ON THE EVOLUTION OF CORPORATE FORMS

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The major theme underlying this symposium is the development and growth of many new forms of business associations over the last few decades. These new forms are characterized by a combination of personal freedom from partner/owner liability and far-reaching freedom of contract for partner/owners. The question thus becomes whether this development of new business associations amounts to an extension of limited liability to partnerships or an extension of freedom of contract to corporations. Leading scholars Henry Hansmann, Reinier Kraakman, and Richard Squire have posited that the latter theory prevails. Specifically, these scholars discuss the concepts of "entity shielding"—i.e., how, and to what extent, a firm's assets may be separated, or be kept separate, from the partners/owners' creditors—and "owner shielding"—i.e., how, and to what extent, a partner/owner's assets may be separated, or be kept separate, from the firm's creditors. According to Hansmann et al., entity shielding is logically prior to owner shielding; thus, new forms of business associations have developed through an extension of freedom of contract to corporations. Hansmann et al. believe that this understanding of the evolution of business associations possesses predictive value for future developments in business association law.

Professor Samuelsson refers to Hansmann et al.'s entity-shielding-prior-to-owner-shielding theory as the "priority thesis" and claims that it is an empirical rather than logical statement. To test that thesis, he traces the legal development of business associations in Europe and Sweden and concludes that those histories do not support Hansmann et al.'s priority thesis and that there are no regularities in the historical evolution of association law that provide predictive value for the future of association law.

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I. INTRODUCTION

Anyone who ever made an earnest attempt to solve a jurisprudential problem will have pondered the question of what kind of analysis we are actually initiating when we embark on such an undertaking. In a typical case, we start out with an issue about which we know one thing from the outset: it is bound to be inadequately or vaguely formulated. What we hope will happen is that, due to our coming to terms with the issue, its terminological makeup will somehow change so that we ultimately find ourselves able to answer a question that we could not put into words when we started, or even perceive as relevant in the context. We are trying to attain a more profound conceptual level where we will, with the aid of fresh distinctions, manage to elucidate a legal problem area which would otherwise remain obscure. A closely related form of analysis advances on the basis of certain fixed and established behavioral assumptions—for example, the kind found in economic theory—in an attempt to reconstruct an established view of a legal problem area. One example of the latter kind of analysis involves formulating a new description of a certain legal area, or jurisprudential problem, with the support of a terminology colored by economic analysis and empirical knowledge. Hansmann et al. have expressed the intention of doing just that. Starting out from an institutional economic paradigm, they attempt to reconstruct the historical evolution of legal entities (primarily *business* entities) from Roman law onwards, up to the present day. Their approach entails a desire on the authors' part to virtually enrich our entire conscious comprehension of history, and more particularly to bring about a reevaluation as to what factors have controlled the emergence of the legal entities—and the legal-entity concept—that we apply today. Their purpose, however, is not merely to understand the past, but also to elucidate the present and predict likely future developments. Thus, the question is whether the description they provide makes more sense than competing and, to some extent, established accounts. The ultimate criterion here, as in respect of every hermeneutic explanation, is the plausibility of the description concerned.[1]

It is not entirely unproblematic to limit one's comments to the brief paper that was presented at the conference, as the relevant research findings are presented in already published works or in working papers.[2] The

1. *See* Charles Taylor, 1 HUMAN AGENCY AND LANGUAGE *passim* (1985).

2. Henry Hansmann, Reinier Kraakman & Richard Squire, Legal Entities, Asset Partitioning, and the Evolution of Organizations (Mar. 2004) (unpublished manuscript, on file with the University of Illinois Law Review) [hereinafter Hansmann et al., *Evolution of Organizations*]; Henry Hansmann & Reinier Kraakman, *The New Entities in a Historical Perspective* (Apr. 2004) (unpublished manuscript); *see also* Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 YALE L.J. 387 (2000) [hereinafter Hansmann & Kraakman, *Organizational Law*]; Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439 (2001); Henry Hansmann & Reinier Kraakman, *Property, Contract and Verification: The* Numerus Clausus *Problem and the Divisibility of Rights*, 31 J. LEGAL STUD. 373 (2002).

present discussion takes these articles and manuscripts into account to some extent; consequently, however, my comments are less systematic and more essayistic than they otherwise would have been. In addition, the articles are bristling with ideas, and I am bound to restrict myself to a small selection of topics. In general, my reflections center on the following theme: during the last few decades, a number of new corporate forms have come into being. A combination of personal freedom from partner/owner liability and far-reaching freedom of contract for partners/owners is often said to be a characteristic feature of these new forms. Does this development amount to an extension of limited liability to partnerships, or does it entail an extension of freedom of contract to corporations limited by shares? Hansmann et al. support the latter hypothesis.[3] In order to be able to understand the position of Hansmann et al., the concepts that are central to them must be described. These concepts are "entity shielding," "owner shielding," and what I refer to as the "priority thesis"—that is to say, the claim by Hansmann et al. that entity shielding is logically prior to owner shielding (limited liability).[4] As this is seen to be an empirical rather than a logical statement, the authors' priority thesis is discussed in relation to legal developments in Europe and Sweden.

II. CLASSES OF CORPORATE FORMS

In association law, different forms of collaboration are often classified with reference to the aim of the relevant operations. Another classification might proceed from differences with regard to the way in which the association itself is organized. With such a system, associations in which decision-making and executive functions are entrusted to separate bodies—as is the case with limited companies—are set up against each other. The form of association which is most sophisticated from the point of view of legal technicalities is the limited company, as it offers the following opportunities: to fulfill a purpose, economic or otherwise, which is *independent of* participants; to acquire an *independent* profit shared between the agent and the participants; and to act through representatives. In such a capital association, the concept of "shareholder rights" serves the purpose of constructing a rights-and-duties structure between the partners/owners and the association. Relationships between persons who own shares are entirely irrelevant from the point of view of corporate law. This form of association can be contrasted with others, whose rules invest each member with a position which both authorizes and obliges him to make decisions and to act on the relevant association's behalf. Partnerships are an example of this latter form. However

3. *See, e.g.*, Henry Hansmann, Reiner Kraakman & Richard Squire, *The New Business Entities in Evolutionary Perspective*, 2005 U. ILL. L. REV. 5.

4. *See* Hansmann et al., *Evolution of Organizations*, *supra* note 2, at 2.

essential these criteria of categorization are, and however powerful the impact they have had on legislation, they are still overshadowed by a classification based on dissimilarities pertaining to the ways in which partners/owners assume liability for the association's obligations. Bearing these dissimilarities in mind, we may distinguish between three main categories of collaborative forms:[5]

- Partners/owners are only liable to the extent of their investment, or what they have undertaken to invest. They are not directly liable in relation to the association's creditors.
- Partners/owners are directly and unrestrictedly liable for the association's obligations.
- One, two, or several of the partners/owners, but not all, are unrestrictedly liable for the association's obligations. The others are only liable to the extent of the sum that they have invested.

According to this classification, the relevant form of association constitutes a designation of a certain constellation of *jural relations* (rights, duties, liabilities, etc.). Variations and intermediate forms are possible and indeed abundant. All national legislations contain examples of such variations. In addition to intermediate forms regulated in law, combinations may be created by way of contracts. Partner liability may be joint or divided. In both cases, the liability of partners may be subsidiary in relation to the association, which means that a creditor must first have tried to obtain payment or compensation out of the association's assets before approaching an individual partner. Joint-and-several liability may be primary, in which case each partner may be approached as though he were the sole liable party, or it may be secondary, in which case each partner is in the first instance only liable for part of the amount of debt, but will see his obligations increase in proportion to any incapacity on the part of the other partners.

Many people have wished to place rules on the manner in which the partners of an association are liable for its obligations as necessarily related to the issue of whether the association constitutes an independent legal subject that is separate from its members. This is, at most, a matter of separate classification that may complement the one outlined above. In other words, we cannot determine to which of the three abovementioned categories a certain form of association belongs merely on the basis of the legal-entity characteristic. Another complementary ground for making systematic distinctions is the difference between personal and capital associations. In a way, all associations presume a combination of the two, but either may be legally constituent. In personal associations the personal element is predominant, and the question of whether a separate mass of accumulated wealth exists is of secondary importance.

5. For a similar taxonomy, see Hj. L. Hammarskjöld, *Redogörelse för den utländska bolags- och föreningsrättens utveckling och nuvarande ståndpunkt, den svenska bolagsrättens utveckling samt de svenska föreningarna (för ekonomiskt ändamål)*, BILAGA TILL BOLAGSKOMMITTÉNS BETÄNKANDE (1890).

For capital associations, on the other hand, the constituent element is precisely the sum of fresh money formed by contributory investments. Clearly, then, the legal classification of associations rests on a complex set of criteria and it is not enough to fall back on just one of them.

The model advocated by Hansmann et al. is, in itself, germane to this traditional pattern of discourse, while diverging from it in one respect: the sole instruments of classification are the concepts "entity shielding" and "owner shielding." Hence, we cannot take account of more than one aspect of that structure of rights that pertains to an association and its members in relation to the collective of creditors. That may amount to shedding light on an essential and, perhaps, neglected aspect—encouraging us to pursue a deeper understanding of the characteristics exhibited by current forms of association. However, a jural classification of business entities according to right-in-rem criteria can only be undertaken on the basis of a more multifaceted pattern of the kind reviewed above. If we assume then that entity shielding represents the most fundamental legal condition, the preceding account would appear to show that entity shielding can hardly be given an unambiguous meaning in any legal sense. Different entities may come with dissimilar legal relations which determine how, and to what extent, a firm's assets may be separated, or be kept separate, from the association members' creditors. Consequently, a powerful intuition favors the view that this aspect (entity shielding) is more multifaceted than its counterpart (limited liability). One reason for this is that limited liability has been attached to the proportion of business capital, whereas entity shielding usually involves assessments of legally complex relations between people.

The operationalization of the entity shielding and asset partitioning concepts thus becomes hard to follow when we move to a concrete level. The authors argue that in a case where there is no asset partitioning,

> a potential creditor of a firm would be hostage to the fortunes of all the other business affairs (as well as the personal financial affairs) of every partner in the firm, and would have to be informed about all those affairs to know whether, and on what terms, to offer credit to the firm.[6]

Additionally, this task would become even more complex if the identity and number of those partners were subject to constant change, as they would be if shares in the firm were tradable.[7] According to Hansmann et al., the firm is the creditor's counterparty in such a case.[8] The absence of legal identity, however, makes it impossible, for formal reasons, for the "firm" to appear as counterparty in a credit contract. Consequently, the creditor is obliged to enter into contracts with individuals, but such con-

6. Hansmann et al., *Evolution of Organizations*, *supra* note 2, at 14.

7. *Id.*

8. *See id.* at 13–15 (discussing asset partitioning while distinguishing between "commercial creditors of a business firm" and "personal creditors of the firm's owners").

tracts do not involve any obligational or right-in-rem relations to persons who conduct business projects conjointly with the debtor. Therefore, the creditor cannot end up in a hostage situation, nor can he be expected to grant any credit to the firm separated from its members. If we take the additional step we are requested to take—i.e., if we imagine that portions owned by partners in this firm are transferable—the creditor's dilemma becomes even greater. Again, though, it would seem that he is obliged to make decisions entailing the granting or withholding of credit concerning an entity which lacks asset partitioning and does not behave like a contracting entity, but which still possesses transferable portions. A number of similar examples could be presented.

III. SHIELDING AND THE PRIORITY THESIS

At the core of the authors' analysis is a revised conception of the role of law in the formation of organizations. The general opinion among legal scholars used to be that limited personal liability for partners/owners is the historically most significant innovation in the field of association law, as well as being one of the cornerstones of the modern market economy.[9] In brief, this rule amounts to separating the owners' personal assets from those of the firm—i.e., what Hansmann et al. refer to as owner shielding.[10] The authors argue that this emphasis on the importance of limited liability is misleading, as the more fundamental factor in legal development is the parallel rule that shields the firm's assets from the owners' creditors (entity shielding).[11]

In addition, the authors maintain that entity shielding is logically prior to owner shielding.[12] If so, however, owner shielding cannot be understood except in relation to entity shielding, whereas the opposite would not be the case. More precisely, we might ask: Do we define entity shielding in terms of owner shielding, or do we do the reverse, or might we do neither?[13] This is not the place for an exhaustive analysis of

9. *See, e.g.*, JAMES D. COX, THOMAS LEE HAZEN & F. HODGE O'NEAL, CORPORATIONS § 7.7, at 7.11 (1998) ("No principle is more engrained in corporate law than that shareholders enjoy limited liability. Indeed, limited shareholder liability is not simply a principle of corporate law, but a cornerstone of capitalism."); David H. Barber, *Piercing the Corporate Veil*, 17 WILLAMETTE L. REV. 371–72 (1981) ("This incentive to business investment [limited liability] has been called the most important legal development of the nineteenth century." (citing E. Merrick Dodd, *The Evolution of Limited Liability in American Industry: Massachusetts*, 61 HARV. L. REV. 1351 (1948))).

10. *See* Hansmann et al., *Evolution of Organizations*, *supra* note 2, at 7–8; *see also* Hansmann & Kraakman, *Organizational Law*, *supra* note 2, at 393–96 (discussing the concept of owner shielding but referring to it as "defensive asset partitioning").

11. *See* Hansmann et al., *Evolution of Organization, supra* note 2, at 12–22 (stating that "[e]ntity shielding is a more fundamental legal institution than owner shielding, and thus deserves central place in studying the history of organizations and the historical role of law in creating organizations" and then discussing the principal reasons why, in their view, entity shielding is more important than owner shielding).

12. *See id.* at 21–22.

13. The definitions of the respective categories are as follows. Entity shielding refers to shielding of the firm's assets from creditors of the firm's owners; owner shielding refers to shielding of the assets of a firm's owners from creditors of the firm. *Id.* at 6–9; *see also* Hansmann & Kraakman, *Organizational Law*,

these questions, and further discussion here would lend undue emphasis to an isolated query. Even so, I have reservations about the idea that the relationship between the relevant concepts is of a logical nature. Rather, the authors' actual point would appear to be that entity shielding is empirically prior to owner shielding in the evolution of association law. This interpretation appears to be supported by Hansmann et al.'s presentation taken as a whole. It is also clear from their categorization of entities that the kind of entity they refer to as peculium lacks entity shielding.[14] If that is the case, then what we encounter here is an impossible classification according to the advocated priority thesis. What then remains is to establish whether the priority thesis possesses an empirical content of the kind implied by the authors. Here I am returning to what the preceding section described as problematic—namely, the question of what criteria should adhere to the concept of entity shielding. If an empirically orientated investigation is to be feasible, this question must be resolved in reasonably precise terms.

IV. ROMAN LAW

The point of departure for the historical account is the *societas* concept in Roman law.[15] It is pointed out that this form of association lacked both entity shielding and owner shielding and was thus not a contracting entity. There was no "firm" or "company" concept under Roman law, and all joint projects came to be classified as *societas*. From our point of view, there often seems to have been no difference between what we term jointly owned property and this form of association. Besides, a prominent feature of *societas* was its basis in relationships. According to Nicholas, the courts' assessments of internal relations between partners rested almost exclusively on legal principles pertaining to good faith.[16] It is interesting to observe that disputes between partners were considered to run counter to the fraternal character of *societas*, and if one partner sued another before a court of law this simultaneously amounted to a cancellation of joint *societas* activity.[17] In present-day society, the winding-up of a relationship in a similar manner may be compared to what we refer to as liquidation.[18]

supra note 2, at 393–96 (discussing these concepts but referring to them as affirmative and defensive asset partitioning, respectively).

14. Slaves were allowed to accumulate some private savings (*peculium*) with which they might eventually purchase their liberty. *See* Hansmann et al., *Evolution of Organizations*, *supra* note 2, at 39–41.

15. *See id.* at 29–33.

16. BARRY NICHOLAS, AN INTRODUCTION TO ROMAN LAW 186 (1962).

17. *Id.*

18. One exception, according to Nicholas, is *actio pro socio*, which could be brought if one partner neglected to ensure that an expected gain was passed on to the other partners, or refused to take the responsibility for his share of a loss. *Id.* at 187.

A *societas* under Roman law merely created rights and duties for the parties to the relevant contract.[19] What is termed "privity of contract" in English law presupposes that a contract does not affect anybody but the parties to it, and that third parties are hence not invested with any rights or obligations as a result of the contract. Any third party who made a contract with a partner in a *societas* was denied access to the others' assets, even if they had expressly approved of the contract with the third party in question.[20] From the point of view of right-in-rem, the situation thus cannot be exhaustively accounted for with reference to the terms entity shielding and owner shielding. Even if, according to principles of good faith, partners were obliged to carry their share of a loss in relation to a third party, it was only the individual partner who had a formal legal duty towards that third party, who was therefore unable to demand payment from any other partner or partners.[21] To that extent, the other partners' assets at least enjoyed some right-in-rem protection. According to the terminology employed by Hansmann et al., then, a *societas* was not a contracting entity, but a joint project nevertheless created right-in-rem immunity against a third party for a partner's duties.[22] A *societas* would thus appear to be connected with a certain form of entity shielding, even though the contractual relationship did not possess any immediate relevance in relation to a third party according to the privity-of-contract principle.

An element of risk would seem to accompany attempts to draw far-reaching conclusions on the basis of the absence of a certain phrase or expression in consulted sources, suggesting that this absence meant that Roman lawyers did not have access to a particular idea. If the argument is that Roman law lacked a legal technique that, by virtue of its rights-and-duties structure, would be equivalent to entity shielding as defined by Hansmann et al., that might not after all be a very powerful argument. Comparisons between, for instance, *societas* and partnerships are a thorough-going feature of their presentation, but it would have been possible for a Roman entrepreneur to have used a combination of contract types in order to achieve what we attain by using a certain form of association if the successful execution of a certain business project was thought to call for such a legal-technical solution.

Christianity became the official religion of the Roman Empire in 313 A.D.[23] As a consequence, ecclesiastical bodies such as monasteries

19. *Id.*
20. *Id.*
21. *Id.*
22. According to Hansmann et al., a contracting entity consists of "(1) a designated pool of assets that are constantly changing ("floating") and (2) an agent or agents with ongoing authority to enter into contracts that, as a default rule of law, are bonded by those assets." Hansmann et al., *Evolution of Organization*, *supra* note 2, at 4.
23. HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 216 (1983).

could be added to the list of associations which were acknowledged as possessing legal capacity, as well as property and contract rights in a general sense and the right to act as legal persons through representatives.[24] Subsequently, Justinian law acknowledged charitable societies such as hospitals, asylums, orphanages, and the like.[25] Only at this point may a form of association be said to come into being that potentially offers the fulfillment of an independent economic or other purpose as well as the acquisition of an independent profit, shared between agent and participants, and action through representatives.

As Roman jurists did not take any appreciable interest in the need for definitions and theories, the connection between an association and its members was never investigated. Digesta, according to Berman, put the matter in laconic terms: "[W]hat is of the corporation is not of the individuals."[26] Where the origin of the association and its legal capacity emanated from, and how it might be legitimated, was not discussed. Twelfth-century jurists maintained that they saw implicit legal principles of significance to association law in Roman law, but that claim would seem to be a reconstruction after the event.[27]

Judging from what Berman says, the root system of European association law originates in the interweaving of three strands: Roman law; the conceptualization concerning the general character of associations in Germanic law; and what canon law says about the character of ecclesiastical communities from the point of view of association law.[28] If we accept that view, the evolution of the association concept inevitably involved Christian notions of "the nature of the congregation" as "the body of Christ," of all Christians being "one in Christ," and similar metaphors. In the twelfth century, canonists seem to have attempted to harmonize these three influences within the scope of one system which suited ecclesiastical interests and requirements. The rise of capitalism with its special institutions and the monetary and credit system assuming a portal position took place at about the same time.[29] In this context, too, the evolution of secular law took great steps forward as a consequence of demand factors.

As the monetary and credit system developed, so did the need, and the opportunity, for pure capital associations.[30] The present context does not permit a review of the legal theories about associations—theories in-

24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.* at 216–20.
29. *Id.* at 348–50.
30. A distinction should be made regarding money from credit. The granting of a credit entails the exchange of two promises whose respective realizations are separated in time. The creditor supplies funds for disposal *now* against a promise of repayment by the debtor *at a later date*. *See* FERNAND BRAUDEL, THE STRUCTURES OF EVERYDAY LIFE: THE LIMITS OF THE POSSIBLE 470 (Sian Reynolds trans., Harper & Row 1981) (1979).

fluenced by natural law—which came into being during the seventeenth and eighteenth centuries. Nor can the link between those theories and Roman, Germanic, and canon law be pursued here.[31] In the mid-nineteenth century, the picture presented by German legal scholarship of competing theories concerning the nature of legal entities was one of utter chaos. A corporation theory of the kind found in England, and subsequently in the United States, was nowhere to be found.[32] As Sweden was strongly dependent on German views and conceptions at that time, and up until the early twentieth century, the situation was no better in our country.[33]

V. LEGAL DEVELOPMENTS IN SWEDEN

From a historical perspective, trade on the European continent evolved within the frameworks set by changeable and complex relations to political power.[34] Initiatives leading to new firms were usually taken by those in power, or by people closely allied with them. Besides, contracts appear to have depended on the rulers' approval for their continued existence, even when no representatives of the powers-that-be were directly involved as partners/owners. In principle, this was the pattern of roles and functions up until the nineteenth century, when a more liberal era began. However, there are indications that commercial activities were conducted under the aegis of what may be called firms ever since the Middle Ages in Sweden. Legal historians suggest that these corporate forms emerged independently of any influence from the German Hanseatic League.[35]

Organized cooperation between two or more persons for economic or similar purposes has existed for a long time, sometimes without the support of particular legal institutions. It is reasonable to regard the Scandinavian Viking raids, famous—or rather infamous—in myth and story, as joint projects in respect of whose proceeds some sort of com-

31. For a discussion of a link between those theories, see Karl Olivecrona, *Studier över begreppet juridisk person i romersk och modern rätt*, Uppsala 112 (1928).

32. *See* Morton J. Horwitz, Santa Clara *Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173 (1985). In this famous article, Horwitz describes the triumph of a "natural entity" theory of the corporation in the United States. *Id.* at 216–22; *see also* William W. Bratton, Jr., *The New Economic Theory of the Firm: Critical Perspectives from History*, 41 STAN. L. REV. 1471, 1501 (1989).

33. The doctrine which obtained in Germany, and which had a Romanist tinge, apparently presumed that the question of the "nature" or "character" of the corporation was solved in accordance with what were believed to be the rules and principles valid for Roman *societas* or corporations. In the former case, the relevant firm lacked assets of its own, and the latter involved an entirely fictitious entity. *See* Olivecrona, *supra* note 31, at 39.

34. There is not a great deal of legal history material that specifically elucidates the development of association law in Sweden. This section mainly relies on the following works: J. Hagströmer, *Om aktiebolag enligt svensk rätt,* Uppsala (1872); Hammarskjöld, *supra* note 5; Robert Montgomery, *Om bolagskontraktet i 1734 års lag,* Helsingfors (1870); Olivecrona, *supra* note 31.

35. The German Hanseatic League was a group of merchants operating outside the country. It was a political and mercantile federation, which was established in the mid-twelfth century and existed for over 500 years.

munity principle was applied. In Sweden's mediaeval provincial laws, however, rules concerning corporate cooperation are few and far between, and only in exceptional cases is anything said about the impact on third parties of corporate activity. The Later Västergötland Law-Roll (*Yngre Västgötalagen*) contains a provision to the effect that a land user might, under certain conditions, be outlawed if he failed to pay the landowner's debt to a third party. The lack of more extensive regulations is surely due to the absence of a credit system and to the fact that projects were almost exclusively based on relationships. While I am not in a position to prove it, corporate forms seem to me to have evolved on the basis of contractual relationships with regard to services. One indication of such a connection is that designations for partners/owners were the same for a long period of time ("master" and "servant," and so on). The Swedish trading partnership (*handelsbolag*) developed out of earlier corporate forms, whose salient characteristic was that their effect was confined to areas covered by laws relating to legal obligations; corporate contracts only had effect between the parties concerned, and they were ineffective from a right-in-rem point of view in that these parties did not appear as legal entities. The present-day Swedish trading partnership developed on the basis of the principle, derived from Germanic law, of joint-and-several liability for jointly borrowed moneys, with subsequent influences from Italian associations and forms of commerce. The kind of partnership referred to as *enkelt bolag* ("simple/single firm") is an older form of association, related to Roman law (*societas*), without legal subjectivity.

The first Swedish trading companies (*kompanier*), which came into being in the seventeenth and eighteenth centuries, bore the imprint of public law and only survived thanks to their cooperation with the government of the day—a state of affairs which agreed well with the mercantilistic ideas that dominated views on business at the time. The first functional trading company was created by the Swedish King Gustavus Adolphus (1594–1632) and had a monopoly of the trade in copper. It was modeled on the great Dutch East India Company, formed in 1602. The early eighteenth century saw the addition of several important new companies, among them Rörstrand in 1726 and the Swedish East India Company in 1731. The formation of such a company often was preceded by a kind of charter, called an *oktroy*, which laid down a set of rules for the firm. The assistance of the ruling powers was often highly tangible, in that they granted what amounted to regular commercial monopolies. As a result, the individual tradesman became highly dependent on the benevolence of the people in power. It should also be observed that, as late as 1706, less than one percent of Sweden's population worked in manufacturing—the economic profits from such activities were hence very modest, or even nonexistent. In other words, activities conducted under corporate forms were quite insignificant, and this is of course a

factor which should be taken into account whenever developments in association law are analyzed.

Not until the early nineteenth century did the opportunity to conduct economic activities without direct political or governmental control arise in Sweden, as business life was increasingly liberated from various constraints. Liberal ideas opposing mercantilistic conceptions had been expressed as early as the 1750s, especially towards the end of the phase known as the Period of Liberty in Swedish history. The influence of French liberal economists was highly significant; de Danguel may be mentioned as an example.[36] A well-known Swedish liberal thinker was Anders Chydenius, a clergyman and a Member of the Swedish Parliament, whose aim was to topple the oppressive mercantilistic policies.[37] It should be pointed out that Chydenius formulated his liberal ideas, radical for their time, eleven years before Adam Smith published his *Wealth of Nations*. The surprising thing is that both these works have exercised such limited influence in Sweden, even after the turn of the century.[38]

The corporate form known as the limited company was not much discussed in Sweden during the first half of the nineteenth century—largely, of course, because industrialization was still in its infancy. That does not, however, amount to saying that this corporate form was entirely unknown. For instance, a proclamation concerning banknote-emitting banking companies was issued in 1846. Additionally, as early as the eighteenth century the example of the mining company Stora Kopparberg demonstrates the ability of early capitalism to penetrate an economic structure that did not, to the outside observer, seem to have changed much since the Middle Ages. The cooperative character of this company disappeared bit-by-bit as its original partnership portions (the so-called fourth parties) were increasingly disseminated and ownership spread to different strata of the population. These portions or shares came to correspond in almost every sense to shares in a limited company. The similarity between this type of corporation and the modern limited company became even more striking when certain joint functions associated with the concrete mining activity ceased to have any connection with part-ownership of the mine.[39]

The first limited companies on the European Continent and in Britain came into being through a concessionary procedure. That was the case in Sweden, too, where the Limited Companies Act of 1848 pre-

36. *See* Louis Joseph Plumard de Danguel, *Remarques sur les Avantages et les Desavantages de la France et de la Grande-Bretagne, Par Rapport au Commerce & aux autres Sources de la Puissance des États* (1754). The translation into English was made by the author himself, under the pseudonym John Nickolis.

37. *See* ANDERS CHYDENIUS, THE NATIONAL GAIN 15–16 (trans., Camelot Press, Ltd. 1931) (1765); *see also* CARL G. UHR, ANDERS CHYDENIUS 1729–1803: A FINNISH PREDECESSOR TO ADAM SMITH (1963). At that time Finland was part of Sweden. Chydenius lived in Österbotten, "East Bothnia," which forms part of present-day Finland. Today, Chydenius is regarded as one of the leading figures in Finnish intellectual history.

38. *See* ELI F. HECKSCHER, *SVENSKT ARBETE OCH LIV. FRÅN MEDELTID TILL NUTID* (1941).

39. *See id.*

scribed that a discharge from personal liability was dependent on the State formally approving, or establishing, the articles of association. The 1848 Swedish Act, greatly influenced by the French *Code de Commerce*, only contained fifteen sections. According to Nisbet, concessionary procedures of the kind referred to here originated in Roman law (in its *collegium*), the upshot being that no association can lay claim to constituting a legal person unless granted such status by way of a decision made by the authorities.[40] In essence, the State was the exclusive association. In Sweden, limited companies had been created before 1848, their position resting on a kind of common law which entailed personal freedom from liability for partners/owners. Even after the 1848 Act became valid, companies that did not obtain State establishment were formed. If the courts of law and the State authorities had consistently upheld the establishment requirement, legal personality—and, consequently, freedom from personal liability—could not have been maintained, either from the point of view of public law or from that of civil law.

When the limited-company form was discussed in the Swedish Parliament in the mid nineteenth century, limited personal liability was regarded as a deviation from what was otherwise the established view in the law bearing on legal obligations—namely, that undertaken commitments entailed, in principle, unlimited personal liability. This view also prevailed in association law in general. The trading partnership consisted of a number of part-owners with unlimited liability for the firm's undertakings. The Act of 1734 only contained provisions regarding firms in which partners were jointly and severally liable. Consequently, it is not surprising that the limited company, which was regarded as a legal entity, bred uncertainty regarding the personal liability of partners/owners. This uncertainty, which was never dispelled by any precedent, was the single most important cause of the 1848 Limited Companies Act. Besides, it was felt to be in the best interests of society at large that big industrial firms should be started (for instance, to fund and build railways). The limited company form made it easier to find the money for these infrastructural investments. The difference between the trading partnership and the limited company gradually emerged, supported by the distinction—originating in French law and often invoked ever since—between personal and capital associations. The limited company was quite simply perceived as consisting of capital lots (shares) and not of persons. It followed from this that shareholders did not have to shoulder any personal liability. Private agreements were deemed insufficient as a means of establishing freedom from liability because they did not resolve the question of whether third-party rights might be infringed in consequence of such agreements.

40. ROBERT NISBET, TWILIGHT OF AUTHORITY 170 (1975).

It is likely that the factor which did more than any other to influence the design of the Companies Act we have today is the many bankruptcies over the years. Ever since the French Mississippi Company and the British South Sea Company failed in the eighteenth century, governments have attempted to prevent similar financial breakdowns. The first really profound experience of this kind in Sweden was the so-called Kreuger Crash in the early 1930s. This collapse did a great deal of damage, some of which was felt far beyond the national boundaries. Deficiencies in the 1910 Act were identified and came to exercise a considerable influence on the preliminary drafting of a new Companies Act, begun as early as 1933. In this context, special emphasis was placed on the duty of a company to issue information about its financial condition—previous requirements in that regard were felt to have been too lax.

Returning to the theme which served as the basis for this symposium—the rapid development of new types of business associations—I can conclude that no corresponding trends are seen in Sweden. The only example of innovative thinking, and one that is only faintly associated with the international debate, are the reforms taking place within Swedish law firms. The ongoing reform work on the Swedish Companies Act includes a new regulation under which the economic liability of law firm partners relating to cooperation within the framework of a limited company is attached to those tasks and mandates for which the individual partner has assumed responsibility. A rule to that effect is already operating in the other Nordic countries. The reason why it is being introduced in Swedish law is that the Swedish Bar Association has brought pressure to bear on the legislature. Curiously enough, this rule is not being extended to the general level and hence will not apply to other forms of professional partnerships, such as auditing and accounting firms. In this respect, the legal situation in Sweden seems to be in a state of vacuum.

VI. SUMMARY

Among the issues raised by Hansmann et al. is the question why contracting entities came into being at such a late stage. The authors maintain that the demand side has been overemphasized in the explanations supplied by previous legal scholars. Their interpretation as to why legal contracting entities did not evolve sooner is based on a combination of arguments which lay stress on the supply side: there were no institutions able to minimize the risk of debtor opportunism and legal techniques were insufficiently developed.[41]

41. *See* Hansmann & Kraakman, *Organizational Law*, *supra* note 2, at 387, 406, 439–40.

Having given some thought to Hansmann et al.'s account of the evolution of association law, I find myself unable to ignore certain fundamental issues raised by their articles. One of these issues might be articulated as follows: Hansmann et al. stress the evolutionary dimensions of legal development so forcefully that the reader is led to believe that developments in association law amount to a process of change in a certain direction and that this process was somehow predetermined, at least to some extent, as well as amenable to explication on an empirical basis.[42] If, however, it was not predetermined at all, I cannot see that it would be possible to locate those regularities in historical evolution that might possess predictive value, and then I find it hard to understand how Hansmann et al. can say anything about the direction in which association law is heading. Personally, I am strongly skeptical about claims that there is such a thing as a scientific theory of historical evolution able to serve as the basis for predictions of future developments. What then remains is the question posed at the outset: Are the descriptions of the evolution and internal logic of association law offered by Hansmann et al. more plausible than already existing ones? Even if that were not the case, I am persuaded that the idea of entity shielding draws attention to a characteristic feature of associations; however, I am troubled by the absence of, among other things, a careful investigation as to what *jural relations* (rights, duties, liabilities, and so on) this concept is associated with. Not until such an investigation has been presented will we be able to tell whether we are dealing with a new intermediate concept, a concept which—like limited liability—connects legal facts and legal consequences in a manner that is otherwise consistent with association law.[43]

42. *See id.* at 406.

43. *See* Lars Lindahl, *Deduction and Justification in the Law. The Role of Legal Terms and Concepts*, 17 RATIO JURIS 182 (2004).