

# Public-Private Contractual Networks and Third Parties' Rights

The Contracting State as a Challenge for Private Law <sup>+</sup>

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## Introduction

In public-private partnership, the question of a third party's rights always was and still remains very controversial.<sup>1</sup> On the one hand, public law has elaborated extensively on third parties' rights over the years. Solutions range from the two-step approach (Zweistufentheorie)<sup>2</sup> to the extensive use [p. 202] of constitutional rights<sup>3</sup> to the requirement of a compulsory written

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<sup>1</sup> For the first time, the question predominantly appeared at the end of the 19<sup>th</sup> and the beginning of the 20<sup>th</sup> Century in French Law. See among others É. Lambert, *Du contrat en faveur de tiers: son fonctionnement, ses applications actuelles*, Paris 1893, 322; for the latest development in France, see Conseil d'Etat 10 décembre 2003 (req. 248950) - *Institut de recherche pour le développement*. German and Swiss law initially limited the question of third parties' rights to public-private contracts to a question of separating contract from decision. Valid third parties' rights would lead to the compulsory use of the administrative decision: see F. Fleiner, *Institutionen des deutschen Verwaltungsrechts*, Tübingen 1913, 203–204; O. Mayer, *Deutsches Verwaltungsrecht*, Leipzig 1895/96, 318 onwards.

<sup>2</sup> This approach legitimizes the use of private contract law forms by preceding the contract with a procedure under administrative law. Ipsen's two-step theory (Zweistufentheorie) was of great importance for further development of the German Law: H. P. Ipsen, *Öffentliche Subventionierung Privater*, Berlin 1956, 86–87. For a similar approach in France that preceded the two-step theory, see the following leading cases of Conseil d'Etat: 21 décembre 1906 – *Syndicat Croix de Seguey-Tivoli*, recueil 968; 5 novembre 1937 – *Union hydro-électrique de l'Ouest*, recueil 1938. For Switzerland, see more recently P. Moor, *Droit administratif; Volume II: Les actes administratifs et leur contrôle*, Bern 2002, 354–354 and 376 onwards.

<sup>3</sup> Promoting the extension of public law principles to private law contracts, see F. v. Zezschwitz, *Rechtsstaatliche und prozessuale Probleme des Verwaltungsprivatrechts*, in: *Neue Juristische Wochenschrift (NJW)* 36 (1983),

consent.<sup>4</sup> On the other hand, under private contract law, third parties are almost completely barred from having any legal influence on the contract as a matter of principle.<sup>5</sup>

Today, as we see more and more public-private partnerships under private law,<sup>6</sup> any political-ly imprinted influence of the administration within a private law contract causes great confusion, in particular regarding third parties' rights. While some insist on the purity of traditional private law doctrine,<sup>7</sup> others insist on the use of public law arguments on the grounds that the state (even if party to a contract) does guarantee basic rights including freedom of contract to private parties, but does not profit from these basic rights itself.<sup>8</sup>

In this context, I will examine three leading cases of the Swiss Federal Court in order to reveal that *the Court does not follow any of the traditional approaches or any of the approaches proposed so far*. In fact, the Court [p. 203] pragmatically realigns private law, simultaneously considering the political dimensions of the cases on the one hand, and the nature and function of private law on the other.

In order to integrate the review of the aforementioned cases into the wider context of the continental system of law, the article *proceeds as follows*:

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1873-1880, 1879; similarly for Switzerland, see R. Rhinow, Verfügung, Verwaltungsvertrag und privatrechtlicher Vertrag, in: Juristische Fakultät der Universität Basel (ed.), *Privatrecht - Öffentliches Recht - Strafrecht: Grenzen und Grenzüberschreitungen; Festgabe zum Schweizerischen Juristentag*, 295-322, 1985, 320 onwards.

<sup>4</sup> For Germany, see § 58 of the Code on procedural administrative law; for more details, see W. Braun, Der öffentlich-rechtliche Vertrag im Spannungsfeld zwischen Verwaltungsakt und verwaltungsprivatrechtlichem Rechtsgeschäft, in: *Juristen Zeitung (JZ)* 79 (1983), 841-848, 846; F. Reimer, Mehrseitige Verwaltungsverträge, in: *Verw.Archiv* 94 (2003), 543-573, 569.

<sup>5</sup> On privity of contract and its relationship to broader social structures, see G. Teubner, After Privatisation? The Many Autonomies of Private Law, in: *Current Legal Problems* 51 (1998), 393-424.

<sup>6</sup> A. Abegg, From the Social Contract to a Social Contract Law – Forms and Function of Administrative Contracts in a Fragmented Society, in: *Ancilla Iuris (anci.ch)* 3 (2008), 1-30.

<sup>7</sup> See, for example, E. Bucher, Nicht «Kontrahierungspflicht» – Schon eher Schutz vor Boykott: Kommentar zu Swiss Federal Court Decision 129 III 35 ff. (7. Mai 2002; 4C.297/2001), in: *recht* 21 (2003), 101-115.

<sup>8</sup> See, for example, the fierce reaction of public law scholars to the decision of the Swiss Federal Court 109 Ib 146 1983 - *Schweizerischer Treuhänder-Verband c. Schweizerische Nationalbank*: G. Müller, Zur Rechtsnatur der Vereinbarung über die Sorgfaltspflichten der Banken bei der Entgegennahme von Geldern und über die Handhabung des Bankgeheimnisses, in: *SJZ* 80 (1984), 349-351; R. Rhinow, Verfügung, Verwaltungsvertrag und privatrechtlicher Vertrag, in: *Juristische Fakultät der Universität Basel (ed.), Privatrecht - Öffentliches Recht - Strafrecht: Grenzen und Grenzüberschreitungen; Festgabe zum Schweizerischen Juristentag*, 295-322, 1985; R. Rhinow, Verwaltungsrechtlicher oder privatrechtlicher Vertrag: Fiskalwirkung der Grundrechte, in: *recht* (1985), 57-64; P. Richli, Die verwaltungsrechtliche Rechtsprechung des BGer 1983: Bankengesetz, in: *Zeitschrift des Bernischen Juristenvereins (ZBJV)* 121 (1985), 428-430.

- Part I presents the *three leading cases of the Swiss Federal Court* about public-private networks and evaluates their common grounds.
- Part II examines *advantages and disadvantages of traditional grand concepts* that deal with the question of public influence to a contract in general and with third parties' rights to such a contract under public influence in particular.
- Part III analyzes in detail the *solution of the Swiss Federal Court* in the above mentioned leading cases and reveals the Court's strategy to deal with public influence in private law.
- Finally, part IV comments on the Court's doctrinal shortcomings and suggests ways to *translate the Court's solution into a more stable private law doctrine*.

## I. Confusing Cases

The three leading cases of the Swiss Federal Court about public-private contracts under private law and third parties' rights could not be more different from each other.

The first case, *P. gegen Stadtrat Luzern*, relates to the beautiful Canton of Lucerne and the majority of its inhabitants. The City of Lucerne transferred the management of paid advertising in and on buses to a private company. The parties signed a so-called “concession contract”. Within this contract, the City of Lucerne retained a “right to veto”. Under this concession contract, an association engaged in animal protection proposed an advertisement to the private advertising company. The advertisement would cover the entire outside surface of a bus and its slogan would read: “More pigs than men live in the Canton of Lucerne – why do we not ever see them?” The City of Lucerne declared its veto by letter against this offer to the private advertising company and the private association. The private association challenged this letter as an administrative decision.<sup>9</sup>

The second case, *Schweizerischer Treuhänder-Verband c. Schweizerische Nationalbank* relates to Switzerland as a safe haven: At the end of the 1970s, during the so-called Chiasso Scandal, more than two billion Swiss Francs, allegedly in connection with illicit Italian earnings and tax evasion, were [p. 204] brought into Switzerland and Lichtenstein, with the help of a major Swiss bank. At the height of this scandal, under strong international criticism, the Swiss Government called the Swiss National Bank to action. No statutory basis existed for such a task given to the Swiss National Bank, an independent actor under public law, mainly

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<sup>9</sup> Swiss Federal Court Decision 127 I 84 2001 - *P. gegen Stadtrat Luzern*.

concerned with the monetary stability of the Swiss Franc. Under the lead of the Swiss National Bank, the Swiss National bank itself with the overwhelming majority of the Swiss banks concluded identical, bilateral contracts regarding the exercise of due diligence with regard to deposits (CDB). As far as the competition amongst different trustee organizations was concerned, the new version of the contract in 1982 discriminated against the Association of Trustees. The Association of Trustees had to disclose the identity of third parties on whose account assets had been invested. The Association challenged this discrimination, which had been confirmed in a letter from the Swiss National Bank, as an administrative decision in an administrative-court complaint to the Federal Court.<sup>10</sup>

The third case, *reisen.ch AG gegen Switch*, is related to the internet and its domain-name system: In Switzerland, the domain-name regulator, Switch, is in charge of administering domain names with the ending .ch on the basis of an administrative contract.<sup>11</sup> When the race to get new domain names with ‘Umlaute’ [mutated vowels] was about to be opened, the company *reisen.ch* asked Switch to grant a particular domain name to them. Switch objected to such a special treatment and made reference to the worldwide established rules of domain-name attribution. *Reisen.ch* challenged this reply as an administrative decision in an administrative-court complaint to the Federal Court.<sup>12</sup>

At first glance, the *common ground of the cases* is obvious: A private party, affected by a bilateral agreement between another private party and the administration, seeks a remedy on the grounds of administrative law. But a second more thorough look at the cases reveals more common ground seemingly contradicting the first impression:

- In all cases, the parties to the underlying public-private partnership *refer to private law* and the Court did indeed apply private law. The private parties to such contracts seem to be rather reluctant to subordinate themselves to an administrative law that makes society ‘available to the administration in the interest of policy realization’.<sup>13</sup> In this respect, it is important to note that these leading cases of the Swiss Federal Court, ranging

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<sup>10</sup> Swiss Federal Court Decision 109 Ib 146 1983 - *Schweizerischer Treuhänder-Verband c. Schweizerische Nationalbank*.

<sup>11</sup> Based on Art 28 of the Swiss Telecommunications Act ([http://www.admin.ch/ch/d/st/c784\\_10.html](http://www.admin.ch/ch/d/st/c784_10.html)).

<sup>12</sup> Swiss Federal Court Decision 131 II 162 2005 - *reisen.ch AG gegen Switch*.

<sup>13</sup> Explicitly, A. Mächler, *Vertrag und Verwaltungsrechtspflege: ausgewählte Fragen zum vertraglichen Handeln der Verwaltung und zum Einsatz des Vertrages in der Verwaltungsrechtspflege*, Zürich 2005, 618.

from 1983 to 2007, are just the tip of the iceberg. In the recent past, many more cases involving cooperation between the administration and private parties have emerged.<sup>14</sup>

- Furthermore, at the core of all three cases we find *spontaneous orderings* created by contractual networks between public and private actors. Within the underlying contractual relationship, a distinct set of rules emerged that went way beyond any existing statute. In the case of the Swiss association of trustees and in the domain-name case, these autonomous structures even declared themselves as “self-regulators”. They indeed contained their own adjudication process and a rule of recognition.
- Finally, in the above-mentioned cases, there is a notable element of *political influence*<sup>15</sup> overriding market-driven behavior to a certain extent: In *P. gegen Stadtrat Luzern*, the city council vetoes in order to prevent a controversial political association from attracting public attention by using the city's public buses, rather than to prevent a drop in revenues should the aggressive advertisement be allowed. Furthermore, in *Schweizerischer Treuhänder-Verband c. Schweizerische Nationalbank*, the Swiss National Bank does clearly lead the setup of the network based on its interest in framing a stable economy and its relationship to the federal council. Finally, in *reisen.ch AG gegen Switch*, the underlying agreement between the domain-name agency and the state administration rests on the telecom monopoly of the state and is thus to be labeled as a concession on the basis of administrative law, which is not handed to private parties under free market rules, but follows the ratio given by the legislature.

Against this background, the *main problem* is obvious: Third parties are excluded or discriminated against based on principles of the public-private network. The principles, on its part, are mainly influenced by the public actor within the network. Thus, the third parties understandably seek a remedy based on administrative law. However, the reference to private law and the application of private law in the mentioned cases cause some confusion. In view of the dimensions of the cases, can both the rights of the third parties and the interests of the state be adequately represented by private contract law?<sup>16</sup>

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<sup>14</sup> See, with reference to a variety of examples, A. Abegg, From the Social Contract to a Social Contract Law – Forms and Function of Administrative Contracts in a Fragmented Society, in: *Ancilla Iuris (anci.ch)* 3 (2008), 1-30.

<sup>15</sup> Political in the sense of systems theory, as communication following a code differentiating in powerful-powerless: N. Luhmann, *Die Politik der Gesellschaft*, Frankfurt a. M. 2002, 88 ff.

<sup>16</sup> See, accordingly, the public law scholars cited in Fn. 8.

## II. Variations within the Continental Law Tradition

### *Traditional Approaches*

Given the persistent confusion, what would be the *range of possible solutions* and the corresponding advantages and disadvantages of these solutions? If we look at the historical path dependencies in the continental civil law tradition, we firstly have to deal with the two traditional solutions: administrative law and traditional private law.

*On the one hand, administrative law* traditionally takes the viewpoint of the administration and the state. As a product of the welfare state, it is concerned about making law available to the state administration in order to unite and shape society.<sup>17</sup> In return, administrative law covers and legitimizes this one-sidedness with rule-of-law guarantees and the democratic reservation of statutory-powers principle.<sup>18</sup> From the perspective of legally structured absolute power, a framework set up by private parties with or without the cooperation of the administration is – as soon as it touches state interests – more a problem of the delegation of state power than one of legitimate regulation set up by public-private cooperation.<sup>19</sup> Consequently, under the delegation doctrine, any third party would be able to challenge any communication of the network that has an impact on that party.<sup>20</sup> The test in this respect is whether a statutory basis covers the actor following public interests, keeping public actors within the hierarchical

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<sup>17</sup> OTTO MAYER, *Deutsches Verwaltungsrecht*, Leipzig, 1895/96, I, 3-4; FRITZ FLEINER, *Entstehung und Wandlung moderner Staatstheorien in der Schweiz; akademische Antrittsrede*, Zürich 1916, 4. In this regard, see the detailed study of ROGER MÜLLER, *Verwaltungsrecht als Wissenschaft. Fritz Fleiner, 1867-1937*, Frankfurt am Main, 2006. For criticism in this regard, see HANS KELSEN, *Zur Lehre vom öffentlichen Rechtsgeschäft*, *Archiv des öffentlichen Rechts* 31 (1913), 53-98 and 190-249. For France, with focus on the role of the Conseil d'Etat : A. Mestre, *Le Conseil d'Etat, protecteur des prérogatives de l'administration (études sur le recours pour excès de pouvoir)*, Paris 1974; F. Burdeau, *Histoire du droit administratif (de la Révolution au début des années 1970)*, Paris 1995, 30 onwards. Similarly, already A. d. Tocqueville, *L' Ancien Régime et la Révolution*, Paris 1856, 128.

<sup>18</sup> However, in the traditional concept of the administrative law, the administration is not supposed to subordinate itself to a constitutional state (“Rechtsstaat”), but merely “approach” it: OTTO MAYER, *Deutsches Verwaltungsrecht*, Leipzig, 1895/96, 66. See also WALTER JELLINEK, *Verwaltungsrecht*, Berlin, 1931, 96. For the more recent theory see M. Bullinger, *Verwaltungsermessen im modernen Staat: Landesbericht Bundesrepublik Deutschland*, in: M. Bullinger (ed.), *Verwaltungsermessen im modernen Staat*, 79-111, Baden-Baden 1986.

<sup>19</sup> In this perspective see K. A. Bamberger, *Regulation as Delegation: Private Firms, Decisionmaking, and Accountability in the Administrative State*, in: *Duke Law Journal* 56 (2006), 477-468.

<sup>20</sup> See, for example, Art 48 of the Federal Act on Administrative Procedure ([http://www.admin.ch/ch/d/sr/172\\_021/a48.html](http://www.admin.ch/ch/d/sr/172_021/a48.html)).

system of the state.<sup>21</sup> However, the main characteristic of our cases is not the administration leading the buildup of the specific frame of regulation. In fact, the administration rather needs to rely on resources that are available to private parties only – especially know-how and participation in the market or in a self-regulated regime in general. To apply the rules of delegation would have invalidated all mentioned forms of spontaneous regulation in the aforementioned cases; the networks on which the administration had to rely for different specific reasons would have been invalidated due to the lack of a statutory basis.

*On the other hand, a pure application of traditional private law* would also be problematic: The basic principle of contract law, privity of contract, does lead to the exclusion of third parties' interests. Such exclusion is legitimized on the grounds of self-ordering of society, mainly the free market, where bilateral agreements are led by the price mechanism of the invisible hand, which is including actual or potential third-party offers.<sup>22</sup> However, as already mentioned, there is a strong element of political influence in the above-mentioned cases, overriding market-driven behavior to a certain extent. This is why paleo-liberal private law is not able to come to terms with the dimensions of the cases.<sup>23</sup>

### *Interventionist Concepts*

So far, we may conclude that a neutral private law is needed, but one that is able to deal with the wide dimensions of the cases, involving public actors who decide on political grounds rather than following a free-market rationale. Thus, we ask for nothing less than for a *re-entry of public law into private law*, which itself occurs by a process of differentiation with regards to public law. Actually, this re-entry has been a major achievement of the interventionist welfare state. Two concepts may be distinguished with respect to including political dimensions in private contract law: mandatory rules of private law and administrative private law.

Since the end of the 19<sup>th</sup> century, as a mode of the continental welfare state, the legislature translates political programs into the form of *mandatory norms* that penetrate private law

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<sup>21</sup> In this respect, the French doctrines of “excès de pouvoir” and “détournement de pouvoir” were groundbreaking: Conseil d'Etat 21 décembre 1906 – *Syndicat Croix de Seguey-Tivoli*, recueil 968; on this see also L. Duguit, *Les particuliers et les services publics*, in: *Revue du Droit public* 14 (1907), 411-439, 436 ff.; G. Jèze, *Das Verwaltungsrecht der Französischen Republik*, Tübingen 1913, 388 onwards and 417-418.

<sup>22</sup> N. Luhmann, *Das Recht der Gesellschaft*, Frankfurt a. M. 1993, 448 onwards.

<sup>23</sup> For a recent version of paleo-liberal private law, see W. Zöllner, *Regelungsspielräume im Schuldvertragsrecht*, in: *Archiv für die civilistische Praxis* 196 (1996), 1-36. Admittedly, the term ‘paleo-liberal’ refers more to a certain model of private law doctrine than to a concrete private law scholar or a private law school.

without removing the basic character of private law.<sup>24</sup> In the form of public law norms, mandatory norms either [p. 208] prohibit certain behavior. Or as mandatory norms of private contract law, they include certain conditions into private law. In both cases, the parties are free to use the forms provided for by private contract law. But if they do, they instantly have to include the concrete expectations and conditions of the legislature into their dealings.<sup>25</sup>

However, this approach to introducing public concerns into private law *does not provide sufficient guidance for the contractual networks between public and private actors* – for several reasons: Already in the experience of the welfare state, the inadequacy and the ineffectiveness of compulsory norms in private law has repeatedly been uncovered. The bottom line of this experience of the welfare state is that within the dynamic free-market regime the legislature is often too slow to react to the constantly changing forms of the free market and its change maneuvers.<sup>26</sup> This finding applies even more to public-private networks which often arise and change rapidly, following not only the pace of the free-market evolution, but also the constant revolutions of the political sphere.<sup>27</sup> The administration actually resorts to this cooperation precisely because the traditional and more stable top-down regulation is not adequate to the actual circumstances and public interests at hand. This is particularly obvious in the above-mentioned case of *Schweizerischer Treuhänder-Verband c. Schweizerische Nationalbank*.<sup>28</sup>

Following from the two-steps theory developed after the Second World War in order to legitimize the administration's use of private contract law forms by preceding the contract with a procedure under administrative law,<sup>29</sup> the more recent attempts by administrative scholars to capture the mentioned cases of new kinds of cooperation between the state and private parties are labeled as *administrative private law (Verwaltungsprivatrecht)*. The core idea of adminis-

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<sup>24</sup> A. Abegg, Die zwingenden Inhaltsnormen des Schuldvertragsrechts - ein Beitrag zu Geschichte und Funktion der Vertragsfreiheit (Diss.), Zürich 2004, 61 onwards.

<sup>25</sup> G. Teubner, Recht als autopoietisches System, Frankfurt a. M. 1989, 102.

<sup>26</sup> It is Polanyi's great achievement to have clearly separated the two driving and, at the same time, converging forces of the modern welfare state: K. Polanyi, The Great Transformation, Beacon Hill 1944/1995; see also G. Teubner, After Legal Instrumentalism? Strategic Models of Post-Regulatory Law (EUI Working Paper 100/84), in: International Journal of Sociology of Law 12 (1984), 375-400.

<sup>27</sup> For a detailed analysis of the driving forces of politics and the economy within such networks, see A. Abegg, Regulation of Hybrid Networks at the Intersection between Governmental Administration and Economic Self-Organisation, in: JSP/Center for the Study of Law and Society Faculty Working Papers (University of California Berkeley, ed.), <http://repositories.cdlib.org/cslls/fwp/39>, last update 8.6.06, last access 27.9.08.

<sup>28</sup> See above Part I.

<sup>29</sup> See above, Fn. 2.

trative private law is basically to make the administration fully respect constitutional rights, even if the administration engages in the private sphere.<sup>30</sup> In consequence, third parties would be able to [p. 209] challenge a bilateral private-law contract on the grounds that it violates their constitutional rights. However, to apply this administrative private law to our cases would provoke serious disadvantages. It might cause incertitude and hamper the ad hoc setup of any public-private-partnership. In particular, it would be difficult to identify qualified third parties at the very moment of the contract negotiations. Indeed, the German experience with § 58 of the administrative procedure code requiring the written consent of third parties affected by public-private contracts, proves this point.<sup>31</sup> Furthermore, in the case the state handed public services out to a private person by contract, we encounter the well-known and unavoidable problems when balancing the constitutional rights of two different private parties. In all of the mentioned cases, the constitutional rights of the third party would conflict with the constitutional rights of the contracting private party.

### III. The Solution of the Swiss Federal Court

In Section II, it has been shown that all available traditional variations have serious shortcomings in providing adequate solutions for the above-mentioned cases. Interestingly, the Federal Court did not make its arguments in the cases with reference to these well-known concepts. Instead, the Court followed its so-called '*conservative pragmatism*'.<sup>32</sup> However, the tension created by this 'conservative pragmatism' is apparent in the three leading cases on the issue of third parties' rights to public-private contracts under private law. We will come back to that issue.

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<sup>30</sup> For an outline of the doctrine of private administrative law, see F. v. Zezschwitz, *Rechtsstaatliche und prozesuale Probleme des Verwaltungsprivatrechts*, in: *Neue Juristische Wochenschrift (NJW)* 36 (1983), 1873-1880; W. Braun, *Der öffentlich-rechtliche Vertrag im Spannungsfeld zwischen Verwaltungsakt und verwaltungsprivatrechtlichem Rechtsgeschäft*, in: *Juristen Zeitung (JZ)* 79 (1983), 841-848; R. Rhinow, *Verfügung, Verwaltungsvertrag und privatrechtlicher Vertrag*, in: *Juristische Fakultät der Universität Basel (ed.), Privatrecht - Öffentliches Recht - Strafrecht: Grenzen und Grenzüberschreitungen; Festgabe zum Schweizerischen Juristentag*, 295-322, 1985.

<sup>31</sup> Among many others, see H. Maurer, *Der Verwaltungsvertrag - Probleme und Möglichkeiten*, in: *Deutsches Verwaltungsblatt* (1989), 798-807, 803.

<sup>32</sup> Indeed, the Swiss Federal Court is known for its pragmatic approach to new problems. At the same time, however, the Court is usually reluctant to advance new doctrinal innovations. For a sharp critique on the Court's approach, see T. Fleiner-Gerster, *Grundzüge des allgemeinen und schweizerischen Verwaltungsrechts*, Zürich 1980, 41.

But what exactly did the Court do? The Court *applied private law, but nevertheless introduced public law arguments in its reasoning*. I would like to further clarify these two points:

Firstly, in all three cases, the Swiss Federal Court *chose private law over public law* mainly due to the fact that the administration was depending on the dynamic self-regulation of the private sphere and that the administration was accordingly in no place to unilaterally impose state interests onto the private parties:

[p. 210]

- In *Schweizerischer Treuhänder-Verband c. Schweizerische Nationalbank*, any traditional state-led regulation would have been too slow in light of the scandal. Furthermore, due to a lack of expertise within the administration and the legislature at that time, a traditional legislation might have done more harm than good to the banking industry, which is pivotal for core political issues such as employment and state revenues.<sup>33</sup> Finally, it must be stressed that the Swiss National Bank did not have any statutory basis to legitimize any action under public law.<sup>34</sup>
- In the advertisement case of *P. gegen Stadtrat Luzern*, the administration relied on the free market to make the most of its public assets.<sup>35</sup>
- Finally, in the internet-domain-name case of *reisen.ch AG gegen Switch*, the Court acknowledged the long-standing and successful tradition of self-regulation in that area.<sup>36</sup>

Secondly, the Federal Court could not and did not ignore the *political dimension* of the cases. It is now crucial to note how the Court did make reference to the political dimension:

- In *P. gegen Stadtrat Luzern*, the Court first noted that, in principle, the more private parties have a choice in the relevant free market, the less the administration has to respect the constitutional rights of private parties.<sup>37</sup> It then went on to state that the current setting under free market rules, combined with a right to veto by the City of Lucerne, was a reason-

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<sup>33</sup> For a more detailed analysis of this case, see A. Abegg, Regulierung hybrider Netzwerke im Schnittpunkt von Wirtschaft und Politik, in: Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft (KritV) (2006), 266-290.

<sup>34</sup> Swiss Federal Court Decision 109 Ib 146 1983 - *Schweizerischer Treuhänder-Verband c. Schweizerische Nationalbank*, 154, para.3b.

<sup>35</sup> Swiss Federal Court Decision 127 I 84 2001 - *P. gegen Stadtrat Luzern*, 88 et seq., para. 4b–c.

<sup>36</sup> Swiss Federal Court Decision 131 II 162 2005 - *reisen.ch AG gegen Switch*, 167–168, para 2.4.

<sup>37</sup> Swiss Federal Court Decision 127 I 84 2001 - *P. gegen Stadtrat Luzern*, 89 onwards, para. 4c.

able way to manage public assets.<sup>38</sup> Furthermore, according to the Court, the veto of the administration, engaging in the advertising market did not in any way violate any constitutional rights. In fact, the Court argued, the administration was referring to the underlying values of the political actor and the according need for the neutral and non-offending appearance of city buses; because the ad would not suit the neutral appearance of the city buses and the city in general, they explained, the veto was, therefore, reasonable in its content.<sup>39</sup> In fact, under the market rational, the parties to the contract were already under strict scrutiny: Were they to deviate [p. 211] too much from the market rational, they would lose the desired profits of the market. To sum up, considering the interests of the administration as a political representative and the declared aim to be having city buses that are both neutral and non-offending in their appearance, it was reasonable to veto the proposed use and offer an – albeit inferior – alternative within the buses. On the other hand, to subject the case to public law would have endangered the benefits of the public-private cooperation under free-market rules.

- In *Schweizerischer Treuhänder-Verband c. Schweizerische Nationalbank*, the Federal Court stressed the adequacy of a spontaneous self-regulation with the participation of the Swiss National Bank, under the circumstances.<sup>40</sup> The Court also mentioned the reasons given by the Swiss National Bank to justify the discrimination in light of the aims of the network.<sup>41</sup>
- In *reisen.ch AG gegen Switch*, the Court first analyzed the underlying common values of the project, i.e., the efficient self-regulation according to traditional and international standards. Then it argued that it was reasonable to strive for this aim with the chosen combination of a very general statutory basis and the reference to the traditional self-regulation in telecommunications and the internet. Consequently, it was also reasonable to deny claimants special treatment and to follow instead the usual first-come-first-serve principle, supplemented by a subsequent private dispute-resolution mechanism.<sup>42</sup>

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<sup>38</sup> *Ibid.*, 91, para. 4d.

<sup>39</sup> *Ibid.*, 91 et seq., para. 4d.

<sup>40</sup> Swiss Federal Court Decision 109 Ib 146 1983 - *Schweizerischer Treuhänder-Verband c. Schweizerische Nationalbank*, para 2 and 3.

<sup>41</sup> The Court also asserted the application of constitutional rights to the acts of the Swiss National Bank. However, this was not for the Private Law Court to investigate, but for the supervisory institution: *ibid.*, para. 4.

<sup>42</sup> Swiss Federal Court Decision 131 II 162 2005 - *reisen.ch AG gegen Switch*, para. 2.3.

To sum up, the Court did not stop at the point where it could have stopped, viz., at the finding that private law applies.<sup>43</sup> Instead, the Court in fact followed its social function, viz., to solve the case at hand in such way that it stabilizes (proto-) normative structures and allows the co-evolution of conflicting social regimes to proceed.<sup>44</sup> Consequently, the Court argued that the current self-regulation followed a reasonable and common set of values and that the measures taken were necessary in light of the values of the self-regulation. Thus, the Court followed in its reasoning a very traditional *test of whether a spontaneous ordering is legitimate and whether its endangerment by hierarchical state law would be worth it*. It is interesting to note the similarities of this reasoning to other legal concepts. A similar kind of test can be found in the Court's review of the exercise of administrative discretion, except for the link to a statutory basis that is demanded in administrative law.<sup>45</sup> But it can also be found in Robert Cover's analysis of 1983 of how in general – also in the absence of the state – any *nomos* builds up and forms its structures.<sup>46</sup> Finally, it also follows some core elements of Habermas' idea of deliberation.<sup>47</sup>

Furthermore, it is also interesting to take note of the test's proximity to what has been described by Gunther Teubner as reflexive law. Indeed, the test aims to persuade public-private networks to impose some kind of self-restraint on themselves by taking into account third-parties' views and holding them against the legitimacy of their own self-regulation.<sup>48</sup>

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<sup>43</sup> Similarly, in Swiss Federal Court Decision 129 III 35 2003 - *Post gegen Verein gegen Tierfabriken*. Indeed, under traditional Swiss private law doctrine, the Court does not apply constitutional rights directly to private law contracts, even if the state administration is a direct party to the contract: see, among others, P. Gauch/W. R. Schlupe/J. Schmid, *Schweizerisches Obligationenrecht; Allgemeiner Teil*; vol. I, Zürich 2003, N 679.

<sup>44</sup> In detail, Gunther Teubner, *Alienating Justice: On the surplus value of the twelfth camel*, David Nelken and Jirí Pribán (eds.), *Law's New Boundaries: Consequences of Legal Autopoiesis*, Ashgate, Aldershot 2001, 21-44.

<sup>45</sup> See, among others, R. Rhinow, *Verfügung, Verwaltungsvertrag und privatrechtlicher Vertrag*, in: *Juristische Fakultät der Universität Basel (ed.), Privatrecht - Öffentliches Recht - Strafrecht: Grenzen und Grenzüberschreitungen; Festgabe zum Schweizerischen Juristentag, 295-322, 1985, 320 onwards*.

<sup>46</sup> R. M. Cover, *Nomos and Narrative*, in: *Harvard Law Review* 97 (1983), 4-67. A *Nomos* may be defined as a socially constructed ordering of rules and forms which are built up and followed day to day.

<sup>47</sup> J. Habermas, *Faktizität und Geltung: Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats*, Frankfurt a. M. 1992, 187 onwards.

<sup>48</sup> G. Teubner, *Substantive and Reflexive Elements in Modern Law*, in: *Law & Society Review* 17 (1983), 239-285.

## IV. Translating the Courts' Reasoning into Private Law Doctrine

For private law scholars of the civil law tradition, the Court's reasoning may be confusing – first, because it seems to *reach well beyond traditional private law*, and, secondly, because, in doing so, it *does not make reference to any private law doctrine or norm*, thus impeding further references to the solutions developed in the cases.

There are some *obvious explanations* for the Court's rather confusing approach: According to traditional private law, no further justification is needed to exclude third parties from the benefits of a bilateral contract.<sup>49</sup> Furthermore, we have to recognize that the Court was on *terra incognita*, i.e., no obvious existing variations of specific private law norms seemed to be of much guidance. Finally, in this context, the Court might have been overburdened by the consequences of its courageous decision to apply private law to a process of spontaneous public-private ordering – to have to deal with a public law re-entry into private law and fit it into the private law doctrinal system.

However, when looking more closely, we do *find two specific doctrines within private law that deal with such a re-entry of public law into private law*. Both remarkably impose a burden of justification (justification, as Wiethölter would call it)<sup>50</sup> on the excluding party.

Under the so-called *Boycott Doctrine*, it is a violation of personal rights to exclude a private person from a trade association without good reason.<sup>51</sup> Mainly, the doctrine limits freedom of association when important economical interests or even the economical existence of private persons are affected. Thus, to exclude private persons from membership of these associations constitutes a violation of the personal rights that may, however, be justified with a predominant interest of the association and its members (Art 28 Swiss Civil Code).<sup>52</sup>

The second doctrine to deal with a public law dimension within private law is the *Common Carrier Doctrine*, first developed under common law. For any private enterprise that is identified as a common carrier, it is unlawful to refuse service unless there is some compelling rea-

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<sup>49</sup> See Fn. 5.

<sup>50</sup> R. Wiethölter, Just-i-fication of a Law of Society, in: O. Perez/G. Teubner (ed.), *Paradoxes and Inconsistencies in the Law*, 65-77, Oxford 2005.

<sup>51</sup> Art 27 and 28 of the Swiss Civil Law Code (<http://www.admin.ch/ch/d/sr/210/a27.html>).

<sup>52</sup> Among others, see the leading case of the Swiss Federal Court 123 III 193, 197. For more details, see E. Bucher, Nicht «Kontrahierungspflicht» – Schon eher Schutz vor Boykott: Kommentar zu Swiss Federal Court Decision 129 III 35 ff. (7. Mai 2002; 4C.297/2001), in: *recht 21* (2003), 101-115.

son. There are some striking parallels of the Common Carrier Doctrine to our cases described above: Common Carrier cases are concerned with private ordering, historically the single market, and the integration of political requirements of non-discrimination into private law in circumstances that would contradict the actual policy. Traditionally, the actual policy behind the Common Carrier Doctrine is the development of the single market.<sup>53</sup>

*In Switzerland*, the cases relating to the Common Carrier Doctrine, such as the famous case *Seelig*<sup>54</sup> and the more recent case of *Post gegen Verein gegen Tierfabriken*,<sup>55</sup> followed the rationale and the specific elements of the Common Carrier Doctrine: Public goods or services that are part of an [p. 214] everyday-life necessity<sup>56</sup> are offered to the public. Furthermore, the person requiring goods or services does not have a viable alternative. And finally and most importantly, there are no good reasons for the refusal to perform.<sup>57</sup> In both cases of *Seelig* and *Post gegen Verein gegen Tierfabriken*, the Court applied the general norm of *boni mores* as a doctrinal connecting point. In short: It would be amoral to refuse access to a common carrier. It is, however, important to note that the Federal Court did not stop at the *boni mores* norm, but it laid the foundation to develop a more detailed private law doctrine – one in line with German, French, and Common Law cases.

In view of the cases of *Seelig* and *Post gegen Verein gegen Tierfabriken*, we may expect a *similar development for the legitimacy of spontaneous public-private ordering by means of contract in general*. First, the use of a general clause such as *boni mores*:<sup>58</sup> Public-private networks act, in principle, against *boni mores* if they exclude third parties without justification. Second, the fleshing out of a more concrete private law doctrine that will advance the compatibility and stability of new forms of public-private partnership within the private law

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<sup>53</sup> For the adaption to German law, see F. Bydlinski, Zu den dogmatischen Grundfragen des Kontrahierungszwangs, in: Archiv für die civilistische Praxis 180 (1980), 1-46, 29 onwards and. 41. Bydlinski mainly draws on H. C. Nipperdey, Kontrahierungszwang und diktiertter Vertrag, Jena 1920.

<sup>54</sup> Swiss Federal Court Decision 80 II 26 1954 - *Seelig*, 37.

<sup>55</sup> Swiss Federal Court Decision 129 III 35 2003 - *Post gegen Verein gegen Tierfabriken*, 45–46.

<sup>56</sup> In the *Seelig*-case, the Court required not only a necessity of everyday life, but also a vital necessity: Swiss Federal Court Decision 80 II 26 1954 - *Seelig*, 37.

<sup>57</sup> *Ibid.*, 37; Swiss Federal Court Decision 129 III 35 2003 - *Post gegen Verein gegen Tierfabriken*, 45–46.

<sup>58</sup> On the character of general clauses as “learning law” and the law's flexible answer on a changing environment, see G. Teubner, § 242 BGB, Grundsatz von Treu und Glauben, in: Reihe Alternativkommentare; Kommentar zum Bürgerlichen Gesetzbuch; vol. 2; Allgemeines Schuldrecht, 32-91, Neuwied 1980, 37.

system.<sup>59</sup> Such a doctrine would place a burden of justification on the autonomous self-ordering between private parties and the administration vis-à-vis third parties, in a way that is similar to the Boycott Doctrine and the Common Carrier Doctrine. This burden of justification would convert troubles caused by the public-private network into internal problems of the network. Furthermore, the doctrine would leave it to the expertise of the network itself to find an adequate, detailed solution.<sup>60</sup> Notably the law would do so by providing clear guidance concerning the standard of justification.

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<sup>59</sup> For the process of converting a general concept into a specific private law doctrine, see G. Teubner, *Netzwerk als Vertragsverbund: Virtuelle Unternehmen, Franchising, Just-in-time in sozialwissenschaftlicher und juristischer Sicht*, Baden-Baden 2004.

<sup>60</sup> On the related concepts of responsive and reflexive law, see G. Teubner, *Substantive and Reflexive Elements in Modern Law*, in: *Law & Society Review* 17 (1983), 239-285.