive director beside the shareholders' meeting who has also certain responsibilities and duties vis-à-vis other stakeholders like the creditors of the company or the public.

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