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# Jurisprudences of Jurisdiction: Matters of Public Authority

Shaunnagh Dorsett, Shaun McVeigh<sup>\*</sup>

*This essay examines a number of jurisdictional engagements that point to difficulties in joining or separating relations between public authority, jurisprudences of jurisdiction and the writing of jurisprudence.*

## Introduction

Questions of public authority have been intimately connected to those of sovereignty and civil authority and the government of territorial states. It is also the case that the study and dispute of forms of authority and public authority that stand alongside, apart from, or beyond, the state has also been a part of these debates. Our interest in this essay lies with drawing attention to some of ways in which jurisdictional thinking might be important to thinking about public authority.

Within ‘western’ legal idioms, questions of multiple forms authority, plural orders and rival jurisdictional arrangements are an everyday part of legal orders. This is so as a matter of ‘scope, scale and structure’ (Tomlins 2012; see also Sassen 2006). Concerns with plural and rival forms of authority arise across a whole range of juridical engagements, from the ordering of personal status and relations to the contest and re-alignment of norm generating and law-making activities of international institutions and global trade and finance. At present, jurists are engaged in efforts to articulate the forms of authority exercised by institutions such as the World Bank, NGOs or international corporations, as well as to elaborate an understanding of the relations of trade that might be realised through the pluralisation of regulatory forms and the privatisation of commercial norms (Cutler, 2003, 12-15). For international jurists, such concerns raise questions about how to establish legal formula that detach public authority from the civil authority of the sovereign territorial state (Ryngaert 2008).

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Professor of Law, Faculty of Law, University of Technology, Sydney; Associate Professor, Melbourne Law School, University of Melbourne. This essay has been presented as a paper at the symposium ‘Public Authority’ held at the *Whitlam Institute*, University of Western Sydney, July 2013 and the ‘Law as ... III’ symposium Irvine Law School, UCLA in March 2014. The authors would like to thank Anna Yeatman and Chris Tomlins respectively for the invitation to participate and the participants for their engagement.

In place of an order of sovereign territorial states, it is argued, it is possible to establish forms and formulations of public authority shaped by ‘global constitutional law’, ‘global administrative law’, and new forms of ‘administrative governance’ (Teubner 2012). For some, such accounts are best understood as developing forms of ‘global legal pluralism’, where overlapping forms of authority co-exist and clash without a clear determination of an ultimate or superior authority (Berman 2012, Twining 2009).

An understanding of the plurality of forms of authority and of legal ordering is also important and interesting to a number of other scholarly disciplines. For legal philosophers, socio-legal scholars and anthropologists, relations between public authority and the plurality of legal orders raise questions of description, status and conceptual ordering. The work of Brian Tamanaha, for example, has done much to show how attempts to do justice to the formation and interaction of legal orders requires an account not so much of legal pluralism, but of a pluralism that is capable of addressing a variety of normative orders (Tamanaha, 2007). Without this, he has argued, it is difficult to capture either the complexity of normative engagement or the reasons why comparative lawyers, anthropologists, global studies scholars all find ‘legal pluralism’ a phenomena worth studying.

For world historians, such as Lauren Benton, Richard Ross, Phillip Stern and Paul Halliday, the histories of Empire from the early modern to the modern period are best understood through forms of ‘legal pluralism’ (Benton and Ross, 2013). As a matter of political control and administration, they point out, the empires of European states and of the Ottoman empire engaged in both internal ordering of Empire and the study of rival and competing forms of authority. The same could be said with the military, political and juridical engagements with other empires and nations. In *Legal Pluralism and Empires: 1500 - 1800*, the authors variously address and practice as historians what Benton and Ross call a ‘jurisdictional legal pluralism’ (p.3). From the viewpoint of world history the fact of legal pluralism (the plurality of legal ordering) is best understood in terms of ‘the formation of historically occurring patterns of jurisdictional complexity and conflict’. Attend to this, they argue, and it is possible to make visible the histories of ‘legal conflict in Empires to the study of circulating ideas about legal pluralism’ (p.4).

While the engagements in this essay touch closely both on the social and legal concerns of legal pluralism and of the relations between the writing of history and jurisprudence, our interest is slightly different to those of international jurists, legal pluralists or world historians. Rather, we examine how authority is shaped and expressed through jurisdictional technique. We argue that what might be gained in holding a jurisprudence to forms of jurisdictional practices is a sense of how such practices authorise lawful relations and provide a way of exercising authority. We do not offer a legitimisation of the exercise of public authority, or a justification of the forms of public authority. Rather, we are interested in the ways in which the ‘authority’ of public authority takes on juridical form. We are also interested in how jurisdictional thinking provides a way of considering and locating the sorts of commitments a jurist holds in articulating public authority.

In this essay we look at three engagements of public authority which have been exercised at some remove from projects of joining public authority to civil (sovereign territorial state) authority. All three point to the expression of public authority through the techniques of jurisdictional practice. Our choice of examples addresses a range of concerns that have been taken up within the office (and traditions) of the common law jurist. Thus, here we focus on forms of association and accounts of lawful relationship as much as civil authority and sovereignty. The first engagement relates to the work of medieval jurists, and their characterisation of authority, which we understand or address in terms of (public) authority without sovereignty. The second is judicial - the corporate form and dominion of the East India Company. This can be understood as thinking about public authority and public consequence when that authority is held apart from sovereignty. The third is jurisprudential and addresses accounts of lawful relations found amongst the English pluralists in the first two decades of the twentieth century. The first two examples consider forms of authority that separate jurisdiction and sovereignty. The third example points to the difficulty that we now have in thinking about the ‘public’ of public authority without turning that concern, or joining that concern, to one of sovereignty. In a concluding comment, we briefly consider the prudence that is practiced through addressing the jurisdictional arrangements which shape the public character of transnational institutions.

## 1. Jurisdiction and Authority

A focal point of much of the modern understanding of public authority within jurisprudence is the concern with the forms of prestige, supremacy and subordination expressed in law and government. In this first engagement with authority we point to a number of ways in which jurisprudential formulations of public authority have been shaped by different and often rival accounts of jurisdictional arrangement and practice. Here we engage with a number of contemporary accounts of medieval jurists that link authority, jurisdiction and status or ‘public personality’.

For the historian Francesco Maiolo, the medieval formulations of authority show that there is both a specific history of the terminology of sovereignty and great variety in the formulations of jurisdictional arrangements. For Maiolo, the repertoires of jurisdiction developed by the medieval jurists covered a broad range of interlinked concerns. The widest concern of *jurisdictio* relates to establishing the authority of a supreme power charged with the obligation of securing justice and equity. Jurisdiction relates both to the authority and power to judge or act on a matter. The term ‘jurisdictional’ could qualify the activity of the jurispudent (discussing the rules of civil life), the juris doctor (elaborating and explaining the content of rules) as well as that of the judge (the authority to decide) and the legislator (exercising the authority to create new law) (Maiolo 2010, 141-142). In short, Maiolo treats jurisdiction as providing the juridical form of the understanding and exercise of authority.

The theological and political understanding of authority was most often shaped around the relations between *ordo ordinans* and *ordo ordinatus* or, in modern idioms, constituent and constituted authority. For political philosophers and public lawyers the elaboration of versions of this relation continues to shape distinctions between *auctoritas* and *potestas* (authority and power) and, in more complex ways, between *imperium* and *dominium* (Berman

1983, 114-115).<sup>1</sup> In this context, questions of authority and authorisation draw attention to the legal personality of who speaks and who hears or listens. What is of interest to us here are the ways in which *jurisdictio* is treated as a mode of *imperium* or of *dominium*.

Jurists, for the most part, come to be remembered by their projects. The medieval juridical projects which receive most attention today related to the great elaboration, defence and criticism of the dual forms of authority in Europe - that of the spiritual authority of the Pope and the temporal authority of the Holy Roman Emperor. The Roman lawyer and post-glossator Bartolus of Sassoferrato (Saxoferrato) (1314-1357) is today remembered for his reformulation of the relationship between the universal jurisdiction of the Holy Roman Emperor (as having (*de jure*) *dominium* over the world) and the jurisdiction of Princes (who had particular jurisdictions over territories) (Figgis 1905, 151). As jurist, he developed a procedural formulation of *jurisdictio* that took as its central concern the relation to *potestas* and *imperium* (Woolf, 1913). Bartolus set the question of jurisdiction in terms of the prerogatives of the *persona publica* (public personality) that relate to the conduct of office. It is this that shapes Bartolus' understanding of the superiority of the Emperor as the one who bears or carries all jurisdictions. In turn such formulations open up Bartolus' thought to what is now political theory: the characterisation of the right of each city to make its own laws as part of the law of nations and the jurisdictional arrangement of the juridical relationship between Pope and Emperor under the authority of God (Pennington 1984).

By contrast, for Maiolo, in the work of Marsilius of Padua (1275-1342) jurisdiction was not addressed directly through divine order, but was instead shaped in terms of human authority and the institutional ordering of deliberation. For Marsilius, the problem of order was shaped around the relation between the *auctoritas* of the divine constituent order (*ordo ordinans*) and

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<sup>1</sup> Berman 1983, 114-115. A more public law inflected account can be found in the histories developed in the work of McIlwain 1940 and more recently Loughlin (2010). These authors emphasise the division between *gubernatio* and *jurisdictio*.

the worldly constituted order (*ordo ordinatus*). For Marsilius, legal science did not mediate divine and human spheres. The *ordo ordinans* was natural and considered a part of natural reason. The constituted political order was not simply related, if at all, to the divine order. Its jurisdictional arrangements and forms of government were plural in almost all aspects: the Empire and the City had their origins in customary consent (Maiolo 2010, 207-209, 288). The important practical and conceptual distinctions of authority were shaped between *potestas* and *violentia* (right and might) rather than between *auctoritas*, *jurisdictio* and *potestas*. This, for many, has been viewed as a distinctly modern formulation of sovereign authority. However, as Maiolo has pointed out, this formulation reflects a particular concern with authority rather than with a general concept of sovereignty (Maiolo 2010, 151-152, 285). Like the jurist Azo, Marsilius argued that while the Emperor had the maximum power in the sense that the Emperor had the greatest power, it was the people who had the fullest power (*potestas*) because it was they who carried natural reason exercised in securing civil peace. In this way, writing as philosopher, rather than jurist, Marsilius reformulated the understanding of the plenitude or fullness of the jurisdiction of the Pope (ibid., 287). In our gloss here we have noted the way in which *jurisdictio* brings with it an account of authority and public personality, although not necessarily one shaped by distinctions of public and private authority. *Jurisdictio* provides the office of the jurist with a device for the technical means of ordering legitimacy and for ways of considering disparate accounts of legality.

A second jurisdictional theme, one that is also taken up by contemporary jurisprudence and historiography, is that of dual or rival spiritual and temporal sources and forms of authority. Recently, Anne Orford has presented Bartolus' account of jurisdiction as resonating with contemporary attempts to shape the practice of the United Nations Security Council and related institutions in terms of the jurisdictional arrangement of public authority (Orford 2011, 159-160). Orford argues that paying attention to the rival accounts of medieval

jurisdiction allows for a formulation of both the political and juridical concerns at issue in the development of the jurisdiction of international institutions. The development of the ‘responsibility to protect’ doctrine in the early 2000s established the responsibility of the ‘international community’ and its institutions to protect populations, particularly in the context of the committing of acts of genocide, of war crimes, of ethnic cleansing and of crimes against humanity (Ibid., 2). The responsibility to protect doctrine establishes a particular mode of expression of authority in the name of universal responsibility of protection, care or security and a particular technical means of elaboration.<sup>2</sup>

The early formulations of the authority of the United Nations were shaped around forms of dual arrangement that held the question of the legitimacy and rights of the state at the level of international law. The development of the institutions of the United Nations as an ‘international executive’ and of the doctrine of ‘responsibility to protect’, Orford has argued, shadows the contest of jurisdiction shaped by the attempt to create an international conscience that would give form to the values of a ‘secular church’ (Ibid., 172-174). A rival jurisdictional account would see the ‘responsibility’ to protect as being more a matter of securing civil peace and establishing the criteria of a civil authority. In contest is whether this civil authority should be in the United Nations or its security council. The difference between medieval thinking about the Holy Roman Empire and the United Nations, and between the rule of Princes and the account of executive rule developed by the first Secretary-General and then through the doctrine of the responsibility to protect, is that, for the latter, authority is caste in terms of function and purpose rather than status and office (Ibid., 148-150).<sup>3</sup>

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<sup>2</sup> For accounts that frame the ‘right to protect’ doctrine in terms of administration and government rather than jurisdiction see Anghie (2004) Mazower (2012).

<sup>3</sup> Peter Goodrich’s consideration of the office of the jurist places emphasis on relating jurisdiction to other legal devices or modes of establishing the conduct of lawful relations. Goodrich, for example, argues that jurisdictional forms are best engaged by addressing the visible and licit forms of representing relations of authority (Goodrich, 2014). For Goodrich, Bartolus’ work as a jurist should not be addressed solely through an emphasis on the forms of political authority made available to Empire and City, but should



In drawing apart the concerns of jurisdiction, public authority and state sovereignty, we note both the plurality of the forms of jurisdictional arrangement and practice and the juristic concern with a plurality of jurisdictional forms and devices of authority. To render public authority in terms of a jurisprudence we have also made a generalisation about the forms of inheritance of jurisdictional practice. Our gloss on Maiolo and Orford draws contemporary thought of public authority back to the technical forms of authority, status and jurisprudence. Thus, our first take on the jurisdictional form of public authority is to treat public authority as a status and as something like an assemblage of jurisdictional devices and practices.

## **2. East India Company: Corporations, Authorities and Thinking with Public Consequence**

Within the common law traditions, it is the mode and manner of the authorisation of lawful relations that offers the clearest account of the forms of public authority. The relationship between the sovereign, the body politic and public authority can be treated in a number of ways. In the early modern period it is the corporation and the office that are the legal forms that represent public authority and through which government is conducted. Phillip J Stern, for example, has characterised both English and colonial government in terms of the plurality of forms of corporate association (Stern 2013, 21-48). The East India Company is one such corporate arrangement through which trade and government were conducted. Here we follow the relation between public authority, sovereignty and the jurisprudence of public law by paying attention to jurisdictional practices found within the common law tradition. In doing so, we examine some of the difficulties of holding public authority and the particular juridical status of the sovereign apart or, indeed, in close relation. The East India Company provides one possible account of public authority within a common law idiom. We ask what it might

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be approached through his *Treatise on Arms and Signs* (Bartolus, 1538 discussed Goodrich, 2014, 50, 63). It is through emblems and signs, argues Goodrich, that the ordering of public life - its offices, duties, rights, privileges - is given form. In medieval terms, emblems provide the mark of office. In a modern, less institutional idiom, they stage or bring to life the norms or rules of action. The task of the ordering of appearances and of bringing law to life is part of the honour of the jurist (Ibid., 213-214).

mean as a matter of jurisdiction for a juridical order to separate the work of public authority from the supposition of the sovereign territorial state. Rather than considering the authority of the East India Company as simply established through delegated prerogative (*East India Company v Sandys* 1 Vern. 127; 23 ER 362 (1682)), a point to which we return later, we describe its authority as established through the projects of jurists (and judges as jurists), who address a range of charters and treaties, express authority through jurisdictional arrangements, and measure the material effects which have ‘public consequence’.<sup>4</sup>

The East India Company’s first charter gave exclusive right to trade in a defined area.<sup>5</sup> This was an extraordinarily large trading zone, including ‘East Indies, in the countries and parts of Asia and Africa, and into an from all the Islands ... of Asia, Africa and America ... beyond the Cape of Bona Esperanza to the Streights of Magellan’ so long as this did not include areas in the actual possession of other Christian Princes. The East India Company was by no means the only company with such rights to trade. By the end of the seventeenth century there were over 30 such trading corporations. Similar charters in the seventeenth century included that of the well-known Levant Company (1581) and Hudson’s Bay company (1670).<sup>6</sup> Some charters, of which the Hudson Bay Company was an example, also granted proprietary interests ‘in free and common socage’.<sup>7</sup> This was meant to give the right to hold and govern foreign lands. Such grants were more commonly associated with settlement and plantations than with trading companies. No such grant was made to the East India Company. Rather, they were granted exclusive rights to trade: ‘the entire and only Trade and Traffick, and the whole entire

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<sup>4</sup> For recent works considering *Sandys* (albeit through a different lens) see Stern (2011), Poole (2013). For a brief discussion of the East India Company, ‘public’ and the State see McLean (2004).

<sup>5</sup> For all charters referred to in this essay see Shaw (1887).

<sup>6</sup> For the Charter of the Levant Company see Cecil T Carr (ed), (1913, 30). For the Charter of the Hudson’s Bay Company see Hudson’s Bay Company (1931).

<sup>7</sup> The HBC charter of 1670 purported to grant all the territory draining into Hudson’s Bay in free and common socage to the governor and company and to make them the ‘absolute Lordes and Proprietors of the same Territory lymittes and places aforesaid,’; see *ibid.* On the validity of this grant see Foster (1990).

and only Liberty, Use and Privilege of trading and trafficking ... to and from the said East-Indies'. It was further provided that the East Indies 'shall not be visited, frequented or haunted, by any of the Subjects of us, our Heirs or Successors' unless they were granted permission in writing by the company.

While the Charter granted the company the power to make 'reasonable Laws, Constitutions, Orders and Ordinances' its jurisdiction was in fact not particularly extensive. In keeping with its purpose as a trading entity its legislative and judicial powers were limited and indistinct, both exercised by the executive of the company. The 1600 Charter authorised the Company to make such laws for its own good government and the better advancement and continuance of its trade. Laws made only applied to company servants and punishments were limited to fines, forfeitures and imprisonments.

Under the 1661 Charter much more extensive powers were granted. The charter extended jurisdiction with respect to all those who lived in the company factories (settlements) and gave the 'power to judge all Persons, belonging to the said Governor and Company, or that shall live under them, in all Causes, whether civil or criminal, according to the laws of this Kingdom'. Even in the eighteenth and nineteenth centuries, after the Company is considered to have established a territorial presence, this remained a complicated system of mixed modes of jurisdiction based in subjecthood and residency (status).<sup>8</sup>

The 1661 Charter was extended to Madras, the earliest Presidency, in 1665. In turn, each of the Presidencies developed its own judicial arrangements, operating under auspices of the 1661 Charter. In Madras some regularised tribunals began to operate in 1678, only a couple of years before *EIC v Sandys* (Jain 2009, 15). The extent to which the company asserted its own authority can be seen by its issuing in 1687 of a charter to establish the Madras corporation and the establishment of a Mayor's court modelled on the one operating as part

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<sup>8</sup>

For one of many examples see *Nagaph Chitty v Rachumamah and Kenehpah* 1 Strange 132 (1802).

of the London corporation. This was authorised under powers of making laws (1600 charter) and of governing settlements (1683 Charter), thereby ensuring it was subject to Company control (Jain 2009, 17). Within the Presidencies, therefore, to the extent that there was a functioning legal system, jurisdiction depended on status - subject and resident. Later, as the company moved out from the Presidencies, a complex array of local courts were established. In the areas adjacent to the Presidency towns – known as the *mofussil* – the East India company courts – the *adalats* – operated. These operated under a supposed delegation of power from the Moghuls and administered the personal laws of the Hindus and Muslims and ‘justice, equity and good conscience’ (Jain 2009, 252-253). English law was not binding on non-subjects. Beyond these land bases, the Charters of 1683/1686 authorised the company to establish Admiralty courts in order to seize the ships of ‘interlopers’ within their areas of exclusive trade (Bruce 1810, 496).<sup>9</sup> These courts did not last that long – they were largely defunct by the late eighteenth century – however they did constitute a significant form of jurisdictional arrangement that shaped the juridical authority of much of the company’s exclusive trading zone (Stern 2011, 60).

This short description of the East India Company has emphasised the ways in which in the seventeenth century its authority and lawful relations were organised around the jurisdictional arrangements of charters and local practices. Courts were constituted under locally made company by-laws. It was not until 1726 that a new charter established uniform courts for the Presidencies that derived their authority from the Crown rather than the company. In the seventeenth century the jurisdictional arrangements of the East India Company were not straightforwardly territorial: that is, organised around an exclusive authority over land and

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<sup>9</sup> This arrangement was a response to the increase in litigation caused by ‘interlopers’ (those who traded without a licence from the East India Company), such as in *East India Company v Sandys*.

population. Nor was jurisdiction bound to property (*dominium*).<sup>10</sup> While the company came to be seen as having territorial (spatial) form in the eighteenth century, at this period its jurisdictional arrangements still largely relied on the main form of jurisdictional attachment of the early modern period – status (here subjecthood and residency).<sup>11</sup> It is tempting to characterise the Company as having territorial authority - after all they asserted jurisdiction over non-subjects within the areas of the Presidency. However, to the extent that this was territorial, it was not territoriality in the sense of the modern territorial state.<sup>12</sup>

Regardless of whether the East India Company was, or could be, regarded as ‘sovereign’ in the seventeenth century, there was little attempt to argue in this period that it had territorial form (based on land). Rather, its authority (whatever the character) relied on the delegated prerogative. Or, as described above, its authority (whatever its character) can be described as relying upon and created by a plethora of local jurisdictional arrangements which attached its jurisdiction to status rather than just territory. In 1684 the ability of the East India company to exclude ‘interlopers’ was brought before the Court of King’s Bench in *East India Company v Sandys*. The Company had sought an injunction to restrain Sandys from trading in the East Indies, claiming such activity to be an infringement of their exclusive right of trade. Sandys in turn argued that he had a right to trade freely, and that in any case the Company’s patents were void because they granted an unlawful monopoly. At heart, therefore, this was an argument about the nature and scope of the King’s prerogative, and as such the case was argued several times before a panel of judges in the King’s Bench. Counsel for Sandys based their argument on the traditional freedom of the seas, and the inability of

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<sup>10</sup> In *East India Company v Sandys* there were arguments (largely accepted by the court) that the company’s possessions were in the nature of a franchise. However, this argument went not to the character of the company’s authority in the East Indies, but to the question of whether some kind of proprietary interest could be found on which the company could found an action: see arguments of Holt for the company (at 382) and the judgment of Jeffries CJ (at 553-4).

<sup>11</sup> This is generally dated to the mid eighteenth century: see Buchan (1994).

<sup>12</sup> Jain reminds us that there was no concept of territorial law in India at the time as such - all criminal law was Muslim, but civil inheritance, succession and others were personal depending on religion (Jain 2009, 10).

the Crown to grant a monopoly. Holt, for the Crown, relied on the authority of the Crown to prohibit trade with infidels (Coke's 'perpetual enemies').<sup>13</sup> More generally, only the King could regulate trade - because it was based on treaties made with foreign princes. So the King exercised the prerogative to regulate trade in order to defend the nation from evil. He could regulate that which might be injurious to public detriment - in other words those matters which have public consequence.<sup>14</sup> The company's powers were derived from the King. Thus, the characterisation of the Company's authority in this case (to the extent this is characterised at all) is one of delegation of Crown prerogative.<sup>15</sup>

If we change registers for a moment, and return to a modern jurisprudential idiom, what is being authorised is a mode of government, but what is more important is that it is a jurisdictionally arranged mode of authority. By paying attention to forms of jurisdictional practice we can see that the incidents of government are ordered through a range of statuses, rather than primarily through territory. The case does not turn on sovereignty, but on the sovereign's jurisdiction. In our account we have followed common law forms in order to show the ways in which jurisdictional thinking has a significant role in establishing arguments of authority.

Read in terms of a jurisprudence of jurisdiction and the conduct of lawful relations, we have argued that *EIC v Sandys* is concerned with forms of common law argument. At one level, for the jurist this formulation draws out, or makes visible, that the contest of forms of commercial and political arrangement in the *Sandys* case is shaped through jurisdictional practice. This is an argument for paying attention to the ways in which authority is authorised

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<sup>13</sup> *Calvin's Case (The 'post-Nati')* 17 Co Rep. 1a. (1608).

<sup>14</sup> *East India Company v Sandys*, Holt for the Crown, 375-380 : "... when the doing of an act may be to the public detriment, the King hath power to restrain it, and it cannot be done without the King's licence. ... A man cannot enclose a park without licence of the King; in that case he takes nothing of anybody, but such inclosing and turning profitable ground into a place of pleasure, may be of public consequence...".

<sup>15</sup> Two years after *Sandy's* a similar result was reached in *The Company of Merchant Adventurers v. Rebow* 3 Mod. 126; 87 Eng. Rep. 81 (K.B.) (1687).

and exercised – here with public consequence. At another level, as we will discuss in the final section of the essay, the linking of public authority through the jurisdictional arrangement of public consequence is taken up again in the modern address of international institutions. There contemporary jurisprudence shapes such relationships by establishing public authority through a variety of ‘technical means’ that in turn create matters of public consequence.

### **3. Plural Forms of Authority**

In our third example we turn attention to some of the difficulties of detaching the practices of jurisdiction from those of sovereignty and territory in the early twentieth century. To do this we turn to the ‘English pluralists’, especially Frederick Maitland (1850-1906) and John Neville Figgis (1866-1918), and more briefly, Harold Laski (1893-1950), in order to follow some of the ways in which they tried to configure forms of political and legal association apart from the (British) sovereign territorial state - or at least apart from the sovereign territorial state as conceived by Hobbes and Austin (Hirst, 2005; Runciman 1997). What was at issue for the ‘English pluralists’ was the quality of lawful relations and the maintenance of a ‘living law’.

In recent work Janet McLean has pointed to what might be taken as a thematic dispute that orders the understanding of the British (English) state within the idioms of the common law tradition (McLean, 2012). The concern with the need for a distinct (corporate) personality of the state is contrasted with the view that the officials and institutions of government are governed more or less by private law (Dicey) (Ibid., ch 1). These concerns are elaborated along with a closely related polemic concerning the dangers of either a centralised or a dispersed (plural) authority of law and government. At the end of the nineteenth century these concerns might have been cast in terms of contrasting views of John Austin, who viewed the state and sovereign will in terms of non-transcendent facts of authority and power, and the British Idealists, such as T. H. Green, who framed the state and sovereignty in terms of moral

personality (Austin 1832; Green 1941; Nicholson 1990). The work of the English pluralists addressed the conducts of life made available through contemporary theories and practices of political association. They investigated a range of corporate forms and associations that existed independently from the sovereign territorial state. Taking up Gierke's accounts of *genossenschaft* and *genossenschaftsrecht* (of the forms of fellowship and laws of relationship), the English pluralists attempted to give form to, and acknowledge the life of, forms of association such as religious bodies, guilds, professional and neighbourhood associations and trade unions (Maitland 1900).

For contemporary political and legal theorists the political ambition of the pluralists to sidestep the doctrine of absolute state sovereignty has been a place for the engagement of public authority in the international domain. Contemporary debates between 'global legal pluralists', 'global administrative lawyers' and public international lawyers, suggest that the concerns of the English pluralists have not yet been exhausted (Bevir 2012).<sup>16</sup>

Thematically, our first interest here, however, is not whether pluralists such as Maitland and Figgis find juridical and political forms that escape the centralised authority of the sovereign territory state, but the difficulty they have in formulating their efforts to do so (see Figgis 1913; Laski 1917; Laski 1919). To make this point we follow (and re-direct) Carl Schmitt's attack on the inability of the legal pluralists to articulate and respond to the political realities of sovereign (State) power, as well as their unwillingness to engage with the conducts of life made available through the presence sovereign authority (Schmitt, 2000). Following on from this, our second theme in this section is the emergence of the contemporary ordering of public authority and sovereignty under the rubric of 'function' and 'organisation'. We follow the consequences of how questions of authority are formulated as they move from the juridical

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<sup>16</sup> Although this is not directly the subject of this essay, making the 'english pluralists' a central part of the genealogy of legal pluralism rather than treating pluralism as a 'social fact' establishes a different range of topics and jurisprudences through which to engage plurality (Twining 2009, Bevir 2012).



forms of jurisdiction and the authorisation of lawful relations to (juridical) forms of function and the description of social (and political) tasks.

The separation of the language of public authority and of the authority of the state has invited a number of forms of investigation. For Gierke and the English pluralists the focal point of engagement with public authority lay with the quality of forms of collective association and with the juridical understanding of corporate personality. For Gierke (and Maitland), the question of establishing forms of public authority independent of the state rested on finding forms of association (real forms) that are capable of existing independently of the tacit or delegated authority of the state. For Maitland, as historian, this concern was shaped by the ways in which jurists have understood the variety of forms (corporations and trusts) that gave shape to associations and lawful relations. What Maitland addressed was the variety of forms of English, and common law, fellowship: the Post Office; trade unions; parishes; municipal corporations; and so forth. All these, argued Maitland, had a corporate existence independent of the Crown (Maitland 2003). For Figgis, it was the Church that provided the model of non-state forms of group life and juridical form (Figgis 1913). For Cole it was the form of the guild association (Cole 1920). Here, we track the ways in which attending to the language of jurisdiction (or its absence) make the plural forms of public authority visible (or invisible). By associating East India Company and English pluralists we are drawing again on the link between the status of the legal actor (sovereign, corporate) and the practice of jurisdiction.<sup>17</sup>

Maitland's work is significant because it engages both in disputing of the juridical form of the state and in developing historical understanding of centrality jurisdiction and procedure within the common law tradition (McLean 2012, 71). What is striking is the difficulty that Maitland has in joining these engagements. Maitland wrote the history of the common law in

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<sup>17</sup> The connections between corporate form, trust, and the example of the *East India Company* are briefly discussed by Maitland in his essay 'Trust and Corporation' in Runciman and Ryan (2003). See also the discussion by Stern (2013).

terms of its practices of procedure and jurisdiction. In doing so he emphasised the practicality and specificity of both the form and knowledge of law (Maitland 1909). The moral and political concern with ‘real’ associations was given corporate but not jurisdictional form.<sup>18</sup> In order to sharpen the sense of the difficulty of separating public authority and jurisdiction we turn to the work of John Neville Figgis, the English pluralist who most sharply contested the authority of the state. His book *Churches in the Modern State* (1913) developed Gierke's theory of association and the corporate personality of the state by casting late medieval and early modern relations of Church and State in terms of authority and jurisdiction. The Churches were, for Figgis, the last forms of association that existed independently of the state (Figgis 1907). Figgis joined Gierke and Maitland in framing questions of politics in terms of association, but his account of the ‘ordered life of the community as a whole’ returns to the work of Johannes Althusius and Althusius’ account of the state as made of (and by and for) associations (Figgis 1912, 210; Runciman 1997, 131). For Figgis, Althusius and Gierke establish the priority of life over the dead letter of the law - and so the quality of lawful relations. It is through the arrangements of jurisdiction and authority that Figgis elaborated his account of organic or ‘real’ (or natural) corporations and forms of association. Where it was possible in the medieval and early modern periods to understand relations of church and state in terms of two jurisdictions, and to treat state and church as related through plural authorities, this is not something that could easily be argued in England or Scotland at the beginning of the twentieth century. There is another sense in which Maitland and Figgis might be joined, and that is in their dissent from the way in which the Church of England was established (Levy 2012).

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<sup>18</sup> For example, in his essay ‘Moral Personality and Legal Personality’, Maitland, somewhat speculatively, links the first systematic accounts of the use of the collectivity of the ‘publick’ to the agency of the carrying of the public debt: Runciman (2003, 62-74). See also our comments on Annelise Riles’ discussion of ‘collateral’ later in this essay.

The centrepiece of Figgis' *Churches in the Modern State* is his discussion of the Free Church Case.<sup>19</sup> While *Churches in the Modern State* presents a series of linked elaborations of the 'nature of human life in society', and the possibilities of the state as a *communitas communitatum*, the *Free Church Case* provided a kind of jurisdictional limit point to his argument (Figgis, 1913, ix). In 1900 the Free Church and the United Presbyterian Church (UPC) were united. The UPC did not adhere to the Establishment Principle, a central tenet of the Free Church. The case was brought by a minority of the 'Wee Frees' (those who did not accept the Union, some 27 out of 500). They claimed that the decision in regards to the holding of the property of the Free Church held by a Trust Deed was *ultra vires*. They argued that the Church had no power to change its doctrines and therefore the property was no longer being used on behalf of the Church as originally intended.

For the majority of the House of Lords the question was a simple one. It was a reasonably straightforward matter of trusts law that turned on the interpretation of the trust deed: 'the original purposes of the trust must be the guide'.<sup>20</sup> For them (and we take the Earl of Halsbury as representative), what was at issue therefore was not the authority and jurisdiction of the Church, but rather the meaning of the Establishment principle (in particular) as a guide to the original meaning of that deed. Halsbury acknowledged that the Church arrogated to themselves the 'competence' to determine their own own creed etc, but subordinated that authority and competence to a reading of the deed. For Figgis this formulation showed the way in which legal form denied the life of religious associations.

By contrast, Lord Macnaughten's judgment includes a jurisdictional account of the arrangements of Church and state law. What is at issue for him was not the strict reading of the trust deed: this was not, as for the majority, just a question of interpretation. Rather he

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<sup>19</sup> *General Assembly of Free Church of Scotland v Lord Overton & Ors* (1904) AC 515 (the 'Free Church Case').

<sup>20</sup> See for example the judgment of Lord Halsbury, *Free Church Case*, 617.

acknowledged the foundation of the Free Church proceeded on the basis of the ‘exclusive authority of Christ in his own house’ and its position ‘that in all matters touching the doctrine, government and discipline of the Church, her judicatories possess an exclusive jurisdiction, founded on the Word of God’.<sup>21</sup> Macnaughten neither saw the church as entirely disconnected with the State, nor outside the authority of the state, nor beyond the ultimate jurisdiction of his court. However, for Macnaughten, to fail to acknowledge the inherent ability of the Church to determine matters within its own jurisdiction was to fail to see the Church as a living organism (636).<sup>22</sup> He maintained a jurisdictional competence for the Church and accepted its jurisdictional arrangements.

For Figgis, the Free Church Case should have been understood both politically and juridically as part persecution and part failure to acknowledge that the Church exists (Figgis 1913, 36). He pointed to what he saw as the oppressive absurdity of the state passing judgment on the theological meaning of the covenants of the Church. For Figgis lawful relations embodied, or should embody, real relations. The *Free Church Case*, he argued, denied the possibility of the church developing as an organic body by stipulating that the life of the church be viewed only in terms of documentary interpretation (Ibid., 33, 40; Geary (2005)). He joined this specific concern with his more general one that associations should have an organic existence independent of the ways in which the State recognises or purports to grant their existence (Ibid., 46). In contrast to the imperial power of the state, Figgis offered an account of (English) liberty of association expressed as part of a spiritual being (Ibid., 51).

Coker, amongst others, has pointed out the ways in which Figgis’ argument seems to repeat accounts of sovereignty and the primacy of the form of the State (Coker 1921). We would emphasise the way in which Figgis, like Gierke, criticised the ‘absolute’ state and struggled

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<sup>21</sup> *Free Church Case*, 632, 640, quoting from the arguments of Counsel and from Church documents.

<sup>22</sup> *Free Church Case*, 636.

to characterise political and juridical authority (royal prerogative, ultramontanism etc). By emphasising the jurisdictional quality of the argument, we can see that the majority in the *Free Church Case* proceeded on the basis of a single account of the sources of authority. Lord McNaughten's judgment, which does not rely on the prospects of establishing a 'living' association, notes the plurality of sources of authority, the practice of (religious) association, and plurality of jurisdictional arrangements. What is problematic for Figgis is the way in which jurisdictional thinking is associated with forms of absolute sovereignty, rather than with the rival arrangements of jurisdiction of living or real associations (here of the Church). Figgis did not argue that the church is a separate law or a rival jurisdiction. Instead he wanted to point to the authoritarian executive rule of both Church and State. In doing so he lost the plurality of jurisdictional thinking – although he did maintain the shape of his criticism of the relation of Church and State (Strears 2012, 50-52).

Our interest here lies with what happens when you change emphasis from the unity or otherwise of the corporate personality and the plurality of forms of association and turn attention to the forms of association and authority made available by jurisdictional practices. Maitland's account of the common law forms of action drew attention to the particular technical means through which lawful relations are formed. In turning to the plurality of corporate forms, Maitland was interested in the forms of association. Runciman, for example, finds Maitland's reluctance to address ontology of corporate association and its forms of lawful life a matter of disciplinary reticence (legal historians do not like to write about being (ontology) Runciman 1997). We think Maitland's reluctance to extend his account of the authorisation of lawful relations might be better interpreted as a desire to hold forms of association to the technical means of their representation through jurisdictional practices.

Where Maitland and Figgis posed the question of association and public authority in terms of an escape or departure from absolute state authority, later English pluralists such Harold

Laski and Cole addressed public authority by redefining state authority in terms of function. In his *Studies in the Problem Of Sovereignty*, Laski also addressed the *Free Church Case*. Like Figgis he was concerned with political facts. In so doing, he placed emphasis on the contest of the authority of the state to ‘intervene’ in church affairs. Laski also drew a link between the challenge to the state as an idea and acts of resistance to secular power – a concern that is framed around nineteenth century accounts of church and state more so than Figgis’ invocation of medieval thought. Laski, like Figgis, assumed a community that is capable of advancement and coherent ordering (Laski 1916). However his community is individualistic and self created.

In establishing their accounts of association Figgis and Laski, like Cole, turned their analysis from group personality to function in order to characterise the conditions of a pluralistic political society (Loughlin 2005). Figgis, did not did not seek to abolish public authority or power but tasked it with the ‘function’ of making laws for the flourishing of associations (Figgis, 1913). In *Authority in the Modern State*, Laski characterised public authority in terms of function and purpose (coordination of lawful relations and associations) (Laski 1919). In so doing attention is turned from legal form and procedure to that of state administration and government. The sense of the importance of administration and social function is emphasised most strongly in the work of Cole and Laski. Laski’s formulation of ‘administrative’ areas responds to the view that the state should be seen as one association amongst many. Questions of ordering, legitimacy and loyalty should be understood accordingly (Laski, 1925). The ‘functional’ for writers like Cole ran against representative models of both politics and law. It did so because the universal character of individuals prevents their will and purpose being limited (Hirst, 1997, 31). What interested Cole then was how associations were brought into being and maintained their associations and relations (Cole 1920, Ch 3). In Figgis and Laski’s response to the Free Church case, questions of status and effect lost their

juridical form because they were detached (though not entirely separated) from jurisdictional thinking. As a consequence public authority came to be measured through the social understanding of the life of civil association rather than through the juridical understanding of the conduct of lawful life (expressed as lawful relations).

Contemporary jurisprudential understanding and criticism of 'function', and particularly 'function' as understood by the English pluralists, has been heavily inflected by Carl Schmitt's assessment of English pluralism in 'Ethic of State and the Pluralist State' (1929) (Schmitt, 2000). Schmitt's analysis focuses on both the pluralists' unwillingness to address the facts of (State) power and their unwillingness to live with political forms of representation. Schmitt rejects liberal individualism (or liberty) and pluralism because they refuse the substantive order and ordering of the State in favour of an 'agnostic' state or 'clearing office' (Laski 1919). While Schmitt notes the way in which the pluralists have addressed what appears to be the empirical situation of the state - it is held in place by many associations - his point of criticism lies with the failure of the pluralists to consider the means of political unity in the face of inevitable conflict. Schmitt defended the substantive unity of the state. Where public authority for pluralists has been shaped around the cultivation of the forms of discrete association, for Schmitt the plurality of conflicts of existence is held in place by the unity of the state.

Much of the effectiveness of Schmitt's argument turns on his sense that the unity of the state is a matter both of authority (*auctoritas*) and power (*potestas*). Schmitt also ties this concern to that of the representation of authority, or rather to the need of the sovereign to present authority (Kelly 2004). While the pluralists drew attention to the institutions of the state and the conditions of the formation of associations, they did so by turning relations of law into social relations. What the pluralists are left with, argues Schmitt, is a species of private authority (Kelly, 2004, 129).

Holding on to jurisdiction has allowed us to emphasise two elements of public authority. The first says something that is obvious in the context of ‘English pluralism’: many of the concerns of authority are better expressed in terms of the meeting of jurisdictions or rival jurisdictions than in terms of a movement ‘beyond’ law or the state. (*The Free Church Case* also offers a warning, from within common law jurisprudence, of the many ways in which it is possible to judge without sensitivity to jurisdictional concerns.) The second element is the quality of the ‘life’ or ‘spirit’ of law. At the risk of over-generalisation, the English pluralists were content to leave the law of the state as administration of forms of association (and its law as ‘life-less’). Where Schmitt pointed to the ways in which functionalism misses the point of political unity and reduces the importance of agonistic politics, we have noted the ways in which the English pluralists rendered opaque what is carried and disputed by way of jurisdictional form.

#### **4. Concluding Comments: Technical Means of Public Authority**

This essay has followed two themes. First, it has examined three gestures of jurisdiction as examples of the technical means of establishing public authority. Second, it has investigated the reception and use of these gestures in contemporary jurisprudences of authority beyond or apart from the state. The presumption of this essay has been that there is something to be gained from treating such engagements as conducted through rival jurisprudences of jurisdiction. We have concentrated on offering a number accounts of the ways in which jurisdictional arrangements carry concerns of authority and public authority. In doing so we have offered a positive argument for continuing to address questions of public authority through the practices of jurisdiction.

One of the advantages of addressing questions of public authority through the practices of jurisdiction is that it allows for questions of jurisprudence to addressed (historically) in terms of institutional conduct. In this concluding section we look to the techniques of jurisdictional



arrangement, and the ways in which authority is exercised, by briefly following the jurisdictional forms of non-state public authority into the international domain.

In taking up the work of Paul Hirst in the last section, we noted how he traced the ways in which the pluralists linked their concern with political authority to technical means. Hirst shaped his understanding of globalism by addressing material, technical and institutional forms through which geo-political, juridical and economic activities are conducted (Hirst 2005). If we translate Hirst's concerns with the practical realisation of authority into the genres of jurisprudence and the practices of jurisdiction a number of observations can be made about the kinds of jurisdictional practice that might carry forms of public authority or public consequence.

From within the University and the disciplines associated with public law, accounts of public authority in the international domain are shaped around the concerns of executive rule, constitution, administration and adjudication (Ryngaert 2008, 5-10). The concern with jurisdictional arrangements divides more or less between the sorts of discussion associated with the allocation of disputes for adjudication and a set of concerns about overall organisation of relations of authority in the international domain (Teubner 2012, Berman 2012). However, by way of a final comment, we pull back from the public law thinking of international law and note a prudential side to jurisdictional thinking which emphasises the creation of relationships of public authority.

The prudence of jurisdictional thinking is illustrated here through Annelise Riles' ethnographic and jurisprudential analysis of the regulation of global financial markets (Riles 2011). In *Collateral Knowledge*, Riles examines forms of engagement with the management of the markets and the practices of regulation. Her work links 'knowledge practices' to the ways in which 'legal technique' has been deployed to create the financial derivatives market (Riles 2011, 9-11). Riles' work is interesting for the way in which it frames authority through

the authorisation of relations rather than through an institutional arrangement of the public institutions of the international order. The ordering of financial markets can be viewed as a matter of private regulation, but the ordering of financial markets clearly is also a matter of ‘public consequence’, both in the sense that it has had disastrous consequence for the public and the sense in which it has involved public institutions creating regulations and acting as regulators (however defined). Riles is concerned with a range of institutions and office holders that carry out regulatory practices in what might be considered either as the global public sphere or a global private sphere. What interests us here are the ways in which the concerns of governance and administration and those of constitutional thinking are both kept at some distance apart. For Riles, the way in which the regulation of financial services is conducted is most cogently understood in terms of technique and technocratic means. Such techniques are shared both by the public and private officials in their varied attempts to understand and act in the working of the global financial markets (Riles 2011, 240-242).<sup>23</sup>

As a matter of office and role Riles notes that similar juridical and accounting techniques are required of regulators and technocrats in a variety of situations (Riles 2011, 223-225). In turning these observations to techniques of jurisdiction, Riles might be seen as offering a prudential account of the value of regulation and the technical means of creating forms of authority. In this account public and private authority alike are viewed as technique and as part of an ethos of office. For Riles, like Maitland but not Figges and Laski, to frame legal knowledge and authority in terms of technique is part of an attempt to make more knowable the technical forms by which the international finance and our lives are created and ordered.

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<sup>23</sup> Netting law allows parties to save or complete their obligations in the event of bankruptcy even when these obligations might be void in a formal legal sense. These laws were part of a suite of legislation passed in the 1990s designed to provide security of interests in the derivative markets. See, for example, Unidroit Study LXXVIII C - Principles and rules on the netting of financial instruments: <http://www.unidroit.org/english/documents/2011/study78c/s-78c-04-e.pdf> (last accessed 4 August 2014).

This returns us to the projects of jurists and jurisprudents to join and separate what is public and lawful about jurisdictional practices.

We close this essay by making a discrete observation about a jurisprudence that takes its cue from jurisdictional practice. Without offering our argument as a systematic thesis, we have tied our accounts of public authority to forms of jurisdictional and prudential thinking about lawful relations. We have presented our account of jurisdictional practice by joining it to the commentaries of jurists and jurisprudents. In so doing the concerns of jurisdiction have been treated as something apart from efforts to produce either a public law jurisprudence or explanations of public authority that are directed to the work of theorising, explaining or securing legitimacy. Holding back from direct engagements with those concerns has enabled us to present an essay on jurisdiction as a concern of the conduct of authority through technical means. It also opens a space for considering again some of the commitments of the relationship between public authority, jurisdiction, jurisprudence and their writing.

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