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The Contracting State and Its Courts

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The Contracting State and its Courts

A historical comparative view on contracts between the state and private persons

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"... the administration is able to administer the law as well as the independent judiciary".
OTTO MAYER, Deutsches Verwaltungsrecht (1895/96), I, 65.

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Introduction: The precarious nature of the contracting state

Since the 1970s in the US, Europe, and indeed throughout the world, there has been a move to transfer public power to private entities, to replace public agencies with private contractors. Alongside this political and administrative development a new scholarly school has developed: one which argues that contract will become the new form of regulation for the emergent public services provided by private contractors.¹ Regarding such contracts between the state and private persons, legal scholars have to deal with two major issues: the transformation of the state vis-à-vis society on the one hand, and the role of the law and the courts in shaping the contracting state on the other hand.

Over the last few years, a fierce debate has unfolded about the first issue, the transformation of the state vis-à-vis society in general and the role and meaning of the state today in particular. While some predict the end of the state as we know it,² others point to the powerful reaction to terrorism and envision the strengthening of the Leviathan.³

With respect to contracts between the state and private persons, probably both claims are correct. We might indeed see the Leviathan taking fierce responsibility for its core duties by providing order and general welfare for society, and even expanding its fields of responsibility. However, the simultaneous rise of the contracting state is a clear indication that the state is not in a position to fulfill its proliferating responsibilities itself, but increasingly depends on cooperation with many actors of society.⁴ Therefore, taking into account the rise of contracts between the state and private persons, we either have to depart from the idea of the state itself, or we have to reassess the concept of sovereignty as the base of the idea of the modern state.⁵

¹ Among many see JODY FREEMAN, *The Contracting State* (2000), 160; PHILIP BOBBITT, *The shield of Achilles war, peace and the course of history* (2002), 667 et seq.

² Among many see MARTIN VAN CREVELD, *The rise and decline of the state* (1999), 336 et seq.

³ Among many see JODY FREEMAN, *Extending Public Law Norms Through Privatization* (2003), 1331. Furthermore, see CHRISTIAN JOERGES (Hg.), *Transnational governance and constitutionalism* (2004).

⁴ On the many new forms of the contracting state cf. JODY FREEMAN, *The Contracting State* (2000), esp. 189 et seq; NIELS ÅKERSTRØM ANDERSEN, *The Contractualisation of the Citizen* (2004), 324 et seq; PETER VINCENT-JONES, *Citizen Redress in Public Contracting for Human Services* (2005), 893 et seq.

⁵ On the rich discussion about sovereignty cf. among many the account of the transformation of the sovereign to a sovereign empire in MICHAEL HARDT/ANTONIO NEGRI, *Empire* (2000) or to sovereign capitalism in WENDY BROWN, *Sovereignty and The Return of the Repressed* (2006). In ANDREAS

This difficult issue, mainly debated in political science,⁶ is implicitly mirrored in the recent research done on the law of the contracting state. However, the recent literature in both common law countries and in civil law countries reveals two very different competing attitudes towards the state:

- For some scholars, the administration needs to bring the multitude of society under the all-embracing hierarchy of the state by the means of legal concepts like regulation⁷ and delegation⁸. These scholars basically understand contracts between the state and private persons as a tool to make the growing multitude of society more available to the state.
- For other scholars, however, the state administration resorts to collaboration with private persons in order to compensate for its own shortcomings regarding its responsibilities. In this view, the state constantly strives to secure new alliances with all kinds of actors to keep society from disintegrating. The administration does so – *inter alia* – by engaging these societal actors in contracts. Traditionally, the administrative agency contracts with private persons on military and civil service and with corporations on delivering or providing goods and services to the administration. Today, however, the administration increasingly also uses contracts to secure the good behavior of a person and the person's willingness to integrate in society. For example, the administrative agency contracts with market actors on their willingness to set up adequate self-regulation respecting certain guidelines. Furthermore, administrative agencies contract with parents on the attitude of stubborn school kids, with welfare recipients on their attitude to work and with prison inmates about their good behavior.⁹ Particularly instructive is the fact that the French administration, represented by military social workers in uniform, enters

ABEGG, *From the Social Contract to a Social Contract Law* (2008), I suggest to capture the phenomenon as a diffusion of state and society.

⁶ Cf. footnote 5.

⁷ JODY FREEMAN, *The Contracting State* (2000), 189 et seq; JODY FREEMAN, *Extending Public Law Norms Through Privatization* (2003), 1285.

⁸ Recently KENNETH A. BAMBERGER, *Regulation as Delegation* (2006), 385 et seq. Similarly to the delegation doctrine, scholars in civil law countries promote the traditional concept of the reservation of statutory powers as a way to legitimize the contracting state: among many cf. EBERHARD SCHMIDT-ASSMANN, *Das Recht der Verwaltungsverträge* (2001), 65 et seq; AUGUST MÄCHLER, *Vertrag und Verwaltungsrechtspflege* (2005), 46 et seq.

⁹ Cf. for many specific examples NIELS ÅKERSTRØM ANDERSEN, *The Contractualisation of the Citizen* (2004), 324 et seq; PETER VINCENT-JONES, *Citizen Redress in Public Contracting for Human Services* (2005), 893 et seq; ANDREAS ABEGG, *From the Social Contract to a Social Contract Law* (2008), 19 et seq.

into agreements with religious leaders, parent organizations or young people in order to tame rioting young men in the suburbs of French cities.¹⁰

While it is still possible to question whether all these forms of collaborations are contracts in the legal sense, on the whole, this scholarly debate confirms the ambivalent and precarious nature of the state today.

In addition to its influence on the transformation of the state vis-à-vis society, the contracting state also raises many questions concerning the rule of law in general and the role of the law and the courts in shaping the contracting state in particular. Two examples may illustrate the complexity and the importance of the relationship between the contracting state and its courts:

- In common law countries, as well as in civil law countries, specialists often populate tribunals which deal with procurement and construction law. These specialists know and understand procurement law and construction law. Furthermore, they also know about the constantly changing needs of public service.¹¹ Thus, the procurement law system supersedes the general principles of contract law with its regulations, experts and special tribunals. Does it matter if the lines between individual contracts and unilateral state regulation blur and if the tribunals frequently favor the administration? Is this just a matter of economics, affecting the price of public procurement, as some French economists have recently suggested¹² or are there deeper impacts on the relationship between the contracting state and private contractors?¹³
- In his illuminating book *Deployed*, MUSHENO/ROSS describe how in the aftermath of the Vietnam war, the US military resorted to contracts to employ its soldiers, how directly after the events of 9/11 President Bush employed presidential order in allowing reservists to be deployed way beyond the explicit terms of the signed document and how many soldiers feel that the army had unilaterally amended the contract and could not be

¹⁰ OCELYNE CESARI, *Demande de l'Islam en banlieue* (2006); ANDREAS ABEGG, *From the Social Contract to a Social Contract Law* (2008), 25.

¹¹ For the US cf. JUSTIN SWEET, *Federal Procurement Law* (2007), 26.

¹² THIERRY KIRAT (Hg.), *Économie et droit du contrat administratif* (2005).

¹³ Martin Shapiro's research on the system of European administrative courts such as the Conseil d'Etat might lead to such a conclusion: MARTIN M. SHAPIRO, *Courts, a comparative and political analysis* (1981), 156.

trusted anymore on fulfilling its commitments.¹⁴ Recent cases like *SANTIAGO V. RUMSFELD* (2005) have raised the question whether common contract law applies to military enlistment contracts, whether courts would have the authority to address these issues and whether the president may change the explicit terms of the contract at any time.¹⁵ This case reveals a twofold dynamic: the role of the court as an impartial arbitrator of two parties engaging in a joint project and the corresponding impact on legal and political structures.

To sum it up, the administration in these examples increasingly puts into question the traditional role of the courts as impartial arbitrators of two parties engaging in a joint project. In doing so, the administration follows a long tradition of civil law.¹⁶ Indeed, there is a considerable uncertainty about the role of the courts in matters of the contracting state and the corresponding impact on legal and political structures that is not limited to the United States but affects both common law and civil law countries alike. Furthermore, this uncertainty on the relationship of courts and the contracting state is not limited to the most recent years, but reaches back for more than two hundred years, leading to core issues of the modern state and its relationship to society, as mentioned above.

Therefore, I will investigate the relationship between the contracting state and its courts by taking a broad view on the long-term evolution of the contracting state¹⁷ and by describing how the corresponding philosophical and legal concepts of the contracting state change over time.¹⁸ I will be looking at the developments since the end of the 18th century, addressing the rich history of the contracting state in France and Germany and comparing it with selected aspects of the evolution of the contracting state in the US.¹⁹

¹⁴ MICHAEL MUSHENO/SUSAN M. ROSS, *Deployed: How Reservists Bear the Burden of Iraq* (2008), esp. 13-14 and 141.

¹⁵ In the oral argument the presiding judge opened with the following caveat: "... assuming that the common contracts law applies to military enlistment contracts and assuming that we have the authority to address the issue ...", broadcast by c-span, available at <http://www.youtube.com/watch?v=c8APE5fLPiI>.

¹⁶ Most importantly Tribunal des conflits, 8 février 1873, rec. 1er supplement 61 - *BLANCO*; OTTO MAYER, *Deutsches Verwaltungsrecht* (1895/96), I: 65.

¹⁷ Cf. FERNAND BRAUDEL, *Ecrits sur l'histoire* (1969/1994).

¹⁸ On the methodology of conceptual history cf. REINHART KOSELLECK, *Futures past : on the semantics of historical time* (1985), 75-92.

¹⁹ Any research taking such a broad view inevitably runs the risk of encountering contradicting facts. However, the relevancy test of such a 'histoire de longue durée' is not so much its consistency with every detail, but whether it is able to construct a coherent account which provides new insights into the questions asked.

- In the first part, I will investigate why contracts between the state and private persons almost completely disappeared in France and Germany for most of the 19th century. I will contrast this absence with the very different evolution of the contracting state in the US.
- In the second part, I will elaborate on the conditions that facilitated the comeback of contracts between the state and private persons in France. Furthermore, I will highlight the differences between France on one side and Germany and Switzerland on the other side. In Germany and Switzerland, contracts between the state and private persons did not emerge in public law until well after the Second World War.

I. The fall of the contract between the state and private persons

A. Creating a frame of reference: A general account of the evolution of the contracting state in the US

While most of the scholars writing on the contracting state are neither interested in a historical nor in a comparative perspective, MITCHELL (1954) and LANGROD (1955) stand out for their detailed comparative analysis of the contracting state in the continental law and the common law.²⁰

Both MITCHELL and LANGROD cite many court decisions reaching back into the 19th century, and both refer the great constitutional differences between France and the US emerging in the 18th and 19th century. However, their account of the contracting state does not take a historical or evolutionary perspective, which would inquire into the changing internal and external stimuli to the legal concepts of the contracting state and vice versa. MITCHELL and LANGROD are instead preoccupied with the contemporary contest between the protection of contractual rights on the one hand and the necessities of effective government on the other. In this regard, certain cases and constitutional changes are singled out as being of great importance. Furthermore, MITCHELL and LANGROD are more interested in

²⁰ JOHN DAVID BAWDEN MITCHELL, *Contractual Promise. Freedom of Executive Action* (1949); JOHN DAVID BAWDEN MITCHELL, *The contracts of public authorities* (1954); GEORGES LANGROD, *Administrative Contracts* (1955).

the increasing similarities of the two systems, common law and civil law, in the middle of the 20th century than in the previous differences.²¹

Indeed, a detailed historical research on the contracting state in common law countries is – to my best knowledge – missing. I will not attempt to fill in this gap at this time, but rather concentrate on the question concerning the difference between common law and civil law. To this end, I will summarize the general account of the evolution of the contracting state in the US and employ it as a framework to explain the difficult and turbulent relationship between the contracting state and its courts in civil law countries. This will allow me to draw conclusions that also apply to the common law, which – as mentioned above – increasingly resembles the civil law experience of the contracting state.

Both MITCHELL and LANGROD start their account of the contracting state in the United States by focusing on constitutional safeguards.²² Article One, Section 10 of the US Constitution of 1787 holds that “no State shall ... pass any ... Law impairing the Obligation of Contracts ...”²³ According to MITCHELL, the framers might not have had the contracting state in mind when enacting Article One, Section 10.²⁴ Presumably, the framers instead focused on contracts between private parties, obligations upon which the state could not intervene even for governing purposes, as held by the Supreme Court in *FLETCHER V. PECK* (1810).

However, in the landmark case of *TRUSTEES OF DARTMOUTH COLLEGE V. WOODWARD* (1819), the Supreme Court not only equated the widely used charters with contracts, but also declared that Article One, Section 10 of the constitution protected such contracts between the state and private persons.

In the equally famous case *CHARLES RIVER BRIDGE V. WARREN BRIDGE* (1837) the Supreme Court expanded the contract clause to also safeguard grants of franchises. However, the court added that the charter would be interpreted as narrowly as possible, thus giving way to state intervention.

²¹ JOHN DAVID BAWDEN MITCHELL, *The contracts of public authorities* (1954), 221; GEORGES LANGROD, *Administrative Contracts* (1955), 362.

²² JOHN DAVID BAWDEN MITCHELL, *The contracts of public authorities* (1954), 81-87; GEORGES LANGROD, *Administrative Contracts* (1955), 333-336.

²³ The Fifth Amendment of 1789, in force 1791, added a safeguard against the Federal Government: “... nor [shall any person] be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.” Furthermore, Section 1 of the Fourteenth Amendment (1868) added a similar provision directed against the States: “... nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

²⁴ JOHN DAVID BAWDEN MITCHELL, *The contracts of public authorities* (1954), 83.

Furthermore, MITCHELL mainly refers to leading cases from 1870 onwards to finally observe that “the history of the judicial attitude in the United States is one of steady withdrawal from that first adopted”. Consequently, in his and LANGROD’S view, US law has come a long way from absolute constitutional protection of contracts between the state and private persons to recognizing the necessities of effective government.²⁵

B. Banishing the contracting state in absolutist and revolutionary France

LOUIS-MARIE DE LAHAYE VICOMTE DE CORMENIN (1788-1866), a leading French scholar in the build up of the modern administrative law, complained in the preface to his *Questions de droit administratif* (1826) and later again in the preface to the *Droit administratif* (1840) that after the great revolution French administrative law had lost its consistency and had not adapted to the new circumstances. Indeed, following the great revolution, scholars were primarily occupied with the most pressing issues of the modern state: the sovereignty doctrine and the division of powers doctrine.²⁶

In this context, which was quite the opposite to the American situation at the time,²⁷ the contract between the administration and private parties did not have a place in the French law of the early 19th century. This is clearly shown in CORMENIN’S work, which recollects and systematizes post-revolutionary administrative law.²⁸ However, there are of course more fundamental structural conditions that advance the dissolution of contracts between the state and private persons than a mere lack of interest.

Many scholars have done research on the emerging “*contrat administrative*” in French law at the end of the 19th century. However, to my best knowledge, none has so far attempted to explain in detail its previous absence. The possible conditions²⁹ for this absence may be explored on two levels, firstly on a level of the specific phenomena directly influencing this absence, and secondly on a more

²⁵ Ibid., 84; GEORGES LANGROD, *Administrative Contracts* (1955), 248-249.

²⁶ Cf. for example BENJAMIN CONSTANT, *Principes de politiques* (1815), preface at III et seq.

²⁷ Above I.A.

²⁸ LOUIS-MARIE DE LAHAYE VICOMTE DE CORMENIN, *Questions de droit administratif* (1826); LOUIS-MARIE DE LAHAYE VICOMTE DE CORMENIN, *Droit administratif* (1840).

²⁹ For the theoretical underpinnings of replacing "reasons" by "possible conditions" see NIKLAS LUHMANN, *Soziale Systeme* (1987): 47.

structural and ideological level. I will first elaborate on the specific phenomena and come back later to the structural and ideological level to explain similar and opposing developments in Germany and the US (below I.D).

In the ancient regime, the French civil courts enjoyed considerable independence from the king mainly by virtue of the judges' hereditary status. However, during the course of the French revolution, the statute on the organization of the judiciary of 1790 formally declared the separation of powers and forbade courts to address issues of the administration or to even cite a civil servant on grounds of his public functions.³⁰ In this manner, as prepared by MONTESQUIEU and ROUSSEAU, the new legal form of the statute, representing the political will of the sovereign, had finally triumphed over the old law as registered and administered by the courts.³¹

Countless variations on the separation of powers doctrine followed the statute of 1790,³² thus harkening back to the absolutist kings' practice of scaling back the jurisdiction of civil courts. To sum it up, by taking advantage of the momentum of the French revolution, the French legislator – as well as the constituent assembly – abolished the old feudal structures that the absolute state of the 18th century had repeatedly attacked by continually limiting the power of the old independent judiciary.³³

Indeed, the great revolution had achieved what the absolutist regime had constantly been striving for: to free the new sovereign nation-state from the old feudal ties, explicitly depicted as privileges (such as the hereditary title of a civil judge) and contracts.³⁴ Privileges and government contracts were to be replaced by the main form of communication of the sovereign state: the “*acte de pure administration*”. These acts would solely follow the statute on the one hand and

³⁰ Loi du 16/24 août 1790 sur l'organisation judiciaire, tit. II, Art. 13: “Les fonctions judiciaires sont distinctes et demeureront toujours séparées des fonctions administratives. Les juges ne pourront, à peine de forfaiture, troubler, de quelque manière que ce soit, les opérations des corps administratives, ni citer devant eux les administrateurs pour raison de leurs fonctions.”

³¹ CHARLES-LOUIS DE MONTESQUIEU, *De l'esprit des lois* (1749/1949); JEAN-JACQUES ROUSSEAU, *Du contrat social ou principes du droit politique* (1795); cf. MAURO CAPPELLETTI, *The judicial process in comparative perspective* (1989), 124 et seq.

³² Cf. most notably Constitution du 3 septembre 1791, chap. V, art. 3: “Les tribunaux ne peuvent ... entreprendre sur les fonctions administratives ou citer devant eux les administrateurs pour raison de leurs fonctions.”

³³ LOUIS-MARIE DE LAHAYE VICOMTE DE CORMENIN, *Droit administratif* (1840), II: 457 and I: 218 et seq.

³⁴ Cf. PHILIPPE-LAURENT PONS DE VERDUN, *Rapport fait au nom du Comité de législation sur le mode d'exécution de la loi du 17 juillet 1793 concernant le brûlement des titres* (1793) in his report to the parliament on the burning of titles.

the discretion of the administration on the other hand. Any judicial review by independent civil courts would be denied.³⁵

As a result of this vigorous separation of powers, the courts lost substantial competences that they had once enjoyed under the ancient regime. Conflicts of competence between the civil courts and the administration were now resolved in favor of the administration. Altogether, any form of collaboration between the state and private persons as well as any claim for damages was withdrawn from the competence of civil courts.³⁶

EMMANUEL JOSEPH SIEYÈS (1748-1836) was aware of the dangers of a powerful administration. In order to counteract this danger, he proposed a council that would act as a watchdog of the constitution.³⁷ Subsequently, Napoleon indeed established the Conseil d'Etat, but commanded its allegiance to the emperor and his corresponding regime and administration, not to the constitution.³⁸ Although Napoleon designed the Conseil d'Etat to be similar to the civil courts, the Conseil d'Etat had neither the competence nor the necessary independence from the administration to develop a comprehensive way in which to supervise the administration and its many forms. Once again, this corresponds to the way in which the ancient regime had introduced many special tribunals in order to keep the courts distanced from as many administrative issues as possible.³⁹

C. From the old German Reich to the sovereign German Länder: the withering contracting state

While legal scholars in France following the revolution examined the great political questions such as democratic sovereignty and separation of powers, German scholars, in the absence of a great revolution, engaged in a detailed discussion on the legal forms through which the state would render its services and employ civil servants.

³⁵ Cf. EUGENE PERRIQUET, *Les Contrats de l'Etat* (1884), N 487 et seq.

³⁶ LOUIS-MARIE DE LAHAYE VICOMTE DE CORMENIN, *Droit administratif* (1840), 440 et seq; RODOLPHE DARESTE, *La justice administrative en France* (1862), 341; EUGENE PERRIQUET, *Les Contrats de l'Etat* (1884), N 231 et seq. and 510.

³⁷ EMMANUEL JOSEPH SIEYES, *Le Tiers-Etat* (1789/1888).

³⁸ Constitution of 22 frimaire an VIII (13 December 1799). Cf. Art. 52: "Sous la direction des consuls, un Conseil d'Etat est chargé de rédiger les projets de lois et les règlements d'administration publique, et de résoudre les difficultés qui s'élèvent en matière administrative."

³⁹ RODOLPHE DARESTE, *La justice administrative en France* (1862), 58.

According to JOHANN HEINRICH GOTTLOB VON JUSTI (1720-1771), a leading German scholar of cameralism, the modern state needed to fundamentally free itself from old ties. In particular, it needed to abandon its practice of handing out public duties, such as providing maintenance to bridges and streets etc. According to JUSTI, the state needed to reclaim these duties and centralize them within the state administration. From this perspective, the state was, in a way, almost entirely self-referential as all public services were provided by the state to its own society.⁴⁰

NIKOLAUS THADDÄUS GÖNNER (1764-1827), an equally important German legal scholar, adopted and detailed this view at the turn of the century, arguing that the state could not engage in a contract by virtue of its sovereignty, but instead had to issue corresponding orders⁴¹ – even when employing civil servants.⁴² Like many scholars before him, GÖNNER of course recognized that the good will of civil servants could not be forced. But this problem was covered up by nationalism, a phenomenon that posited that it was an honor to work for the state.⁴³ Another problem was how to deal with employing a foreign specialist; in this instance, GÖNNER created an exception by allowing the use of a contract. The solution of another scholar, JOHANN MICHAEL SEUFFERT (1765-1829), however, remained remarkably consistent with the general theory: the foreigner would be invited to the country, made a citizen and then ordered to begin civil service.⁴⁴

After GEORG WILHELM FRIEDRICH HEGEL (1770-1831) had explicitly confirmed this doctrine,⁴⁵ it was adopted by virtually all German scholars and courts during the 19th century, with the notable exceptions of the two liberal scholars ROBERT VON MOHL (1799-1875)⁴⁶ and FRIEDRICH JAKOB SCHMITTHENNER (1796-1850).⁴⁷

⁴⁰ JOHANN HEINRICH GOTTLOB VON JUSTI, *Politische und Finanzschriften* (1761), I: 346.

⁴¹ NICOLAUS THADDÄUS GÖNNER, *Beobachtungen über die Rechtsmaterien* (1803), 352 et seq. Similarly EMER DE Vattel, *Le droit des gens, ou, principes de la loi naturelle appliqués à la conduite & aux affaires des nations & des souverains* (1758), §§ 100-104.

⁴² NICOLAUS THADDÄUS GÖNNER, *Der Staatsdienst* (1808), 56.

⁴³ *Ibid.*, 70; cf. JOHANN MICHAEL SEUFFERT, *Von dem Verhältnisse des Staats und der Diener des Staats* (1793), 12; FRANZ ARNOLD VON DER BECKE, *Von Staatsämtern und Staatsdienern* (1797), preface and § 17.

⁴⁴ JOHANN MICHAEL SEUFFERT, *Von dem Verhältnisse des Staats und der Diener des Staats* (1793): 28.

⁴⁵ GEORG WILHELM FRIEDRICH HEGEL, *Die "Rechtsphilosophie"* von 1820 (1820/1973), §§ 268 und 294.

⁴⁶ ROBERT VON MOHL, *Das Staatsrecht des Königreiches Württemberg* (1831), 188 und 192, N 5.

⁴⁷ FRIEDRICH SCHMITTHENNER, *Grundlinien des allgemeinen oder idealen Staatsrechtes* (1845), 509, Fn. 5. On Schmitthenner see MICHAEL STOLLEIS, *Geschichte des öffentlichen Rechts in Deutschland*, Bd. 2 (1992), 182.

Indeed, contracts between the state and private persons became next to non-existent in 19th century in German law. The fiscal theory⁴⁸, under which civil courts protected certain rights of private parties against the state, only provided a partial functional equivalent to contracts between the state and private persons. While under the fiscal theory certain rights – such as the right of the civil servant to be provided with sustenance – could be enforced by legal action in civil courts, it is important to note that these rights were not seen as part of a contract, but as property rights.⁴⁹

Compared with the natural law doctrine of the 18th century, which held the state responsible for its contractual promises as it did private persons,⁵⁰ this was indeed a remarkable shift. What circumstances prompted this shift in legal theory and practice? As for France, a more phenomenological explanation about the relationship between the state and its courts (following below) and a more theoretical explanation drawing on the underlying social theories (below I.D) may be advanced.

The old German Reich was founded on fundamentally different political structures than absolutist France. While France strove towards centralized power in the sovereign, first seen embodied in the king and later in the people, the old German Reich was not a sovereign state in the sense of the 19th century. In fact, it merely held together the many overlapping and concurring fractions in its realm. Thus it was a community based on law and a stronghold against centralized power, rather than a political unity in the sense of a modern state.⁵¹ Within this setting, the old German Reich of the 18th century developed a relatively elaborate rule of law for private persons against the various rulers of the states – primarily as a way to maintain the unity of the Reich.⁵²

⁴⁸ The fiscal theory emerged at the beginning of the 19th century as a predecessor to the modern administrative law. See most importantly CARL JOSEPH ANTON MITTERMAIER, *Beiträge zu den Gegenständen des bürgerlichen Processes* (1820). For authors linking the fiscal theory with the contracting state see RODOLPHE DARESTE, *La justice administrative en France* (1862): 205 f.; JOHANN CASPAR BLUNTSCHLI, *Allgemeines Staatsrecht* (1852): 2 f.; for an overview see REGINA OGOREK, *Individueller Rechtsschutz gegenüber der Staatsgewalt* (1988): 385 ff.

⁴⁹ Cf. for example JOHANN CASPAR BLUNTSCHLI, *Allgemeines Staatsrecht* (1852), 422 et seq; HEINRICH ALBERT ZACHARIÄ, *Deutsches Staats- und Bundesrecht* (1854), II, 27-28.

⁵⁰ The later natural law scholars however started to recognize the ‘special situation’ of the state while still holding on to *pacta sunt servanda* as the fundamental principle of natural law: cf. CHRISTIAN VON WOLFF, *Ius naturae* (1748/1968), § 904; JOHANN GOTTLIEB FICHTE, *Grundlage des Naturrechts nach Prinzipien der Wissenschaftslehre* (1796/1979), 164.

⁵¹ DIETER GRIMM, *Der Staat in der kontinentaleuropäischen Tradition* (1987), 60 et seq.

⁵² REGINA OGOREK, *Individueller Rechtsschutz gegenüber der Staatsgewalt* (1988), 375-376.

The various Länder (states) of the Reich nevertheless followed the French example and strove towards more united and centralized form of power. When the Reich disintegrated in 1806, its stronghold against the united and centralized power of the Länder ceased to exist. As a direct consequence, the rule of law as guaranteed by the Reich also ceased to exist. Correspondingly, German Länder reduced the jurisdiction of independent courts to issues between private parties.⁵³

Furthermore, the case of Germany illustrates two major differences with respect to France that will prove influential in understanding further path dependencies of the contracting state:

- Firstly, in the various German Länder, the civil service developed certain autonomy and independence from the regime, which was at times secured by constitution or statute. HEGEL explicitly promoted civil service as a substitute for democracy and liberalism. In his view, civil service mediated between the regime and the people.⁵⁴
- Secondly, following this important position of the civil service and due to the more evolutionary than revolutionary developments in the German Länder, the regimes kept depending on selective arrangements with old authorities to perform specific tasks of the state.⁵⁵

To sum up, the disintegration of the German Reich stimulated a similar but weaker shift to sovereign power compared to France. As in France, it finally separated the administration from the ties of the old judiciary. However, unlike the French regime during the course of revolution, the German Länder disengaged themselves slowly and gradually from many old privileges; this gradual disengagement curtailed many vital resources needed to administer modern society, a move that subsequently called into question the sovereign state.

⁵³ HANS-UWE ERICHSEN, *Lehre vom fehlerhaften belastenden Verwaltungsakt* (1971), 121 et seq. and 167 et seq; REGINA OGOREK, *Das Machtspruchmysterium* (1984), 91.

⁵⁴ GEORG WILHELM FRIEDRICH HEGEL, *Grundlinien der Philosophie des Rechts* (1821/1995), § 295.

⁵⁵ This is still visible in Otto Mayer's view of the state: OTTO MAYER, *Zur Lehre vom öffentlichrechtlichen Verträge* (1888), 42 fn. 59. Cf. DIETER SCHWAB, *Eigentum* (1975); JAMES J. SHEEHAN, *Der Ausklang des alten Reiches* (1994), 391.

D. The origin of differences between the common law and the continental law and its impact on the contracting state

So far, we have seen that contracts between the state and private persons almost completely disappeared by the end of the 18th and the beginning of the 19th century in France and Germany. During these years, scholars – especially in Germany, but also seen in France – went along the separation of powers doctrine by banishing contracts between the state and private persons from the law all together. In the US, however, the law of contracts between the state and private persons evolved to the contrary. Article One, Section 10 of the US Constitution of 1787 explicitly protected contracts from state intervention; indeed, the Supreme Court in *TRUSTEES OF DARTMOUTH COLLEGE V. WOODWARD* (1819) expanded this clause to cover contracts between the state and private parties.

As important as the separation of powers might be for the evolution of the contracting state, from the viewpoint of conceptual history the separation of powers appears more as epiphenomenon to the fall of contracts between the state and private persons in civil law. Indeed, the sovereignty doctrine provides further explanations as to why contracts between the state and private persons were almost non-existent in France and Germany for most of the 19th century but present in the US. At the core of this difference between the common law and the civil law tradition are the theories of JEAN BODIN (1529-1596) and THOMAS HOBBS (1588-1679), which both exerted a very specific influence in France and Germany that did not translate to England and the US:

- In brief,⁵⁶ BODIN made the sovereignty of society an issue of political authority. As a result, the king had to assume responsibility for the unity of the multitude of men, a task made necessary by the many religious wars on the continent. In return, providing unity to the multitude of men legitimized the king.⁵⁷ However, religious wars were relatively easily resolved in England and BODIN's theory did not have as great an impact on England as on the continent.⁵⁸
- On the basis of BODIN'S theory, HOBBS internalized the reference point of political legitimacy by separating the monarch from his likeness to God,

⁵⁶ For more details see ANDREAS ABEGG, *From the Social Contract to a Social Contract Law* (2008), 4 et seq.

⁵⁷ JEAN BODIN, *Les six livres de la république* (1576), 127 et seq.; cf. JACQUES MARITAIN, *The Concept of Sovereignty* (1950).

⁵⁸ DIETER GRIMM, *Der Staat in der kontinentaleuropäischen Tradition* (1987), 62.

making him a representative of the multitude of his subjects. This relationship is symbolized by the social contract, by which each one of the so called multitude “... by mutual covenants one with another, have made themselves every one the author” and unite in the “common-wealth” for “peace and common defense”. Again, in this respect, due to the outcome of the English civil war, Hobbes' theory did not resonate as much in England as it did in France and the German Länder.⁵⁹

These two theories, taken further by ROUSSEAU,⁶⁰ account, among others, for some important differences in the common law concept of rule of law on the one hand and the civil law concept of *état de droit* and *Rechtsstaat* on the other hand. In particular, the sovereign in the civil law holds all means necessary – including the law – to carry out its promises. Thus, continental law develops public law as a body of law above the law, emanating from and dealing with the all-embracing sovereign state. By issuing codes, the continental state pretends that law, regardless of its long and rich tradition, ultimately derives from the state. Alternatively, under the rule of law doctrine as influenced by LOCKE, law enjoys a certain independence from the king and the state administration.⁶¹

This core difference also gives rise to a very different approach when dealing with the contracting state:

- In England and in the US, due to the absence of the division between private law and public law as coined under the absolutist theories on the continent, common law applies to all kinds of contracts. Therefore, the pivotal question of the contracting state in the common law is whether a specific public agency may – as an exception – divert from contractual promises by reason of effective government. This perspective becomes clearly visible as early as *CHARLES RIVER BRIDGE V. WARREN BRIDGE* (1837).
- In continental law, however, the question is quite the opposite: does public law allow the public agency to contract with a private party, thus deviating from the usual way of communicating by command based on statute?⁶²

⁵⁹ THOMAS HOBBS, *Leviathan* (1651/1839), 158; on Hobbes and Bodin cf. PRESTON KING, *The ideology of order: a comparative analysis of Jean Bodin and Thomas Hobbes* (1999).

⁶⁰ JEAN-JACQUES ROUSSEAU, *Du contrat social ou principes du droit politique* (1795).

⁶¹ JOHN LOCKE, *Two treatises of government* (1680-90/1966), esp. § 131.

⁶² Cf. in particular FRITZ FLEINER, *Institutionen des deutschen Verwaltungsrechts* (1913), 201 et seq.

To sum up, under such a rigid modern sovereignty-doctrine, the contracting state was inconceivable for most German and French legal scholars of the late 18th and the first half of the 19th century. Rather, the contracting state was depicted as a form of the old feudal regime and as a source of dispute and corruption that had to be overcome by absolute sovereignty.

II. Re-entry of the contract between the state and private persons

By the end of the 19th century, the French Conseil d'Etat started to elaborate on a specific doctrine of administrative contracts under public law. Various cases around the turn of the century⁶³ mark the 're-entry' of contracts between the state and private persons in two different ways: firstly, the contracts between the state and private persons reappeared on the stage of the courts and in academic discourse after nearly a century. Secondly, the contracts between the state and private persons marked a re-entry into public law in the sense that public law was, up until this point, defined by its opposition to business transactions ("act de gestion"). Thus, the difference by which public law defined itself was partially re-introduced into public law.

German law, as well as Swiss and Austrian law, however, did not develop such a public contract law doctrine until well after the Second World War. These German-speaking countries instead utilized the fiscal theory; one example of this is the remuneration of the civil servant. Yet, the fiscal theory, with its limited perspective on certain aspects of the legal relationship between the state and private persons, did not amount to a substitute for the contract under public law.⁶⁴

In the following, I will again explore these striking differences by taking a close look at the relationship of the state administration to the judiciary.

⁶³ Conseil d'Etat, 26 décembre 1891, rec. 789 - *COMPAGNIE DU GAZ DE SAINT-ETIENNE*; Conseil d'Etat, 11 janvier 1895, rec. 31 - *COMPANIES DES CHEMIN DE FER D'ORLEANS ET DU MIDI*; Conseil d'Etat, 10 janvier 1902, rec. 5 - *COMPAGNIE NOUVELLE DU GAZ DE DEVILLE-LES-ROUEN*; Conseil d'Etat, 6 février 1903, rec. 96 - *TERRIER*.

⁶⁴ On the fiscal theory cf. above Fn. 49.

A. France: Liberal theory and independent judiciary

A first milestone on the way to reintroducing contracts between the state and private persons into public law may be seen in DARESTE'S paradigmatic book on administrative justice.⁶⁵ RODOLPHE DARESTE (1824-1911) aimed at further legitimizing the growing, and ever more despotic, administration of France by putting its acts vis-à-vis private persons into the form of the law and bringing it under independent judicial review.⁶⁶ In this context, Dareste also identified various forms of collaborations between the state and private persons as contracts. To form a contract-doctrine in public law, he borrowed from the form of the civil code and then adapted these rules to the specific circumstances of administrative tasks.⁶⁷ EUGÈNE PERRIQUET (1833-?) took Dareste's concept one step further, systematically reconstructing a contracts-doctrine in public law.⁶⁸

DARESTE proposed the juridification of the state administration during the Second Empire (1852–1870) under the despotic regime of Napoleon III. After being the first president of France from 1848, Napoleon III took power in a coup d'état in 1852. Indeed, Dareste is part of a strong trend of liberal critique against the absolute state. Such liberal critique may be seen as one precondition of the re-emerging contracting state. Remarkably, the liberal critique was inspired by the United States.⁶⁹ Writing in opposition to the sovereignty-doctrine as demonstrated by the works of BODIN, HOBBS AND ROUSSEAU, liberals like TOCQUEVILLE attacked the state for its accumulation of power and for its reluctance to let its subordinates participate in the core tasks of the state.⁷⁰

Furthermore, it is important to note that the administrative tribunals increasingly gained independence from the French regimes. Although the Second Empire revoked the Conseil d'Etat's previously obtained right to administer justice in the name of the people,⁷¹ the Conseil still enjoyed considerable independence under this regime for two reasons. Firstly the juridification of the administration

⁶⁵ RODOLPHE DARESTE, *La justice administrative en France* (1862).

⁶⁶ *Ibid.*, 674-675.

⁶⁷ *Ibid.*, 301 et seq.

⁶⁸ EUGÈNE PERRIQUET, *Les Contrats de l'Etat* (1884).

⁶⁹ Cf. the well known ALEXIS DE TOCQUEVILLE, *De la démocratie en Amérique* (1835-1840); ALEXIS DE TOCQUEVILLE, *L' Ancien Régime et la Révolution* (1856).

⁷⁰ ALEXIS DE TOCQUEVILLE, *De la démocratie en Amérique* (1835-1840), II 389 et seq.

⁷¹ The Second Republic (1848–1852) had awarded the 'justice déléguée' to the Conseil by Loi du 3 mars 1849 (cf. Art. 6), i.e. the Conseil administered justice in the name of the people, not in the name of the king.

compensated for the regime's missing democratic legitimacy.⁷² And secondly, the regime also depended on a strong Conseil d'Etat to combat the *décentralisation* by which local administrations gained more independence from the rather weak central state.⁷³

In this context of the decentralization, the Conseil d'Etat developed its key instrument to finally bring the administration under the '*Etat de droit*'. In some cases against local governors, the Conseil d'Etat expanded its *recours pour excès de pouvoir* (appeal for exceeding power) to the case of *détournement de pouvoir* (abuse of power).⁷⁴ This meant that the Conseil could not only hold the administration accountable for breaching the letter of the statutes, but also for deviating from its purposes.⁷⁵ Only this wider perspective later allowed for reviewing contracts between the state and private persons, which, by definition, can never be fully anticipated and captured by statute.

Furthermore, the famous case of *BLANCO* in 1873 finally paved the way for the recognition of the contracting state under public law. Before Blanco, only a decision of the legislator could give rise to compensation. The Tribunal des Conflicts, closely linked to the Conseil d'Etat, held in Blanco that the courts could indeed judge tortious acts of the administration. Whether it was for the administrative or the civil court to look into the subject matter had to be distinguished according to the specific activity of the administration.⁷⁶

Following from the precedent of *BLANCO* (1873), the Conseil d'Etat came close to re-introducing the contract into administrative law in the case *HOTCHKISS* (1874), which dealt with allegedly deficient weapons delivered by the private company Hotchkiss to the state in the course of the German-French war (1870–1871). Although the form of the contract did not play a major role in *HOTCHKISS* (1874), the case stands for the circumstances in which administrative law started to build on the contract-doctrine. First and foremost, the administrative tribunals started to reconcile the public interests with the need of the administration to collaborate with private parties. Behind this stood the need of the administration to draw on resources it did not directly dispose of and could not have absorbed by force

⁷² Actually, the Conseil d'Etat departed from its former doctrine of non-interference into politics based on a statute of the former regime, by revoking the military title of a nephew of the former king Napoleon III in the case Conseil d'Etat, 19 février 1875, rec. 155 - *PRINCE NAPOLEON*.

⁷³ Most notably in the cases Conseil d'Etat, 19 mai 1858, rec. 399 - *VERNHES* and Conseil d'Etat, 25 février 1864, rec. 209 - *LESBATS*.

⁷⁴ Conseil d'Etat, 25 février 1864, rec. 209 - *LESBATS*.

⁷⁵ Cf. JEAN-MARIE AUBY, *The Abuse of Power in French Administrative Law* (1970), 549 et seq.

⁷⁶ Tribunal des conflits, 8 février 1873, rec. 1er supplement 61 - *BLANCO*.

without running the risk of losing the cooperation of the private sector all together. This is also particularly obvious in the many cases on public infrastructure that followed.⁷⁷

Following these developments, the administrative courts also departed from the sovereignty-doctrine in the sense that they did not so much distinguish between *acte d'autorité* and *acte de gestion* as a way to divide public and private law jurisdiction, but instead allocated administrative acts according to its function. This may be seen as the final precondition to reconstruct contracts in public law. While under the old doctrine, public law was the law of the sovereign state acting by command and order, the new public law would focus more on the public function than on the form of communication.⁷⁸ In order to deliver on its main tasks, to unite the multitude of society and lead it to general welfare, the sovereign state had – in a way – lost its pure form and started to substitute the great political social contract by way of many small legal contracts.

To sum up, the contracting state re-emerged in public law under similar but opposing conditions as it disappeared about a century earlier. Contracts between the state and private persons re-emerged after the judiciary, in this case the administrative tribunals of France, had gained more independence from the regime⁷⁹; indeed, this reemergence occurred after liberals called for the withdrawal of the sovereignty-doctrine as a way in which to encourage private persons to engage in public service.⁸⁰ In this context, legal scholars initiated the process to include contracts into public law by providing ideas on how the growing and, at times, despotic administration could be better legitimized by expanding the rule of law.⁸¹ Furthermore, legal scholars took up the new cases of the administrative tribunals in order to integrate the contract doctrine into

⁷⁷ Among many cf. Conseil d'Etat, 26 décembre 1891, rec. 789 - *COMPAGNIE DU GAZ DE SAINT-ETIENNE*; Conseil d'Etat, 11 janvier 1895, rec. 31 - *COMPANIES DES CHEMIN DE FER D'ORLEANS ET DU MIDI*; Conseil d'Etat, 10 janvier 1902, rec. 5 - *COMPAGNIE NOUVELLE DU GAZ DE DEVILLE-LES-ROUEN*; Conseil d'Etat, 21 décembre 1906, rec. 961 - *SYNDICAT CROIX DE SEGUEY-TIVOLI*; Conseil d'Etat, 6 décembre 1907, rec. 913 - *D'ORLEANS ET AUTRES COMPAGNIE DU NORD*; Conseil d'Etat, 29 janvier 1909, rec. 116 - *COMPAGNIE DES MESSAGERIES MARITIMES*; Conseil d'Etat, 10 mars 1910, rec. 216 - *COMPAGNIE GENERALE FRANÇAISE DES TRAMWAYS*.

⁷⁸ Cf. in particular Conseil d'Etat, 29 janvier 1909, rec. 116 - *COMPAGNIE DES MESSAGERIES MARITIMES*.

⁷⁹ Most notably in Conseil d'Etat, 19 février 1875, rec. 155 - *PRINCE NAPOLEON*.

⁸⁰ Most notably ALEXIS DE TOCQUEVILLE, *L' Ancien Régime et la Révolution* (1856), 131 et seq.

⁸¹ RODOLPHE DARESTE, *La justice administrative en France* (1862), preface; EUGENE PERRIQUET, *Les Contrats de l'Etat* (1884), N 51.

administrative law as well as maintain a systematic and consistent administrative law.⁸²

B. Germany and Switzerland: The late juridification of the police state

In Germany and Switzerland, contracts between the state and private persons were not common practice in public law until well after the Second World War. With few exceptions, contracts between the state and private parties become more widely used in the 80s and 90s of the 20th century.⁸³

In view of the previously uncovered relationship between the contracting state and its judiciary, once more it is important to confirm a direct correlation between the two. Although Germany installed administrative courts at the end of the 19th and Switzerland at the beginning of the 20th century, the administrative courts of both countries did not in general have jurisdiction to investigate the contracting state until after the Second World War.⁸⁴

The cases of Germany and Switzerland also confirm the significant influence of the sovereignty doctrine. After its failure in 1848-1849, the liberal movement in Germany reduced its political demands to the private sphere and to the free market regime. The monarch, and its regime, kept its full and undivided responsibility for uniting society and providing general welfare.⁸⁵ Although scholars like RUDOLF VON GNEIST (1816-1895) and OTTO BÄHR (1817-1895) vigorously demanded administrative courts to keep the growing administration in check,⁸⁶ administrative courts were only partially independent from the administration and confined on a narrow competence vis-à-vis the administration. Administrative courts were merely allowed to pass a judgment on whether the administration expressly violated a given statute. Contrary to the Conseil d'Etat of

⁸² Cf. HENRY BERTHELEMY, *Traité élémentaire de droit administratif* (1906); LEON DUGUIT, *Les particuliers et les services publics* (1907); GASTON JEZE, *Nature juridique de la concession de service public* (1910); GASTON JEZE, *Les contrats administratifs* (1927-1934).

⁸³ WORACHET PAKEERUT, *Die Entwicklung der Dogmatik des verwaltungsrechtlichen Vertrages* (Diss.) (2000), 26 and 113 et seq.

⁸⁴ In detail on Germany HANS-UWE ERICHSEN, *Lehre vom fehlerhaften belastenden Verwaltungsakt* (1971), 162 et seq; WOLFGANG RÜFNER, *Die Entwicklung der Verwaltungsgerichtsbarkeit* (1984), for Switzerland see REGINA KIENER, *Entwicklung der Verwaltungsgerichtsbarkeit* (2004).

⁸⁵ REGINA OGOREK, *Individueller Rechtsschutz gegenüber der Staatsgewalt* (1988), 401 et seq.; MICHAEL STOLLEIS, *Geschichte des öffentlichen Rechts in Deutschland*, Bd. 2 (1992), 385 et seq.

⁸⁶ RUDOLF VON GNEIST, *Das heutige englische Verfassungs- und Verwaltungsrecht* (1857/1863); OTTO BÄHR, *Rechtsstaat* (1864).

the time, German courts could not hold the administration responsible for not following the spirit of the statute or even the spirit of the law. The courts were virtually barred from assessing the discretionary power of the administration, which did not belong to the law but rather to the realm of the monarch.⁸⁷

Since the contracting state, by definition, uses discretion to strive flexibly towards what it considers to be the most adequate solution, the administrative courts did not have much room to call to account the contracting state. Consequently, the law was not able to broach the issue of the contracting state. Fiscal theory and the corresponding competence of civil law courts remained strong in Germany.⁸⁸

Interestingly, we find a very similar situation in Switzerland. At first glance, this might come as a surprise because Switzerland is the only country where the liberal revolution of 1848 has, in a way, succeeded. Furthermore, both the liberal underpinnings and the federal structures of Switzerland correspond to those of the United States, which implemented contracts between the state and private persons at a very early stage of the 19th century.⁸⁹ However, other particularities of Switzerland prove to be distinctive:

- Firstly, we have to take into account the absolutist character of Swiss democracy in the sense of ROUSSEAU.⁹⁰ Even today, democracy is seen as a functional equivalent to the rule of law.⁹¹ Thus, the young federal state and its member states did not focus on rule-of-law guarantees for private persons, but rather on democratic checks and balances within the various sovereign Cantons.
- Secondly, the function of the federal state in Switzerland was to unite the independent sovereign Cantons (states) of Switzerland after the civil war of 1847. This also reflected in the fact that according to the constitution of 1848, sovereignty lay in the people of the member states, not on the federal

⁸⁷ WOLFGANG RÜFNER, *Die Entwicklung der Verwaltungsgerichtsbarkeit* (1984), 912; MARTIN BULLINGER, *Verwaltungsermessen im modernen Staat: Landesbericht Bundesrepublik Deutschland* (1986), 136-137; REGINA OGOREK, *Individueller Rechtsschutz gegenüber der Staatsgewalt* (1988), 402 et seq.

⁸⁸ Cf. among others explicitly RICHARD THOMA, *Die Gasröhrenkonzession und die Rechtslage des Röhrennetzes nach Ablauf der Konzessionsdauer* (1918), 319.

⁸⁹ Above I.A.

⁹⁰ Cf. above I.D.

⁹¹ Consequently, on the federal level, even today courts are barred from adjudicating on issues that have been decided by parliament: Art. 190 of the Swiss Constitution.

level.⁹² Therefore, the federal state was not constituted as a sovereign with its corresponding responsibilities, but as a mere tool to unite a fragmented multitude of states. Any judicial review of the federal administration initiated by private persons would have hampered this task. Indeed, the federal government and the federal administration later vigorously fought against the demand to implement administrative courts. The fight even continued after the Swiss people voted to introduce administrative courts in 1914.⁹³

Correspondingly, until the First World War, scholars in Germany and in Switzerland were not primarily concerned with the upcoming interventionist state, but rather with making the police state more legitimate by introducing a certain degree of the rule of law. At the same time, OTTO MAYER'S forceful denial resonated within the scholarly discourse until well after the Second World War.⁹⁴ The majority of scholars followed MAYER, who still relied upon a sovereignty-doctrine that mandated that the state unite society, thereby disposing of all the means necessary, including the production of law.⁹⁵ Paradoxically, due to the sovereignty-doctrine, German and Swiss scholars had to make one important concession. Contracts between the state and private persons would be valid in administrative law if the sovereign explicitly established the basis of such contracts in a statute.⁹⁶

C. Conclusions: The inevitable paradox of the modern state

Today, many scholars point out that the administration constantly attracts more and more responsibilities even as it does not have the means to live up to the promises it makes. One way to compensate for this lack of resources is to call upon private persons. However, there is some unease about how far and under

⁹² Cf. Art. 1 of the Swiss Constitution of 1848. This also applies to the Constitution of 1872; cf. WILHELM SNELL, *Naturrecht nach den Vorlesungen von Wilhelm Snell* (1857), 233-234.

⁹³ Cf. FRITZ FLEINER, *Eidgenössische Verwaltungsgerichtsbarkeit* (1921).

⁹⁴ OTTO MAYER, *Theorie des französischen Verwaltungsrechts* (1886); OTTO MAYER, *Zur Lehre vom öffentlichrechtlichen Verträge* (1888).

⁹⁵ Among many see WALTER JELLINEK, *Zweiseitiger Verwaltungsakt und Verwaltungsakt auf Unterwerfung* (1925) for Germany and ZACCARIA GIACOMETTI, *Grenzziehung zwischen Zivilrechts- und Verwaltungsrechtsinstituten* (1924) for Switzerland.

⁹⁶ Cf. FRITZ FLEINER, *Institutionen des deutschen Verwaltungsrechts* (1913), 201 et seq. The Swiss Federal Court explicitly followed this doctrine in BGE, 41 II 299 1915, - *KRAFTWERK LAUFENBURG GEGEN STAAT AARGAU*.

which conditions the state can dispose of its core responsibilities which define it as a state in the first place.⁹⁷

A brief look at the long-term evolution of the contracting state reveals that the problem might run deep into the basic concepts of modern society. Since the birth of the modern state, scholars have repeatedly argued that, as a matter of principle in civil law, the sovereign state does not contract with private persons. Additionally, they have argued that in common law, the sovereign state cannot be bound by such contracts.⁹⁸ However, it is a fundamental paradox of the modern state that the state is also increasingly dependent upon collaboration with private persons.⁹⁹

For the civil law countries of Germany and France, this paradox may be traced back to the absolutist state and the early continental democratic state, both of which virtually banned contracts between the state and private persons from the law.¹⁰⁰ It is at this point that the state possesses all the power necessary to unite society; we can see the emergence of the modern state when the sovereign power consciously decides *not* to utilize contracts during unification. However, this unity is also vulnerable to weakness. Indeed, we can observe the unraveling of the modern sovereign state in three steps:

- From early on in the 19th century, German scholars vigorously demanded that the state refrain from entering into contracts with private persons and from transferring privileges to private persons – *except* to civil servants. Indeed, the civil service was an inevitable point of contact between the state and society. The state could not dispose of one crucial resource: the goodwill of its civil servants. This had very practical consequences for the proposed legal doctrines, as GÖNNER pointed out. However, under the continental sovereignty-doctrine, which focused on the undivided sovereign, it was inconceivable to comprehend these cases as contracts. Instead, the law protected certain rights of private persons as property rights under the fiscal theory.¹⁰¹

⁹⁷ Above
Introduction: The precarious nature of the contracting state.

⁹⁸ Above I.A.

⁹⁹ Above I.B-I.D.

¹⁰⁰ A comprehensive historical account of the contracting state for the Common Law countries is missing so far. See above I.A.

¹⁰¹ Above I.C. Furthermore, it was also difficult to find any other way to draw a foreign specialist into civil service than by contract: NICOLAUS THADDÄUS GÖNNER, *Der Staatsdienst* (1808), 93. But since

- Between 1850 and 1914 in France, we can see how the first wave of systematic re-entry of contracts into continental public law relates to the problem of public services and public procurement. On one hand, the state engaged in a build up of new transport and sanitary infrastructures. On the other hand, the many wars created the need to further collaborate with private companies in order to deliver state-of-the-art weaponry and other important materials and services.¹⁰² It is important to note that the contract between the state and private persons did not reappear until: first, liberal thinkers like DARESTE had made concrete suggestions on how to bring the growing and ever more intervening administration under the rule of law; second, the French administrative courts had gained more independence from politics; and third, the administrative courts had developed ways to hold the ever more flexible administration to account with the *recours pour détournement de pouvoir* (appeal for abuse of power).¹⁰³ However, at the same time in Germany and Switzerland, contracts between the state and private persons were still mostly substituted by the fiscal theory. Scholars were primarily concerned with making the police state more accountable, but no independent courts possessed the competence to hold the new interventionist administration accountable. Thus, the cases of Germany and Switzerland confirm the decisive influence of liberal theory and independent judiciary on the evolution of the contracting state.¹⁰⁴
- In Germany and Switzerland, the contracting state caught up to France during the great reconstruction after the Second World War and during the second half of the 20th century, when new administrative responsibilities of the interventionist state emerged. Since the administration did not have the means to live up to these new responsibilities by the traditional means of the policy state, it required the services of private contractors. Once more, liberal theory and increasing independence of the courts proved to be decisive for the reappearance of contracts between the state and private persons.¹⁰⁵

the sovereignty-doctrine recognized territorial limits to the sovereign, this did not put into question the theory.

¹⁰² Above II.A.

¹⁰³ Above II.A.

¹⁰⁴ Above II.B

¹⁰⁵ However, it is important to note that the administrative state nevertheless attempted to back up its contracts with administrative sanctions and unilateral administrative procedures. In this way, the interventionist state and private persons bargained for these contracts in the shadow of the state: ANDREAS ABEGG, *From the Social Contract to a Social Contract Law* (2008).

To sum up, we can observe the noteworthy correlation of liberal theory and independent judiciary with the fall and rise of the contracting state. In both France and Germany, contracts between the state and private persons vanished at the same time as the new sovereign state prevented independent courts from looking into matters of state administration. Furthermore, contracts between the state and private persons reappeared shortly after independent administrative courts regained the competence to look into matters of the contracting state. This correlation is mirrored in the separation of powers doctrine and is decisively shaped by the sovereignty-doctrine and the corresponding liberal influence on it. Considering the evolution of the contracting state, these factors also account for the core differences between civil law and common law.

Consequently, the evolution of contracts between the state and private persons suggests that independent courts – along with liberal thought and the shape of the sovereignty-doctrine – have a major role to play when the state increasingly depends on collaboration with private parties.

Yet, it is crucial to note that this insight is being challenged today on many levels¹⁰⁶, and that this insight runs counter to the founding principle of continental administrative law and recent developments in the US: that the administration is able to administer the law as well as the independent judiciary.¹⁰⁷

¹⁰⁶ Above at Fn. 14.

¹⁰⁷ Cf. OTTO MAYER, *Deutsches Verwaltungsrecht* (1895/96), I, 65.

Literature

- ABEGG, ANDREAS, From the Social Contract to a Social Contract Law - Forms and Function of Administrative Contracts in a Fragmented Society, in: *Ancilla Iuris* (anci.ch) 2008.
- ÅKERSTRØM ANDERSEN, NIELS, The Contractualisation of the Citizen - on the transformation of obligation into freedom, in: *Soziale Systeme* 2004.
- AUBY, JEAN-MARIE, The Abuse of Power in French Administrative Law, in: *The American Journal of Comparative Law* 1970.
- BÄHR, OTTO, *Der Rechtsstaat. Eine publizistische Studie*, 2nd ed., Kassel/Göttingen 1864.
- BAMBERGER, KENNETH A., Regulation as Delegation: Private Firms, Decisionmaking, and Accountability in the Administrative State, in: *Duke Law Journal* 2006.
- BECKE, FRANZ ARNOLD VON DER, *Von Staatsämtern und Staatsdienern*, Heilbronn am Neckar 1797.
- BERTHÉLEMY, HENRY, *Traité élémentaire de droit administratif*, 4th ed., Paris 1906.
- BLUNTSCHLI, JOHANN CASPAR, *Allgemeines Staatsrecht*, München 1852.
- BOBBITT, PHILIP, *The shield of Achilles war, peace and the course of history*, London 2002.
- BODIN, JEAN, *Les six livres de la république*, 2nd ed. (reprint), Paris 1576.
- BRAUDEL, FERNAND, *Ecrits sur l'histoire*, Paris 1969/1994.
- BROWN, WENDY, Sovereignty and The Return of the Repressed, in: Working Paper, Kadish Center for Morality, Law & Public Affairs, University of California, Berkeley, http://www.law.berkeley.edu/centers/kadish/workshop_2006/brown.pdf, last update: 27 February 2006, last visit: 20 November 2008.

- BULLINGER, MARTIN, Verwaltungsermessen im modernen Staat: Landesbericht Bundesrepublik Deutschland, in: Bullinger (ed.), Verwaltungsermessen im modernen Staat, Baden-Baden 1986.
- CAPPELLETTI, MAURO, The judicial process in comparative perspective, Oxford 1989.
- CESARI, OCELYNE, Demande de l'Islam en banlieue : un défi à la citoyenneté, in: Cemoti - no. 19 - Laïcité(s) en France et en Turquie, <http://cemoti.revues.org/document1695.html>, last update: 16 May 2006, last visit: 8 December 2008.
- CONSTANT, BENJAMIN, Principes de politiques, applicables à tous les gouvernements représentatifs, et particulièrement à la constitution actuelle de la France, Paris 1815.
- CORMENIN, LOUIS-MARIE DE LAHAYE VICOMTE DE, Questions de droit administratif, 3rd ed., Paris 1826.
- CORMENIN, LOUIS-MARIE DE LAHAYE VICOMTE DE, Droit administratif, 5th ed., Paris 1840.
- DARESTE, RODOLPHE, La justice administrative en France; ou traité du contentieux de l'administration, Paris 1862.
- DUGUIT, LÉON, Les particuliers et les services publics, in: Revue du Droit public 1907.
- ERICHSEN, HANS-UWE, Verfassungs- und verwaltungsrechtsgeschichtliche Grundlagen der Lehre vom fehlerhaften belastenden Verwaltungsakt und seiner Aufhebung im Prozess - ein dogmengeschichtlicher Beitrag zu Rechtsbindung, Rechtswidrigkeit und Rechtsschutz im Bereich staatlicher Eingriffsverwaltung, Frankfurt a. M. 1971.
- FICHTE, JOHANN GOTTLIEB, Grundlage des Naturrechts nach Prinzipien der Wissenschaftslehre, 2nd ed. (reprint), Hamburg 1796/1979.
- FLEINER, FRITZ, Institutionen des deutschen Verwaltungsrechts, 3rd ed., Tübingen 1913.
- FLEINER, FRITZ, Eidgenössische Verwaltungsgerichtsbarkeit, in: Neue Zürcher Zeitung 1921, Separatdruck No. 764, 769 und 772.

- FREEMAN, JODY, The Contracting State, in: Florida State University Law Review 2000.
- FREEMAN, JODY, Extending Public Law Norms Through Privatization, in: Harvard Law Review 2003.
- GIACOMETTI, ZACCARIA, Über die Grenzziehung zwischen Zivilrechts- und Verwaltungsrechtsinstituten in der Judikatur des schweizerischen Bundesgerichts, Tübingen 1924.
- GNEIST, RUDOLF VON, Das heutige englische Verfassungs- und Verwaltungsrecht, Berlin 1857/1863.
- GÖNNER, NICOLAUS THADDÄUS, Beobachtungen über die Rechtsmaterien, in: Juridisches Archiv 1803.
- GÖNNER, NICOLAUS THADDÄUS, Der Staatsdienst aus dem Gesichtspunkt des Rechts und der Nationalökonomie betrachtet nebst der Hauptlandespragmatik über die Dienstverhältnisse der Staatsdiener im Königreich Baiern, Landshut 1808.
- GRIMM, DIETER, Der Staat in der kontinentaleuropäischen Tradition, in: Grimm (ed.), Recht und Staat der bürgerlichen Gesellschaft, Frankfurt a. M. 1987.
- HARDT, MICHAEL/NEGRI, ANTONIO, Empire, Cambridge, Mass. 2000.
- HEGEL, GEORG WILHELM FRIEDRICH, Die "Rechtsphilosophie" von 1820, Vorlesungen über Rechtsphilosophie, Ilting, Stuttgart 1820/1973.
- HEGEL, GEORG WILHELM FRIEDRICH, Grundlinien der Philosophie des Rechts, 5th ed., Hamburg 1821/1995.
- HOBBS, THOMAS, Leviathan: or the matter, form, and power of a commonwealth ecclesiastical and civil, The English Works of Thomas Hobbes, vol. III, Molesworth, London 1651/1839.
- JELLINEK, WALTER, Zweiseitiger Verwaltungsakt und Verwaltungsakt auf Unterwerfung, in: Festgabe zur Feier des 50 jährigen Bestehens des Preußischen Oberverwaltungsgerichts, Berlin 1925.
- JÈZE, GASTON, Nature juridique de la concession de service public, in: Revue du droit public 1910.

- JÈZE, GASTON, Les contrats administratifs de l'État, des départements, des communes et des établissements publics, Paris 1927-1934.
- JOERGES, CHRISTIAN (ed.), Transnational governance and constitutionalism, Oxford 2004.
- JUSTI, JOHANN HEINRICH GOTTLOB VON, Politische und Finanzschriften über wichtige Gegenstände der Staatskunst, der Kriegswissenschaften und des Cameral- und Finanzwesens, Kopenhagen/Leipzig 1761.
- KIENER, REGINA, Die Entwicklung der Verwaltungsgerichtsbarkeit in der Schweiz, in: Institut für öffentliches Recht der Universität Bern (ed.), Der Staat vor den Herausforderungen des 21. Jahrhunderts, Bern 2004.
- KING, PRESTON, The ideology of order: a comparative analysis of Jean Bodin and Thomas Hobbes, London 1999.
- KIRAT, THIERRY (ed.), Économie et droit du contrat administratif, Paris 2005.
- KOSELLECK, REINHART, Futures past : on the semantics of historical time, Cambridge, Mass. 1985.
- LANGROD, GEORGES, Administrative Contracts: A Comparative Study, in: The American Journal of Comparative Law 1955.
- LOCKE, JOHN, Two treatises of government, Laslett, reprint, Cambridge 1680-90/1966.
- LUHMANN, NIKLAS, Soziale Systeme: Grundriss einer allgemeinen Theorie, Frankfurt a. M. 1987.
- MÄCHLER, AUGUST, Vertrag und Verwaltungsrechtspflege: ausgewählte Fragen zum vertraglichen Handeln der Verwaltung und zum Einsatz des Vertrages in der Verwaltungsrechtspflege, Zürich 2005.
- MARITAIN, JACQUES, The Concept of Sovereignty, in: The American Political Science Review 1950.
- MAYER, OTTO, Theorie des französischen Verwaltungsrechts, Strassburg 1886.
- MAYER, OTTO, Zur Lehre vom öffentlichrechtlichen Verträge, in: Archiv für öffentliches Recht 1888.
- MAYER, OTTO, Deutsches Verwaltungsrecht, Systematisches Handbuch der Deutschen Rechtswissenschaft, Binding, Leipzig 1895/96.

- MITCHELL, JOHN DAVID BAWDEN, Contractual Promise. Freedom of Executive Action, in: *Modern Law Review* (MLR) 1949.
- MITCHELL, JOHN DAVID BAWDEN, *The contracts of public authorities; a comparative study*, London 1954.
- MITTERMAIER, CARL JOSEPH ANTON, Beiträge zu den Gegenständen des bürgerlichen Processes, in: *Archiv für die civilistische Praxis* 1820.
- MONTESQUIEU, CHARLES-LOUIS DE, *De l'esprit des lois*, Paris 1749/1949.
- MUSHENO, MICHAEL/ROSS, SUSAN M., *Deployed: How Reservists Bear the Burden of Iraq*, Ann Arbor 2008.
- OGOREK, REGINA, Das Machtspruchmysterium, in: *Rechtshistorisches Journal* 1984.
- OGOREK, REGINA, Individueller Rechtsschutz gegenüber der Staatsgewalt. Zur Entwicklung der Verwaltungsgerichtsbarkeit im 19. Jahrhundert, in: Kocka (ed.), *Bürgertum im 19. Jahrhundert Deutschland im europäischen Vergleich*, München 1988.
- PAKEERUT, WORACHET, *Die Entwicklung der Dogmatik des verwaltungsrechtlichen Vertrages* (Diss.), Berlin 2000.
- PERRIQUET, EUGÉNE, *Les Contrats de l'Etat : Traité comprenant notamment les règles en matière de ventes ... concessions ... pensions ... récompenses nationale*, Paris 1884.
- PONS DE VERDUN, PHILIPPE-LAURENT, Rapport fait au nom du Comité de législation sur le mode d'exécution de la loi du 17 juillet 1793 concernant le brûlement des titres, in: *Maclure Collection of French Revolutionary Materials*, Paris 1793.
- ROUSSEAU, JEAN-JACQUES, *Du contrat social ou principes du droit politique*, Paris 1795.
- RÜFNER, WOLFGANG, Die Entwicklung der Verwaltungsgerichtsbarkeit, in: Jeserich/Pohl/Unruh (eds.), *Deutsche Verwaltungsgeschichte; Band 3; Das Deutsche Reich bis zum Ende der Monarchie*, Stuttgart 1984.
- SCHMIDT-ASSMANN, EBERHARD, Das Recht der Verwaltungsverträge zwischen gesetzlicher Bindung und administrativer Gestaltung, in: Drenseck (ed.), *Festschrift für Heinrich Wilhelm Kruse zum 70. Geburtstag*, Köln 2001.

- SCHMITTHENNER, FRIEDRICH, Grundlinien des allgemeinen oder idealen Staatsrechtes, Giessen 1845.
- SCHWAB, DIETER, Eigentum, in: Otto Brunner et al. (eds.), Geschichtliche Grundbegriffe, Stuttgart 1975.
- SEUFFERT, JOHANN MICHAEL, Von dem Verhältnisse des Staats und der Diener des Staats gegeneinander im rechtlichen und politischen Verstande, Würzburg 1793.
- SHAPIRO, MARTIN M., Courts, a comparative and political analysis, Chicago 1981.
- SHEEHAN, JAMES J., Der Ausklang des alten Reiches: Deutschland seit dem Ende des Siebenjährigen Krieges bis zur gescheiterten Revolution: 1763 bis 1850, Berlin 1994.
- SIEYÈS, EMMANUEL JOSEPH, Le Tiers-Etat, Paris 1789/1888.
- SNELL, WILHELM, Naturrecht nach den Vorlesungen von Wilhelm Snell, Langnau 1857.
- STOLLEIS, MICHAEL, Geschichte des öffentlichen Rechts in Deutschland. Zweiter Band. Staatsrechtslehre und Verwaltungswissenschaft 1800-1914, München 1992.
- SWEET, JUSTIN, "From the Tower" Redux: Lessons a Contruction Practitioner Must Learn from Federal Procurement Law, in: Construction Lawyer 2007.
- THOMA, RICHARD, Die Gasröhrenkonzession und die Rechtslage des Röhrennetzes nach Ablauf der Konzessionsdauer, in: Archiv des öffentlichen Rechts 1918.
- TOCQUEVILLE, ALEXIS DE, De la démocratie en Amérique, Paris 1835-1840.
- TOCQUEVILLE, ALEXIS DE, L' Ancien Régime et la Révolution, 2nd ed., Paris 1856.
- VAN CREVELD, MARTIN, The rise and decline of the state, Cambridge 1999.
- VATTEL, EMER DE, Le droit des gens, ou, principes de la loi naturelle appliqués à la conduite & aux affaires des nations & des souverains, Londres 1758.
- VINCENT-JONES, PETER, Citizen Redress in Public Contracting for Human Services, in: Modern Law Review MLR 2005.

VON MOHL, ROBERT, Das Staatsrecht des Königreiches Württemberg, Tübingen 1831.

WOLFF, CHRISTIAN VON, Ius naturae, Thomann, Nachdruck, Hildesheim 1748/1968.

ZACHARIÄ, HEINRICH ALBERT, Deutsches Staats- und Bundesrecht, 2nd ed., Göttingen 1854.