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From the Social Contract to a Social Contract Law

- Forms and Functions of Administrative Contracts in a Fragmented Society – a Continental View*

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I. Adequate legal framework of the cooperating administration

Political bias of the recent legal doctrine on administrative contracts

According to the *recent literature on administrative contracts*, the growing divergence of interests in society 'needs to be made available to the administration in the interest of policy realisation'¹ while simultaneously guiding the needs of cooperative administration to the safe haven of traditional state-derived legitimacy.² Both demands can be met through a denser set of material and procedural norms, tailored to the needs of the administration.³

* I would like to thank Maurizio Borghi, Kurt Paerli, Fabian Steinhauer and Annemarie Thatcher for their critical and productive comments and input.

¹ See AUGUST MÄCHLER, *Vertrag und Verwaltungsrechtspflege: ausgewählte Fragen zum vertraglichen Handeln der Verwaltung und zum Einsatz des Vertrages in der Verwaltungsrechtspflege* (Zürich, 2005): p 618.

² In the continental tradition, legitimacy derives from the reservation of statutory powers on the one hand and extended protection through constitutional rights on the other: See EBERHARD SCHMIDT-ASSMANN, *Das Recht der Verwaltungsverträge zwischen gesetzlicher Bindung und administrativer Gestaltung*, in: Drenseck (ed.), *Festschrift für Heinrich Wilhelm Kruse zum 70. Geburtstag* 65-78 (Cologne, 2001), MARKUS SCHEFER, *Grundrechtliche Schutzpflichten und die Auslagerung staatlicher Aufgaben*, *Aktuelle Juristische Praxis* 1131-1143 (2002). Similarly to demands made in relation to US Law JODY FREEMAN, *The Contracting State*, *Florida State University Law Review* 28 155-214 (2000), p. 213; following the delegation doctrine, see BAMBERGER, *Regulation as Delegation: Private Firms, Decisionmaking, and Accountability in the Administrative State*, *Duke Law Journal* 56 477-468 (2006).

³ For the US, see JODY FREEMAN, *Extending Public Law Norms Through Privatization*, *Harvard Law Review* 116 1285-1352 (2003): especially 1351-1352; KENNETH A. BAMBERGER, *Regulation as Delegation: Private Firms, Decisionmaking, and Accountability in the Administrative State*, *Duke Law Journal* 56 477-468 (2006), esp. p. 388 and pp. 399 onwards. For Switzerland, see more recently, the postulate of BERNHARD WALDMANN, *Der verwaltungsrechtliche Vertrag - eine Einführung*, in: Häner/Waldmann (ed.), *Der verwaltungsrechtliche Vertrag in der Praxis* 1-23 (Zürich, 2007): p. 23; and similarly GEORG MÜLLER, *Zulässigkeit des Vertrages und zulässige Vertragsinhalte*, in: Häner/Waldmann (ed.), *Der verwaltungsrechtliche Vertrag in der Praxis* 25-37 (Zürich, 2007): pp. 36-37. More basically with regard to legal process, see AUGUST MÄCHLER, *Vertrag und*

Question and structure of the text

Can the above mentioned approach to administrative contracts solve current and future problems for good? In view of increasing instances of cooperation between the state and private parties, this seems questionable at least. The contractual regimes regulating interactions between the state and private persons that are emerging with increasing intensity in an increasing number of places raise doubts as to whether this Sisyphus task can be succeeded of drawing together a proactive form of administration that depends more and more on cooperation and subjecting it to a state derived form of legitimacy. This simultaneously raises questions about the governing theories; the theory of sovereignty on one hand and the theory of social contract on the other hand.

Taking the viewpoint of the civil law tradition with its long-term experience with state-derived legitimacy, I will approach this set of problems in three steps:

- The first step will be to recall the basic principles of the traditional administrative law doctrine that frequently remain unexpressed: the ideal-typical concepts of the modern sovereign national state and the social contract, of which we find crucial elements in the theories of Bodin and Hobbes, and which were adapted to democracy by Rousseau. These concepts substantially shape modern administrative law and the status of the administrative contract, admittedly more in the civil law doctrine of sovereignty than in the common law doctrine (part II).
- Following this, two groups of cases that paradigmatically stand for the fundamental aspects of state will be examined as to whether they can still be adequately solved using traditional concepts of administrative law. The first group of cases deals with the delegation of governance in a hierarchical administrative organisation. Lawyers in the 18th and 19th centuries have already largely dealt with this question in the light of the relationship between the state and civil servants (part III.A.). The second group of cases deals with the interventionist and welfare state experiences of administrative economic and legal resources respectively, which are not able to keep up with their mandate of framing or at least guaranteeing the unity and welfare of society. And even more radically: the administration simply lacks the knowledge about the society it is supposed to organise (part III.B.).⁴

Verwaltungsrechtspflege: ausgewählte Fragen zum vertraglichen Handeln der Verwaltung und zum Einsatz des Vertrages in der Verwaltungsrechtspflege (Zürich, 2005). The foundations for Germany are given in EBERHARD SCHMIDT-ASSMANN, Das Recht der Verwaltungsverträge zwischen gesetzlicher Bindung und administrativer Gestaltung, in: Drenseck (ed.), Festschrift für Heinrich Wilhelm Kruse zum 70. Geburtstag 65-78 (Cologne, 2001): pp. 67-68.

⁴ Basically, from a theoretical point of view, see HELMUT WILLKE, Ironie des Staates:

- In the last part, the two groups of cases referred to will be shown to be part of a yet greater problem, touching on the self-conception of the administration and of administrative law as a regulatory authority with regard to the unity and welfare of society: the fundamental concepts of our construct of society and in particular the concept of the state prove to be increasingly contingent. From this it follows that the idea of a social contract encompassing society is increasingly split into numerous small contracts, which provide a functional equivalent to the social contract – not only with effect, but also in law (part IV).

II. Social contract, administrative law, administrative contracts

Bodins' doctrine of sovereignty, Hobbes' social contract and Rousseau's expansion to Democracy

The moment in which command and authority-related semantics change from supreme power (*suprema potestas*) to sovereignty (*majestas*) marks the starting point of modern theories of sovereignty, which have greatly influenced the emergence of the social contract. In general, Bodin is seen as the founder of this doctrine of sovereignty,⁵ in which it is up to politics to reunite a society fragmented by religious wars: by means of united power in the hands of the king on the one side and by consistent and equal use of this sovereign power to govern the people on the other. Prominent differences to England became apparent, where religious disputes were relatively easily resolved.⁶ According to Bodin, the people ("le peuple") hand over all worldly power permanently to the monarch for his free disposal ("pour disposer ... sans autre cause que de sa liberté").⁷ Accordingly, Bodin created a twofold subordination: Firstly, the monarch is subordinate to God and the monarch's authority is subordinate to natural law. At the same time, however, not God but the monarch is the sovereign representative of men on earth. In doing so, Bodin not only took the step of separating the monarch from God. As an image of God, the monarch was also separated from mankind, over whom he exerted life-long absolute power in a hierarchical manner. In this sense, the flesh and body of the monarch contains the sovereignty of society over fragmented society – a body that is subject to the borders of human life. The great revolution *nota bene* felt forced to eliminate precisely this body in order to be able to overcome the old order.⁸

Grundlinien einer Staatstheorie polyzentrischer Gesellschaft (Frankfurt am Main, 1992).

⁵ See JACQUES MARITAIN, *The Concept of Sovereignty*, *The American Political Science Review* 44 343-357 (1950): pp. 344-345, amongst others.

⁶ Furthermore, parliamentarianism was strengthened due to the later civil war - for more on the differences between the civil law tradition and the common law tradition, see DIETER GRIMM, *Der Staat in der kontinentaleuropäischen Tradition*, in: Grimm, *Recht und Staat der bürgerlichen Gesellschaft* 53-83 (Frankfurt a.M., 1987): pp. 56 onwards.

⁷ JEAN BODIN, *Les six livres de la république* (Paris, 1576): pp. 127-128.

⁸ JEAN BODIN, *Les six livres de la république* (Paris, 1576): chapter 8, especially pp. 122 onwards; on the topic as a whole: see JACQUES MARITAIN, *The Concept of Sovereignty*, *The*

Hobbes, in particular, added the element of the social contract to Bodin's theory,⁹ 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 "commonwealth" for "peace and common defence".¹⁰ Hobbes notably illustrated this unity of the multitude of society in the body of the monarch on what is possibly the most famous book cover in history¹¹ – again, in the tradition of the continental doctrine of sovereignty, which in turn affected rather the continent than the British isles.¹²

We have now briefly established the connection between modern politics, sovereignty and social contract: while Bodin made the sovereignty of society an issue of political authority, so that it had to assume responsibility for the unity of society, from the perspective of modern politics, Hobbes internalized the reference point of political legitimacy by separating the monarch from his likeness to God, making him a representative of the multitude of his subjects – as symbolized by the social contract. This legitimacy of the omnipotence of the state for the benefit of society was finally relocated by *Rousseau* without changing its form: from "l'état, c'est moi" to "l'état, c'est nous". However, in spite of this relocation from representation by the king to representation by the unity of a democratic multitude, the principle of centralised and absolute sovereign power as the uniting force of society remained – probably also due to the catchy metaphor of corporal unity.¹³

American Political Science Review 44 343-357 (1950), amongst others.

⁹ It is well known fact that the social contract already appeared in Althusius. However, from another, more liberal (today's perspective) context: JOHANNES ALTHUSIUS, *Politica methodice digesta atque exemplis sacris et profanis illustrata* (Aalen, 1603/1981).

¹⁰ The central passage states: " For by this authority, given him by every particular man in the commonwealth, he hath the use of so much power and strength conferred on him, that by terror thereof, he is enabled to perform the wills of them all, to peace at home, and mutual aid against their enemies abroad, And in him consisteth the essence of the commonwealth ; which, to define it, is one person, of whose acts a great multitude, by mutual covenants one with another, have made themselves every one the author, to the end he may use the strength and means of them all, as he shall think expedient, for their peace and common defence. And he that carrieth this person, is called SOVEREIGN, and said to have sovereign power ; and every one besides, his SUBJECT.": THOMAS HOBBS, *Leviathan: or the matter, form, and power of a commonwealth ecclesiastical and civil* (London, 1651/1839): p. 158.

¹¹ See HORST BREDEKAMP, *Thomas Hobbes, Der Leviathan das Urbild des modernen Staates und seine Gegenbilder, 1651-2001* (Berlin, 2006).

¹² Hobbes thus professes his affiliation to the continental - and above all French - doctrine of sovereignty: PRESTON KING, *The ideology of order: a comparative analysis of Jean Bodin and Thomas Hobbes* (London, 1999): see especially pp. 56 onwards.

¹³ JEAN-JACQUES ROUSSEAU, *Du contrat social ou principes du droit politique* (Paris, 1795). Although Rousseau's theory initially persevered, according to which all sovereignty was in the hands of the people, without restriction, and the sovereign was simply able to dispose over everything, by contrast to Sieyès theory, according to which certain elements of law, particularly understood to be "droits de l'homme" (human rights) and perceived to be more of a requirement than a restriction on political communication, acquired pre-state character and constitutional protection through a predecessor of the constitutional court: EMMANUEL JOSEPH SIEYÈS, *Le Tiers-Etat* (Paris, 1789/1888). Benjamin Constant (1767-1830) also spoke out against an absolutist understanding of the people's sovereignty: BENJAMIN CONSTANT, *Principes de politiques, applicables à tous les gouvernements représentatifs, et*

Social Contract and the abolishment of the corporative feudal state

In the transition from the 18th to the 19th century, *the banishment of contract on the continent as a legal form for stabilizing diffuse, power-related cooperation coincided most notably with the emergence of another great form of contract: the social contract.*¹⁴ Thus, the task of stabilizing society by means of contract changed the frame of reference from law to social theory. The great social contract abolished (in German: "aufheben") the many small contracts on the diffusion of power in a threefold Hegelian sense: first of all, it preserved the term "contract". Secondly, it lifted the many small contracts to the level of society as a whole. And thirdly, it disposed of the contract as a form of law between the state and private parties. As regards content, the social contract promised to regenerate societal unity: defence from danger and social welfare for all, if, in return, the sovereign was able to unite the power that had been fragmented and dispersed throughout society.¹⁵ At the same time, the modern state finally freed itself from independent judicial review.¹⁶ This unification of power in the sovereign, this concise hierarchical use and legitimation of power sought to replace the old intertwined network of feudal power dispersion contracts, in which the interests of the ruling regime had to be aligned with the interests of the contracting party, and in which bilateral conflicts of power arose where interests clashed.¹⁷

Implementation through Administrative law

In Germany and Switzerland at the turn of the 20th century, Otto Mayer and Fritz Fleiner decisively influenced the creation of a modern *administrative law* that

particulièrement à la constitution actuelle de la France (Paris, 1815): pp. 13 onwards.

¹⁴ For example, this is shown by the way in which German lawyers regularly re-define acts of cooperation with the state as hierarchic relationships, leaving little room for contractual regulation: amongst others, see JOHANN HEINRICH GOTTLÖB VON JUSTI, *Politische und Finanzschriften über wichtige Gegenstände der Staatskunst, der Kriegswissenschaften und des Cameral- und Finanzwesens* (Kopenhagen/Leipzig, 1761), I: p. 346; NICOLAUS THADDÄUS GÖNNER, *Der Staatsdienst aus dem Gesichtspunkt des Rechts und der Nationalökonomie betrachtet nebst der Hauptlandespragmatik über die Dienstverhältnisse der Staatsdiener im Königreich Baiern* (Landshut, 1808): pp. 130 onwards. France's experiences were similar. For a retrospective view, see ADOLPHE CHAUVEAU, *Principes de compétence et de juridictions administratives* (Paris, 1841-44): N pp. 403 onwards., especially p. 411; LOUIS-MARIE DE LAHAYE VICOMTE DE CORMENIN, *Droit administratif* (Paris, 1840): vol. I, inter alia XXXVIII.

¹⁵ Although Hegel, most prominently, opposed the theory of social contract and distanced himself from Rousseau's "idea-less abstraction" of a social contract, their common element was determined: the unification of society under the umbrella of a sovereign national state: GEORG WILHELM FRIEDRICH HEGEL, *Die "Rechtsphilosophie" von 1820* (Stuttgart, 1820): § 258.6.

¹⁶ See the famous French prohibition on the courts judging the administration: Loi du 16/24 août 1790 sur l'organisation judiciaire, tit. II, Art. 13. The dissolution of the old German Court of the Empire, the Reichsgericht, at the end of the Reich in the year 1806 had a similar effect.

¹⁷ On the feudal system in general: MAX WEBER, *Wirtschaft und Gesellschaft* (Tübingen, 1921-1925/1980): pp. 580 onwards.

adopted and shaped this socio-political program of a united sovereign nation state, each emphasizing different aspects. Administrative law thereby obtained a double function in relation to the modern state:¹⁸

- On the one hand, the emerging administrative law treated the production of law in the same way as the production of norms by the state.¹⁹ The administration benefited from this so called legal authority of the state and implemented it purposefully in the realization of its political programs.²⁰ In addition to relying on its influence in the legislative process and by absorbing the French invention of the administrative decision (copied from the court decision and transferred into German law by Otto Mayer),²¹ the administration enrobed its constantly changing projects in the cloak of the law. In this way, the administrative procedure initially appeared to be a functional equivalent of an independent court procedure, furthermore allowing for systematic re-structuring of administrative communication according to legal criteria.²² In doing so, administrative decisions, as a form of communicating public authority, nestled close to the doctrine of

¹⁸ OTTO MAYER, *Deutsches Verwaltungsrecht* (Leipzig, 1895/96), I: pp. 3-4 (with restrictions on the participation of the people in the state); FRITZ FLEINER, *Entstehung und Wandlung moderner Staatstheorien in der Schweiz; akademische Antrittsrede* (Zürich, 1916): p. 4. In this regard, see the detailed study of ROGER MÜLLER, *Verwaltungsrecht als Wissenschaft. Fritz Fleiner, 1867-1937* (Frankfurt am Main, 2006).

¹⁹ This becomes particularly clear where the civil law becomes a product of the "*Rechtsstaat*" (constitutional state) - see OTTO MAYER, *Deutsches Verwaltungsrecht* (Leipzig, 1895/96): p. 81.

²⁰ For criticism in this regard, see HANS KELSEN, *Zur Lehre vom öffentlichen Rechtsgeschäft*, *Archiv des öffentlichen Rechts* 31 53-98, 190-249 (1913).

²¹ Demonstrated by the following statement of OTTO MAYER, *Deutsches Verwaltungsrecht* (Leipzig, 1895/96), I: p. 60: "So können wir sagen, dass aus dem jahrhundertelangen Kampfe der französischen Parlamente mit der königlichen Verwaltung, der auch sonst manche bedeutsame Spuren im französischen Rechte zurückgelassen hat, schliesslich doch die Parlamente als Sieger hervorgegangen sind. Es ist nicht gelungen, die Verwaltung der Macht der Justiz äusserlich zu unterwerfen. Aber sie hat sich zu den Ideen bekennen müssen, deren Trägerin die Justiz war. Die Rechtsordnung, in welcher diese sich darstellte, beruhte auf einem ganz bestimmten System von rechtlicher Gebundenheit: das Gesetz über alles, das Urteil gebunden an das Gesetz, die der Vollstreckung gebunden an das Urteil. In der Übertragung dieser Gebundenheit auf die Verwaltung liegt die Grundidee des neuen französischen Verwaltungsrechtes." ("Thus we can say that the battles between the French parliament and the royal administration that lasted for centuries and significantly influenced French law were ultimately won by the parliaments. The administration did not succumb to the judiciary - even from an external perspective. But it did have to admit to ideas that were initiated by the judiciary. The legal order in which these presented themselves was based on a very special system of legal adherence: statute above everything, jurisdiction bound to statute, and execution bound to jurisdiction. In transferring this adherence to the administration, the basic idea behind new French administrative law was born."). See OTTO MAYER, *Deutsches Verwaltungsrecht* (Leipzig, 1895/96), I: p. 95 for more on the form of rulings, explicitly.

²² See OTTO MAYER, *Deutsches Verwaltungsrecht* (Leipzig, 1895/96), I: pp. 94 onwards on administrative acts.

sovereignty and to the image the modern state had of itself.²³

- On the other hand, the police state and monarchic government (or, accordingly, a monarchically acting government) were supposed to be counteracted by an administrative law that had become infused by scientific principles.²⁴ The administrative decision was interlinked with the concept of the *Rechtsstaat* as a sovereign hierarchic authority of law, whose administration sought to be tied to legal rules and be enacted within the reservation of statutory powers.²⁵

III. Irritating cases: the trend of disintegration of the theories of sovereignty and social contract

In the following, two groups of cases will demonstrate how recent cases tie in with the above mentioned guiding administrative law principles. These groups of cases are paradigmatic of the fundamental aspects of the state, and furthermore correspond with the generally applied historical model, which divides the evolution of administrative law into a phase of existence as a police state and a subsequent phase of existence as an interventionist welfare state. First of all, the civil service (A.) and secondly, the typical administrative tasks of the welfare state (B.) will be tested with regard to their relationships with the theory of sovereignty and the

²³ This already follows from Otto Mayer's definition OTTO MAYER, *Deutsches Verwaltungsrecht* (Leipzig, 1895/96): p. 95: "Der Verwaltungsakt ist ein der Verwaltung zugehöriger obrigkeitlicher Ausspruch, der dem Unterthanen gegenüber im Einzelfall bestimmt, was für ihn Rechtens sein soll." ("The administrative act is an authoritarian claim vis-à-vis the administration that determines the rights of a subordinate individual in a particular case.").

²⁴ It may be surprising that the latter applies not only to Germany, but also to Switzerland. However, remember that the democratic-constitutional structures of the comparatively young, Swiss federal state were not made to curb the government and leadership by the federal council, but rather to ensure convergence between the Cantons. In this context, see for example comments by the federal counsellor and legal scholar Jakob Dubs (1822-1879): it is the natural consequence for independent administrative legal process to reject a - at most self-restricting - form of sovereign politics and to support the professionalization of the administration and political participation by the people: JAKOB DUBS, *Das öffentliche Recht der schweizerischen Eidgenossenschaft dargestellt für das Volk* (Zürich, 1878): p. 14, p. 151 and p. 206. The priority of politics over law was expressed most clearly in Art 113 of the federal constitution of 1874 that was greatly influenced by Dubs. This provision precluded the Swiss Federal Tribunal from repealing unconstitutional legal federal statutes. See also WALTHER BURCKHARDT, *Kommentar der schweizerischen Bundesverfassung vom 29. Mai 1874* (Bern, 1914), Art. 114 BV: pp. 786 onwards. For more on Dub, see his biography by FERDINAND ZEHENDER, *Dr. Jakob Dubs, ein schweizerischer Republikaner* (Zürich, 1880); and ALFRED KÖLZ, *Neuere schweizerische Verfassungsgeschichte: Ihre Grundlinien in Bund und Kantonen seit 1848* (Bern, 2004): p. 31. More critically on the federal council's struggle to defend itself against administrative jurisdiction, see FRITZ FLEINER, *Eidgenössische Verwaltungsgerichtsbarkeit*, NZZ Separatdruck Nr. 764, 769 und 772 (1921): especially p. 13.

²⁵ The administration was not supposed to subordinate itself to a constitutional state ("Rechtsstaat"), but merely "approach" it: OTTO MAYER, *Deutsches Verwaltungsrecht* (Leipzig, 1895/96): p. 66. See also WALTER JELLINEK, *Verwaltungsrecht* (Berlin, 1931): p. 96.

social contract theory. Following this, their relationship with the corresponding specific legal rules will be examined.

A. The concern about the rule of law: From the bureaucratic to the cooperative state

Instrumental law versus the rule of law

On the level of specific civil law doctrines, current problems relating to the civil service manifest themselves, because important differences in substantive law rely on the private or public law nature of a case, and because this private / public law division has become increasingly contingent. For example, the following and thus far unresolved aspect touches on the fundamental mechanisms of the democratic rule of law-legitimacy:²⁶

Is it conceivable for the state by its legal authority to change, either by legislation or by administrative decree, and to allocate a civil service contract to public law on one occasion and to private law on another occasion, according to its changing political needs? The question behind this question is: to what degree can political discourse implement law instrumentally, thereby possibly even disposing of the rule of law principles, by which it ought to be kept in check for the benefit of civil society? Kelsen also criticised this situation, in which the legal authority of the sovereign (i.e. the sovereign's power to create legal rules) encroaches its role as a contracting party.²⁷ However, Kelsen's criticism, essentially, did not persevere.²⁸

²⁶ Amongst others, see MAX IMBODEN, *Der verwaltungsrechtliche Vertrag*, ZSR 77 II 1a-218a (1958): pp. 95a onwards.; THOMAS P. MÜLLER, *Verwaltungsverträge im Spannungsfeld von Recht, Politik und Wirtschaft: eine systemtheoretische Analyse von Verträgen zwischen dem Gemeinwesen und Privaten mit Hinweisen auf die rechtsdogmatischen Konsequenzen* (Basel, 1997): pp. 225 onwards., with reference to Ruling of the Swiss Federal Tribunal 103 Ia 505, pp. 514 onwards. (1983; Hofmann AG v. Einwohnergemeinde Thun); PETER GAUCH, *Zur Nichtigkeit eines verfrüht abgeschlossenen Beschaffungsvertrages*, Baurecht 119-123 (1998); ULRICH HÄFELIN/GEORG MÜLLER, *Grundriss des Allgemeinen Verwaltungsrechts* (Zürich, 1998): N pp. 894 onwards.; CLAIRE HUGUENIN JACOBS, *Die bundesgerichtliche Praxis zum öffentlichrechtlichen Vertrag*, ZBJV 118 489-521 (1982): pp. 512 onwards.

²⁷ HANS KELSEN, *Zur Lehre vom öffentlichen Rechtsgeschäft*, Archiv des öffentlichen Rechts 31 53-98, 190-249 (1913).

²⁸ Although Kelsens position was heard by administrative-law scholars, it was rejected as an unrealistic position, based on a theory that focussed on legal logic alone: Apelt commented pointedly: "Kelsen ... recently stated - and correctly from his point of view - that administrative acts are not an institution of law. The fact that he comes to this astonishing conclusion that is so distant from real life and its requirements, strongly throws the criteria from which he draws his conclusions into doubt": WILLIBALT APELT, *Der verwaltungsrechtliche Vertrag: Ein Beitrag zur Lehre von der rechtswirksamen Handlung im öffentlichen Rechte* (Leipzig, 1920): p. 6. Similarly, THEODOR BUDDEBERG, *Rechtssoziologie des öffentlich-rechtlichen Vertrages*, Archiv des öffentlichen Rechts 8 85-161 (1925): p. 136. Even Stern, who followed Kelsen for the main part with regard to the administrative contract, accused him of disregarding reality: "Denn insoweit handelt es sich um eine exklusive Sondermeinung, die eine Scheidewand unseres Rechtssystems [i.e. Trennung Privatrecht und

Recently, these types of paradox came to the surface in a fierce battle surrounding the long working hours for assistant and head doctors in Swiss hospitals. While one group is covered by a private law regime and thus protected by the employee protection act,²⁹ the other group remains largely unprotected, as it falls under a public services legislation that is mainly driven by fiscal, political interests.³⁰ Moreover, the legislative and government of the Canton of Graubünden recently wanted to set up legislation to transfer psychiatric services into an independent public law corporation, in order to provide it with "the greatest entrepreneurial freedom possible" by circumventing compulsory private law norms with its public law status and by circumventing unwanted public law norms through the blanket delegation of legislative powers concerning employment regulation.³¹

The Civil Service as a paradigmatic point of contact between the state and civil society

These modern problems with administrative contracts can be better understood if we take a look at their past, in the course of which the link between the sovereignty doctrine and the social contract theory will be disclosed as well. Central principles, such as the principle of an undivided state sovereign have been colliding with

öffentliches Recht] einreißt und der Grundstruktur unserer Rechtsordnung widerspricht." ("Because it is insofar an exclusive special opinion that is far from reality; a wall separating our legal system [i.e. the separation between private and public law], which contradicts our legal order"): KLAUS STERN, Zur Grundlegung einer Lehre des öffentlich-rechtlichen Vertrags, Verw. Archiv 49 106-157 (1958): p. 107. Kelsen, however, was not against a separation of public from private law per se, but rather primarily against the way in which public law connected legal subjects to legal authority. Correctly MARTIN BULLINGER, Öffentliches Recht und Privatrecht (Stuttgart, 1968): pp. 11-12. Although Kelsen's warning was incorporated in § 54 of the German administrative procedural code, for instance, administrative contracts regulating services provision by the civil authorities, which gave private contractual partners legal claims, were strongly restricted. As a whole, the conglomeration of legal authority with legal subjects that Kelsen criticised has persevered: see below at Fn. 91: p. 4.

²⁹ Swiss Federal Act on Industry, Trade and Commerce (Labour Law Act) of March 13, 1964 (as of June 13, 2006, SR 822.119).

³⁰ Head doctors, who are employed by way of private labour law agreements, can take advantage of the protection offered by the Labour Law Act, which tightly regulates their maximum working hours. By contrast, head doctors employed by the public service often have to work up to 70 hours per week. A restriction of the public sector is only offered by widely formulated provisions on general health protection (Art. 3a and Art. 6 of the Labour Law Act). The federal counties ("Cantons") rejected the initiative proposed by the federal counsellor Marc Suter in 1998 to subject head doctors to the Labour Law Act as well for financial reasons: see GINETTE WIGET, Arbeiten bis zum Umfallen, der arbeitsmarkt 15-17 (2004): pp. 15-16. Protecting measures were limited to assistant doctors: amendment to the 1st Decree on the Labour Law Act, of April 7, 2004 (SR 822.11), AS 2004 2411.

³¹ The Swiss Federal Tribunal repealed this delegation, due to breaches of the principle of the separation of powers and legality, according to the Constitution of the Canton of Graubünden. Ruling of the Swiss Federal Tribunal 128 I 113 (2002; Psychiatrische Dienste Graubünden): especially pp. 120 onwards, E. p. 2e and p. 3. See also the respective commentary of YVO HANGARTNER, Bemerkungen zu BGE 128 I 113, Aktuelle Juristische Praxis 1498-1501 (2002).

social demands since the late 18th century (with regard to conflicts concerning the civil service)³² or 19th century (with regard to conflicts concerning the transfer of state responsibilities to private actors in a broad sense)³³ in such a way as to irritate both the concrete legal doctrine and the legal theory of the civil service. Ultimately, it is possible to trace the debate about the stabilization of cooperation between state authority and private persons back to the birth of the modern national state. For nothing less than the *fundamental paradox of the modern state* hides behind it – the modern state claiming total power in order to unite society, but at the same time reverting back to cooperation with the same civil actors it subjected to its rule in the first place, as a means of securing general welfare.³⁴ In the 18th and 19th centuries, German academics had already recognized that all pre-modern privileges and guarantees could indeed be abolished, except for those of the civil servants:³⁵ the civil servants remained a last and unavoidable point of contact between modern and thus radically self-referential politics and society. For the modern state had to rely on the good will of its civil servants from the very beginning,³⁶ which was

³² At this stage, very general reference can be made to a very lively discourse in legal research on the legal nature of the civil service. This discourse started in nuce from the 18th century through to the beginning of the 20th century. To mention just a few of the famous people who have commented on this topic: CHRISTIAN VON WOLFF, *Ius naturae* (Hildesheim, 1748/1968): § 904 und § 925; JOHANN GOTTLIEB FICHTE, *Grundlage des Naturrechts nach Prinzipien der Wissenschaftslehre* (Hamburg, 1796/1979): pp. 163-164.; GEORG WILHELM FRIEDRICH HEGEL, *Die "Rechtsphilosophie" von 1820* (Stuttgart, 1820): § 268 and 294; OTTO MAYER, *Zur Lehre vom öffentlichrechtlichen Verträge*, *Archiv für öffentliches Recht* Bd. 3 3-86 (1888); PAUL LABAND, *Das Staatsrecht des Deutschen Reiches* (Tübingen, 1901), Vol. 1: pp. 405-406.; HANS KELSEN, *Zur Lehre vom öffentlichen Rechtsgeschäft*, *Archiv des öffentlichen Rechts* 31 53-98, 190-249 (1913).

³³ This was accentuated in the second half of the 19th century in a wide-ranging project of national transport and communicational infrastructure, in particular following construction of the railway: more recently: LORENZ JELLINGHAUS, *Zwischen Daseinsvorsorge und Infrastruktur zum Funktionswandel von Verwaltungswissenschaften und Verwaltungsrecht in der zweiten Hälfte des 19. Jahrhunderts* (Frankfurt am Main, 2006).

³⁴ This refers to the connection between sovereignty and the social contract.

³⁵ An important part was played by the role of the administration (in the German concept) as an independent mediator between regal authority and the people - in the sense of a functional equivalent to enable the participation of the people in the legislative process, which could never have been attained by the weakly represented citizens, and harnessed and made the political power whose hold on society was becoming stronger and stronger appear legitimized. For more, see JAMES J. SHEEHAN, *Der Ausklang des alten Reiches Deutschland seit dem Ende des Siebenjährigen Krieges bis zur gescheiterten Revolution: 1763 bis 1850* (Berlin, 1994): pp. 391 onwards.

³⁶ See JUSTUS HENNING BÖHMER, *Introductio in ius publicum universale* (Halle/Magdeburg, 1710/1726): § 11; CHRISTIAN VON WOLFF, *Ius naturae* (Hildesheim, 1748/1968): § 904 und § 925; CHRISTIAN VON WOLFF, *Ius naturae* (Hildesheim, 1748/1968): VIII and §§ 2, 4, as well as CHRISTIAN VON WOLFF, *Grundsätze des Natur- und Völkerrechts, worinn alle Verbindlichkeiten und alle Rechte aus der Natur des Menschen in einem beständigen Zusammenhange hergeleitet werden* (Halle, 1754): § 972 et seq.; JOHANN MICHAEL SEUFFERT, *Von dem Verhältnisse des Staats und der Diener des Staats gegeneinander im rechtlichen und politischen Verstande* (Würzburg, 1793): in particular, pp. 17-18., 42-43., p. 93, pp. 120-121., 140 -141 and p. 155; JOHANN GOTTLIEB FICHTE, *Grundlage des Naturrechts nach Prinzipien*

impossible to enforce using any form of power whatsoever.³⁷ However, the secure position of civil servants that is protected from arbitrariness of power has been put into perspective to this day mainly by two measures:

- Since the replacement of the fiscal theory (by virtue of which civil servants' monetary interests received a certain level of protection from the civil courts) by differentiated administrative law, the harmonization of state interests with existential interests of the civil servants wholly depends on positivism centred on the state. This positivism constantly threatens to affect private parties' positions, as the administration is capable of drawing on state authority to boost its position as a (contracting) party at all times.³⁸
- Furthermore, liberal theories were brought forward from time to time during the 19th century, which dominated the subject matter from the end of the Second World War onwards.³⁹ These theories put the previously dominant status⁴⁰ of civil servants as a privileged and single point of contract between

der Wissenschaftslehre (Hamburg, 1796/1979): pp. 163-164. FRANZ ARNOLD VON DER BECKE, *Von Staatsämtern und Staatsdienern* (Heilbronn am Neckar, 1797), I: § 14; NICOLAUS THADDÄUS GÖNNER, *Teutsches Staatsrecht* (Landshut, 1804): pp. 461-462. These questions were already apparent in VEIT LUDWIG VON SECKENDORFF, *Teutscher Fürsten-Stat* (Franckfurth/ M., 1665): p. 656 and pp. 680-681.

³⁷ The political internalization of these resources was often aspired to, with the help of the national ethos, but without the intended effect of long-term stabilization: see e.g. GEORG WILHELM FRIEDRICH HEGEL, *Die "Rechtsphilosophie"* von 1820 (Stuttgart, 1820): § 268 and 294.

³⁸ The foundation for this positivistic concept is given, amongst others, by FRITZ FLEINER, *Institutionen des deutschen Verwaltungsrechts* (Tübingen, 1913): pp. 201 onwards. Cf. The criticism on Kelsen: above Fn. 27-28.

³⁹ For France, see e.g. ALEXIS DE TOCQUEVILLE, *De la démocratie en Amérique* (Paris, 1835-1840), II: pp. 389 onwards; for Germany, see for example ROBERT VON MOHL, *Die Polizeiwissenschaft nach den Grundsätzen des Rechtsstaates* (Tübingen, 1866), I: pp. 19 onwards.; RUDOLF VON GNEIST, *Der Rechtsstaat und die Verwaltungsgerichte in Deutschland* (Berlin, 1879): pp. 286 onwards. These liberal theories coerced the autocratic governance on the one hand, only to lead to cooperation on a local level at first and then also on a national level between the state and the economy in France, Germany and Switzerland. On the former, see MICHAEL STOLLEIS, *Die Entstehung des Interventionsstaates und das öffentliche Recht*, *Zeischrift für neuere Rechtsgeschichte (ZNR)* 129-146 (1989): p. 133-134. On the latter, see more recently LORENZ JELLINGHAUS, *Zwischen Daseinsvorsorge und Infrastruktur zum Funktionswandel von Verwaltungswissenschaften und Verwaltungsrecht in der zweiten Hälfte des 19. Jahrhunderts* (Frankfurt am Main, 2006): especially p. 163, who recognized the first attempts at functional change from a liberal defence state to the modern welfare state in the pre-emptive health care schemes that were aimed at combating epidemics.

⁴⁰ This applies for Germany as a mono-culture: see JAMES J. SHEEHAN, *Der Ausklang des alten Reiches Deutschland seit dem Ende des Siebenjährigen Krieges bis zur gescheiterten Revolution: 1763 bis 1850* (Berlin, 1994): pp. 397 onwards. On the rejection of the cooperating state at the end of the 18th century, see e.g. JOHANN HEINRICH GOTTLÖB VON JUSTI, *Politische und Finanzschriften über wichtige Gegenstände der Staatskunst, der Kriegswissenschaften und des Cameral- und Finanzwesens* (Kopenhagen/Leipzig, 1761), I: p. 346; NICOLAUS THADDÄUS GÖNNER, *Der Staatsdienst aus dem Gesichtspunkt des Rechts und der Nationalökonomie betrachtet nebst der Hauptlandespragmatik über die Dienstverhältnisse der Staatsdiener im Königreich Baiern* (Landshut, 1808): pp. 130 onwards;

state and society into perspective, by arranging for (state-owned or private) companies to take over many of the state responsibilities from central administration.⁴¹

New old problems concerning civil service and the dissolution of the social contract

The far-reaching importance of giving the civil service a legal form has been displayed in various ways: it was already evident in Germany at the end of the 19th century, where, in order to overcome the former police state, administrative law was mainly formed with a focus on the civil service.⁴² Furthermore, in Switzerland at the beginning of the 20th century, the project to introduce an independent judicial review on administrative practice gained ground, thanks to a series of scandalized cases, in which civil servants felt threatened by an arbitrary state authority.⁴³ Further on, the increasing cooperation between the state and the private sector was directly linked to the re-evaluation of the civil service in the modern national state.⁴⁴

AUGUST WILHELM HEFFTER, *Beiträge zum deutschen Staats- und Fürstenrecht* (Berlin, 1829): pp. 106 onwards.; FRIEDRICH CHRISTOPH DAHLMANN, *Die Politik, auf den Grund und das Mass der gegebenen Zustände zurückgeführt* (Leipzig, 1847): p. 277; JOHANN CASPAR BLUNTSCHLI, *Allgemeines Staatsrecht* (Munich, 1852): p. 422. Amongst other things, this concept led to precisely the kind of rejection of the administrative contract: OTTO MAYER, *Zur Lehre vom öffentlichrechtlichen Verträge*, *Archiv für öffentliches Recht* Bd. 3 3-86 (1888): pp. 41 onwards.; FRITZ FLEINER, *Institutionen des deutschen Verwaltungsrechts* (Tübingen, 1913): p. 183; ZACCARIA GIACOMETTI, *Über die Grenzziehung zwischen Zivilrechts- und Verwaltungsrechtseinrichtungen in der Judikatur des schweizerischen Bundesgerichts* (Tübingen, 1924): p. 16.

⁴¹ Forsthoff, for example, pointed out that the increase in public law contracts was caused by the fact that the administration no longer worked according to a strict hierarchy and civil servants were no longer the sole point of contact of the state to society: ERNST FORSTHOFF, *Lehrbuch des Verwaltungsrechts erster Band* (Munich, 1958): p. 250-251.

⁴² This becomes especially clear in OTTO MAYER, *Zur Lehre vom öffentlichrechtlichen Verträge*, *Archiv für öffentliches Recht* Bd. 3 3-86 (1888).

⁴³ See in particular as a result of the Spaeni case (a civil servant working in the department for telegraphs had been disciplined by the federal council) that even the federal assembly invited the federal council to seriously consider the introduction of an administrative legal process. "The federal council has been invited to investigate and report on the question of whether it is advisable to introduce a confederate administrative authority that has the power to decide over claims issued by civil servants and employees of the federal administration in relation to decrees and dispositions of the federal council or other federal institutions in cases of a breach of constitutional and federally accepted rights": cited according to the message of the federal council to the federal assembly in relation to the revision of the federal constitution with regard to creating a confederate administrative court, of December 20, 1911, BBl. 1911 V 322: 325. For more on the whole, see ALFRED KÖLZ, *Neuere schweizerische Verfassungsgeschichte: Ihre Grundlinien in Bund und Kantonen seit 1848* (Bern, 2004): p. 854.

⁴⁴ Forsthoff, for example, pointed out that the increase in public law contracts was caused by the fact that the administration no longer worked according to a strict hierarchy and civil servants were no longer the sole point of contact of the state to society: ERNST FORSTHOFF, *Lehrbuch des Verwaltungsrechts erster Band* (Munich, 1958): p. 250-251.

The importance of giving the civil service a specific legal form is also evident in current topics of discussion, such as the above mentioned problems with private-law regulated doctors working in public hospitals.⁴⁵ Furthermore, the responsibility of the state to arrange for the safety of its citizens obviously leads to a similar set of questions. Given the radical change of the internal and external need for safety and the politically driven 'essentialization' of government responsibilities,⁴⁶ the state increasingly contracts with external contractors to provide safety and corresponding security personnel services.⁴⁷ In this case, two different forms of contractual services have to be distinguished: contracted civil service or military service on the one hand and indirectly contracted mercenary service on the other:

On the one hand, for example, the US today does not have a general conscription obligation. This goes back to the experience of the Vietnam war (1959-1975) and means that soldiers enter into military service and into the sphere of state authority by contract and of their free will.⁴⁸ This also applies to those members of the National Guard who were initially contracted and qualified in the USA for specific military formations and for a one-year disaster operation. Following Nine-Eleven, the Bush administration invoked a contractual clause of state emergency in the more than one hundred page-contract, relocating the place of service from the US to Iraq and Afghanistan and prolonging the duration of service from the explicitly stated one year to several years of combat duty,⁴⁹ making it more difficult (and

⁴⁵ See above Fn. 30.

⁴⁶ See GEORG MÜLLER, *Wege zu einem schlanken Staat: Überprüfung der Aufgaben stete Pflicht der Staatsleitung*, NZZ, 16th March 2005, for more on this definition. In contrast to the election slogans employed by civil politicians on the restricted resources available to the state, the state implements an ever-increasing amount of resources in the respective fields. Paradoxically, the activities of the state increase precisely where "saving" would be in order. Accordingly, any attempts of the state to economize could cost it more than it saves. Recent concise commentary on this topic: KURT PÄRLI, IIZ: Illusionäre Wirkungen – Gefahren einer fürsorglichen Belagerung, in: Gächter (ed.), *Rechtsfragen zur interinstitutionellen Zusammenarbeit (IIZ)* (Bern, 2007).

⁴⁷ The application to Switzerland can be deduced clearly from the federal council report on private security and military companies of December 2, 2005, BB1. 2006 II 623, especially pp. 632-633.

⁴⁸ For a concise analysis, see CYNTHIA GIMBEL/ALAN BOOTH, *Who Fought in Vietnam?*, Social Forces 74 1137-1157 (1996): 1140: "Draftees may not have been preferred for highly skilled support jobs because they were only in the service for 24 months and because they were presumed to be not committed to the military, since they did not volunteer. It was not cost-effective to invest heavily in training a draftee who would only use his skills for a short time. In addition, assigning draftees to combat may have aided in recruitment. One recruiting strategy was to offer relatively safe assignments to those who entered voluntarily for an extended period."

⁴⁹ The US Army Regulation 601-210 of May 16, 2005 contains the following clause in § 9-13 (5) on pp. 93-94: Members ... may be involuntarily ordered to AD in time of war or national emergency declared by the President or Congress of the United States or under any other conditions authorized by law in effect at time of enlistment, or which may later be enacted." The regulation can be downloaded under the following url: www.army.mil/usapa/epubs/pdf/r601_210.pdf (visited most recently on 07/12/17).

expensive) to recruit new members of the National Guard.⁵⁰ Thus, the old problem of how the state disposes over resources (in this case the good will of a public servant) without having access to these resources in the first place, presents itself with new intensity.

On the other hand, thousands of mercenaries engage in the war in Iraq for the western coalition, employed by profit-oriented private companies. These mercenaries also come from armies such as those built up by Pinochet and the South-African apartheid regime, escalating the problems of outsourcing state responsibilities.⁵¹ At present, a fierce debate is raging on rule of law legitimacy and democratic legitimacy.⁵² The mounting importance of private security services in public spaces in general and in prison management in particular demonstrates that the scope of the problem is not restricted to (far-away) warfare.⁵³ However, whether, how and to what degree the rules of public law and constitutional rights apply to those carrying out public services (and whether those services are public after all), is widely disputed.⁵⁴ In particular, the attempt to liaise between the constitutional rights of various private parties, i.e. third parties to the contract, and the contracting private party, threatens to reach the limits of legally arguable reasonableness.⁵⁵

⁵⁰ This was already evident from 2004 onwards: ERIC SCHMITT, Guard Reports Serious Drop in Enlistment, 2007, downloadable at: <http://www.nytimes.com/2004/12/17/politics/17reserves.html?ex=1261026000&en=603cadee900906d0&ei=5088>. For more on the whole issue from the perspective of the reservists, see MICHAEL MUSHENO/SUSAN M. ROSS, *Deployed: How Reservists Bear the Burden of Iraq* (Ann Arbor, 2008).

⁵¹ For example, ROBERT FISK/SEVERIN CARRELL, *Coalition of the Mercenaries: Occupiers Spend Millions on Private Army of Security Men*, 2007, downloadable at: <http://www.counterpunch.org/fisk03292004.html>.

⁵² Amongst others, see STEVEN BRAYTON, *Outsourcing War: Mercenaries and the Privatization of Peacekeeping*, *Journal of International Affairs* 55 303-329 (2002); JON D. MICHAELS, *Beyond Accountability: The Constitutional, Democratic, and Strategic Problems with Privatizing War*, *Washington University Law Quarterly* 82 1001-1127 (2004); CLIVE WALKER AND DAVE WHYTE, *Contracting out war?: Private Military companies, Law and Regulation in the United Kingdom*, *International and Comparative Law Quarterly* 54 651-690 (2005).

⁵³ See e.g. THOMAS VESTING, *Der Staat als Serviceunternehmen: Politik im Zeitalter der Wissensgesellschaft, Staatswissenschaften und. Staatspraxis (StWStP)* 473-505 (1998): p. 28; JODY FREEMAN, *Private Parties, Public Functions and the New Administrative Law*, in: Dyzenhaus (ed.), *Recrafting the Rule of Law: The Limits of Legal Order* 331-369 (Toronto, 1999): pp. 10-11. See also the federal council report under Fn 53: p. 4.

⁵⁴ Instead of others, see MARKUS SCHEFER, *Grundrechtliche Schutzpflichten und die Auslagerung staatlicher Aufgaben*, *Aktuelle Juristische Praxis* 1131-1143 (2002); ISABELLE HÄNER, *Grundrechtsgeltung bei der Wahrnehmung staatlicher Aufgaben durch Private*, *Aktuelle Juristische Praxis* 1144-1153 (2002); WALTER KÄLIN/ANDREAS LIENHARD/JUDITH WYTTEBACH/MIRJAM BALDEGGER, *Auslagerung von sicherheitspolizeilichen Aufgaben* (Basel, 2007): pp. 80 onwards, respectively focusing on Switzerland.

⁵⁵ Canaris speaks of an empty "escape into appraisal": CLAUD-WILHELM CANARIS, *Grundrechte und Privatrecht: eine Zwischenbilanz - stark erweiterte Fassung des Vortrags gehalten vor der Juristischen Gesellschaft zu Berlin am 10. Juni 1998* (Berlin, 1999): p. 73.

Both forms of cooperation mentioned thus far, the public service in a broad sense on the one hand, and so called 'contracting out' on the other, emanate from fundamentally different constellations and follow different rules today: while the continental forms of public service essentially arose out of the aim of absolutism to create a society guided by comprehensive public welfare,⁵⁶ 'contracting out' can be traced back mainly to the liberal idea of breaking up the dichotomy of the state and society by introducing so called intermediaries.⁵⁷ And while the public service primarily follows the rules of delegation today, 'contracting out' tends to follow the rules of regulation.⁵⁸ However, as different as public services and 'contracting out' may be,⁵⁹ both cases display the state, understood as uniting society using its monopoly on power, as being incapable of fulfilling the most fundamental responsibilities defined by the social contract using its own resources: the implementation of peace and order.⁶⁰ Indeed, the state is *essentially dependent on ad-hoc cooperation with society*.⁶¹

⁵⁶ Absolutism sought to destroy or to integrate the numerous pre-modern intermediaries (from aristocratic structures over economic organizations through to communal self-administrations) into the state administration, in order to advance centralization and the development of the administration. See concise comments by Tocqueville: "La révolution démocratique, qui a détruit tant d'institutions de l'ancien régime, devait donc consolider celle-ci, et la centralisation trouvait si naturellement sa place dans la société que cette révolution avait formée qu'on a pu aisément la prendre pour une de ses oeuvres.": ALEXIS DE TOCQUEVILLE, *L'Ancien Régime et la Révolution* (Paris, 1856): pp. 131-132. The revolution had consequently created the administration that absolutism had striven for, but had not been able to complete at that time. See further also Tocqueville: "Ce ne sont pas, comme on l'a dit tant de fois, les principes de 1789 en matière d'administration qui ont triomphé à cette époque et depuis, mais bien au contraire ceux de l'ancien régime qui furent tous remis alors en vigueur et y demeurèrent.": p. 131; on the whole: FRANÇOIS BURDEAU, *Histoire de l'administration française du 18e au 20e siècle* (Paris, 1994). Similar to what Tocqueville retrospectively did for Germany e.g. THEODOR BUDDEBERG, *Rechtssoziologie des öffentlich-rechtlichen Vertrages*, *Archiv des öffentlichen Rechts* 8 85-161 (1925): p. 133.

⁵⁷ The foundations were particularly supplied by the liberal movement in the mid-19th century. For more on France, see ALEXIS DE TOCQUEVILLE, *De la démocratie en Amérique* (Paris, 1835-1840), II: pp. 389 onwards.; for Germany see ROBERT VON MOHL, *Die Polizeiwissenschaft nach den Grundsätzen des Rechtsstaates* (Tübingen, 1866), I: pp. 19 onwards.; RUDOLF VON GNEIST, *Der Rechtsstaat und die Verwaltungsgerichte in Deutschland* (Berlin, 1879): pp. 286 onwards.; in agreement, finally also CARL FRIEDRICH VON GERBER, *Grundzüge des deutschen Staatsrechts* (Leipzig, 1880): p. 111.

⁵⁸ More recently, see Bamberger, who tries to combine these categories: KENNETH A. BAMBERGER, *Regulation as Delegation: Private Firms, Decisionmaking, and Accountability in the Administrative State*, *Duke Law Journal* 56 477-468 (2006).

⁵⁹ In the light of what frequently ends as a guarantee reservation only, the concept of privatization is aiming in the wrong direction by insinuating relocation from the area of political responsibility into that of economic responsibility.

⁶⁰ The Irak War is widely defended by arguing that its benefit is internal security for itself and all of its allies.

⁶¹ The above referenced Swiss federal council report also carefully tends towards this direction: see above, Fn. 53: before pp. 632-633.

B. The Limits of the Welfare State and Overcoming Them

Intervention as a method of the modern welfare state

At the turn of the 20th century, the administrative responsibilities of the emerging welfare state that aimed to provide social security and social stability on the one hand and politically defined equality on the other hand, multiplied. This is evident for example from the emerging new state responsibilities, especially with regard to infrastructure and the respective discussions by scholars and in politics.⁶²

The growth of the state administration also meant, although not primarily, an increase of government tasks, but this was expressed more as a tendency of politics to influence and *intervene in* society directly.⁶³ From the perspective of administrative contracts, this tendency is of particular interest, as administrative contracts appear in areas in which the administration strives to structure or influence society, even more so where their responsibilities cannot be fulfilled by relying solely on traditional means such as command-like decrees or subsidization. Max Weber had already diagnosed that the boundaries of the *Rechtsstaat* needed to be redefined in order to rescue the promises made by the welfare state. Max Weber critically:

"Securing public bureaucracy by private means to fulfil demands is about to create the future cage of dependence, in which perhaps one day people will be obliged to conform, if a technically sound, i.e rational administration and accommodation run by functionaries is the last and single value that decides on the form of their service." [Translated by AA]⁶⁴

Two cases dealing with heritage conservation, a typical responsibility of the welfare state, may illustrate what Max Weber may have imagined with his statement.

⁶² The legal debate on nationalization of the railway is particularly concise: see *inter alia* Seiler, who argues in favour of nationalizing the railway and against contractual solutions, using legal arguments: OSCAR SEILER, Über die rechtliche Natur der Eisenbahn-Konzessionen nach schweizerischem Recht (Zürich, 1888).

⁶³ This also applies to private law: see ANDREAS ABEGG, Die zwingenden Inhaltsnormen des Schuldvertragsrechts - ein Beitrag zu Geschichte und Funktion der Vertragsfreiheit (Diss.) (Zürich, 2004).

⁶⁴ "[Die öffentliche Bürokratie mit den Mitteln der privaten Bedarfsdeckung] ist ... an der Arbeit, das Gehäuse jener Hörigkeit der Zukunft herzustellen, in welche vielleicht dereinst die Menschen sich ... ohnmächtig zu fügen gezwungen sein werden, wenn ihnen eine rein technisch gut und das heisst: eine rationale Beamten-Verwaltung und -versorgung der letzte und einzige Wert ist, der über die Art der Leistung ihrer Angelegenheiten entscheiden soll." MAX WEBER, Parlament und Regierung im neugeordneten Deutschland. Zur politischen Kritik des Beamtentums und Parteiwesens, in: Die innere Politik 294-431 (Munich und Leipzig, 1918): p. 320.

1. Two paradigmatic cases of the welfare administration

In the decision of the Zurich administrative court ZR 72 no. 89, dating from 1973, the government of the city of Zurich, upon the request by the commission responsible for the preservation of historic buildings, decreed the protection of two private town houses. As legal basis they quoted the city statute on the protection of historic buildings, which ordered that the effect of objects relevant to heritage conservation "may not be impaired".⁶⁵ The owners argued against the conservation decree, arguing that the houses were in such need of renovation that they could no longer be worthy of preservation.⁶⁶ The court responded to this objection by admitting the lack of a statutory basis for ordering renovation. Sec. 123 of the cantonal building code only permits intervention in this regard by the police. However, according to the court, without maintenance, especially with regard to buildings in such great need of renovation, the order of protection would be disproportional: the implemented action would not be able to achieve the set objectives intended by heritage conservation.⁶⁷ In a spectacular turn, the court nevertheless came to the rescue of heritage conservation:

"Since the administration may not unilaterally order maintenance due to a lack of statutory basis, it has to combine protection with maintenance in an administrative contract. Since the expensive maintenance of historic buildings cannot be justified without giving the building legal protection, these kinds of contracts may be concluded under the condition that a legally binding administrative decree is passed on the protection of the historic building. Alternatively, the administration may combine the protection and maintenance order in a single decree. The formal expropriation procedure has to be instated when negotiations are deemed to have failed." [Translated by AA]⁶⁸

This case clearly shows the limits of police law on the one hand and how interventionist law compensates these limits on the other hand:

⁶⁵ Art. 1 of the decree regulating the protection of the city landscape and monuments ("Monument Protection Decree"), communal council decision of February 14, 1962 (AS StZH 31 569). As a special statute with welfare state character, the Monument Protection Decree has priority over the Building Decree of the city of Zurich: Art. 2 of the City of Zurich's Building and Zone Decree of June 12, 1963 (AS StZH 34 84).

⁶⁶ Ruling of the Zurich Administrative Court ZR 72 Nr. 89 (1973): p. 213.

⁶⁷ Ruling of the Zurich Administrative Court ZR 72 Nr. 89 (1973): pp. 213-214.

⁶⁸ "[Die Ergänzung der Unterschutzstellung mit Pflege des Denkmals kann,] ... da das Gemeinwesen in diesem Bereich [ohne gesetzliche Grundlage] keine einseitigen Anordnungen treffen darf, durch verwaltungsrechtlichen Vertrag geschehen. Ein solcher Vertrag kann, weil sich die kostspieligen denkmalpflegerischen Aufwendungen ohne rechtliche Sicherung des Bauwerkes nicht rechtfertigen lassen, unter der aufschiebenden Bedingung geschlossen werden, dass der Denkmalschutz rechtskräftig angeordnet wird, oder er kann Denkmalschutz und Denkmalpflege uno actu ordnen ... Scheitert der Vertragsschluss ... so ist die formelle Enteignung einzuleiten.": Ruling of the Zurich Administrative Court ZR 72 Nr. 89 (1973): p. 215.

The administrative instruments of police law were unable to combat the passivity of the house owners, who were neglecting the historic buildings; classic protection, with its restraining orders, failed to live up to the administrative aim of preserving the historic buildings.

The court reacted to this drifting apart of administrative means and administrative aims with a combination of police law and contractual instruments, which enabled the administration to directly influence the possible course of action of the private party, without using legal prohibitions and commands. Furthermore, the court avoided the problem of the reservation of statutory powers: The field of a potential contractual agreement was structured by the threat of expropriation. Within this setting the private party was 'free' to enter contractual negotiations and thus strive for a settlement that would only possibly take his needs into consideration. However, at the same time, he would have to contribute to the implementation of those administrative tasks the administration was unable to impose using police law in the first place with this contract. The 'free' will of the private party replaces the legitimacy of Parliament here, i.e. the reservation of statutory powers.

As the Swiss Federal Court Decision 126 I 219 (2000; protection of a historic cinema in Carouge) indicates, the case discussed above of 1973 was neither a one-off case, nor was it a problem of the past. Brought before the Federal Court were the legal basis and the corresponding statutory preconditions to oblige proprietors to continue economic activity for the purposes of heritage conservation. Notwithstanding the drastic nature of the invasion into the constitutional rights of both the owner and economic beneficiary by denying a change of use,⁶⁹ the federal court acknowledged the legitimacy of such measures in view of the function of heritage conservation.⁷⁰ However, at the same time the court required close cooperation between the administration and the proprietors, in order to elicit the possibilities of use and modification. Still, the court put into perspective the initial act of protection, which would not change its legal nature to that of a contract, but would remain a non-negotiable act by the sovereign.⁷¹

The phenomena of a welfare administration that resorts to contracts in response to the decline of traditional categories of administrative aims and means on the one hand and of courts recognising contracts as a chance to widen administrative competence beyond the reservation of statutory power on the other hand, is naturally not confined to heritage conservation. Contracts on land development⁷² or

⁶⁹ "Changement dans destination": Ruling of the Swiss Federal Tribunal 126 I 219, 221 (2000; Monument protection for the Vieux-Carouge cinema).

⁷⁰ "... personne ne prétend sérieusement que le bâtiment A1035 constituerait, comme tel, un édifice d'une grande valeur architecturale ou artistique qui devrait être sauvegardé à tout prix.": p. 223.

⁷¹ p. 226: "Cette obligation de collaboration ne change pas la nature de l'acte de classement, qui n'en devient pas négociable pour autant, et demeure une prérogative exclusive et unilatérale de l'Etat."

⁷² For example Ruling of the Swiss Federal Tribunal 105 Ia 207 (1979; Zehnder versus Gemeinde Birmenstorf).

expropriation⁷³ are traditionally used to relieve the administration's resources and to free it from the strict confinement of the statutory basis. The same applies to contracts on taxation, although these infringe the principle of equal administrative treatment and the principle of equal taxation.⁷⁴ But at the same time, the taxing authority would not be able to solve the countless cases using the internal resources available on their own without the cooperation of the taxpayer.⁷⁵ Although, with few exceptions,⁷⁶ the general legitimacy of administrative contracts is no longer disputed, concerns about an administration that is free from the legitimizing bonds of the reservation of statutory power translate into an unstable legal doctrine guiding this sort of cooperation. For German law and as a result of doctrinal transfer Swiss law, unlike French law, have to this day had trouble adequately capturing the interventionist administration,⁷⁷ due to their early focus on overcoming the police state and a less advanced judicial review process for administrative actions.⁷⁸

Expansion of the interventionist state: The activating contract

Today, this uncertainty about which legal rules to apply, in view of a limited but expanding administration is radicalized by new types of irritation. Although the following cases seem to reside on a different level, they also involve the role of contracts in a situation in which the administration does not lack the will, but merely the resources to shape society: More recently, a so called 'activating state'⁷⁹ increasingly concludes contracts with certain 'clients' such as welfare recipients, unruly adolescents and asylum seekers on aspects of social integration.⁸⁰

⁷³ See e.g. Ruling of the Swiss Federal Tribunal 102 Ia 553 (1976; Kury-Kilchherr v. Einwohnergemeinde Reinach).

⁷⁴ With reference to these central principles, the Swiss Federal Tribunal recently declared a degressive tax tariff as being unconstitutional: Ruling of the Swiss Federal Tribunal 2P.43/2006 (2007; degressiver Steuersatz Kanton Obwalden).

⁷⁵ See, for example, Ruling of the Swiss Federal Tribunal 119 Ib 431 (1993; 'fifty-fifty-Steuerrechtspraxis'). On a comparable situation in Germany, see JÜRGEN SONTHEIMER, *Der verwaltungsrechtliche Vertrag im Steuerrecht* (Cologne, 1987).

⁷⁶ Most recently, see: GEORG MÜLLER, *Zulässigkeit des Vertrages und zulässige Vertragsinhalte*, in: Häner/Waldmann (ed.), *Der verwaltungsrechtliche Vertrag in der Praxis* 25-37 (Zürich, 2007).

⁷⁷ MICHAEL STOLLEIS, *Verwaltungsrechtswissenschaft und Verwaltungslehre 1866-1914*, in: Jeserich/Pohl/Unruh (ed.), *Deutsche Verwaltungsgeschichte; Band 3; Das Deutsche Reich bis zum ende der Monarchie* 85-108 (Stuttgart, 1984): pp. 90-91 and p. 100. On France and for further references, see FRANÇOIS BURDEAU, *Histoire du droit administratif (de la Révolution au début des années 1970)* (Paris, 1995): pp. 283-284.

⁷⁸ See above, Fn 48.

⁷⁹ Bernhard Blanke, in particular, has characterized this concept of a political program based on economic principles that requires and supports citizen collaboration: STEPHAN VON BANDEMER/BERNHARD BLANKE/JOSEF HILBERT/JOSEF SCHMID, *Staatsaufgaben - Von der "schleichenden Privatisierung" zum "aktivierenden Staat"*, in: a. (ed.), *Den Staat neu denken. Reformperspektiven für die Landesverwaltungen* 41-60 (Berlin, 1995).

⁸⁰ The early detection of this problem is attributed to Pärli: KURT PÄRLI,

According to the statute of the Canton Fribourg on social welfare, for example, welfare aid is supplied in the form of a contract to promote social integration. Art. 4a, paragraph 2, states the following on the contract on social integration:

"The person in need has to accept the contract on social integration, to the extent that the contract aligns with the person's abilities and potential. If the person rejects the proposed integrational project, material aid may be limited to the minimum amount..."⁸¹

This example clearly shows how the expectations placed on state administration to regulate society, right into its smallest crevasses, draws forms of contract into focus that have not been discussed previously. This method of forming society using politics knows that it lacks knowledge about the society it is supposed to regulate in an *optimal* way, and it gains this knowledge by selectively cooperating with the part of society it subjects to regulation. In this sense, by including - to a certain degree - the regulated area of society, regulation by means of contract is superior to crude traditional regulations by order and command.

However, at the same time, the administration continues to rely on the traditional order and command basis in its contractual negotiations, as was pointed out in the above mentioned example of heritage conservation.⁸² Admittedly, this form of contract no longer has much in common with the Kantian freedom of contract. Freedom in this sense is no longer the pre-conditional freedom of will inherent in every individual by virtue of his humanness,⁸³ but rather a freedom (of negotiation) arranged or even forced upon the individual by the administration.⁸⁴ The contract on social welfare comes about as a result of the threat of denial of social benefits. Accordingly, the wording in Art. 4a paragraph 1 of the statute of the Canton Fribourg on social welfare indicates the Fribourg legislative's uncertainty about the legal nature and standing of such a contract:

"[The integrational contract] is put on a par with the administrative contract."

Numerous analogous manifestations have appeared in other areas of law and in other places, which point to the connection of this new kind of activating and at the same time socially constructive contract between the state and private parties with

Sozialhilfeunterstützung als Anreiz für Gegenleistungen, SBS/ASPAS Sozial Aktuell 17-23 (2001). See also NEVILLE HARRIS, Empowerment and State Education: Rights of Choice and Participation, Modern Law Review MLR 68 925-957 (2005).

⁸¹ Swiss Social Benefits Act of November 14 1991, 831.0.1. This provision has been in force since January 1, 2000.

⁸² See above, Fn. 72.

⁸³ IMMANUEL KANT, Kritik der praktischen Vernunft (Hamburg, 1788/1993): 112 [173 1st ed.].

⁸⁴ See criticism in this regard by HANS Kelsen, Zur Lehre vom öffentlichen Rechtsgeschäft, Archiv des öffentlichen Rechts 31 53-98, 190-249 (1913). More recently, NIELS ÅKERSTRØM ANDERSEN, The Contractualisation of the Citizen - on the transformation of obligation into freedom, Soziale Systeme 10 273-291 (2004); see also PETER VINCENT-JONES, Citizen Redress in Public Contracting for Human Services, Modern Law Review MLR 68 887-924 (2005).

greater social challenges. Thus, more Cantons like Valais⁸⁵ and Basle-Land⁸⁶ use the contract on social welfare. Harris, for example, shows that school principals in Great Britain increasingly contract with unruly students, before resorting to order and enforcement measures.⁸⁷

Another swan's song on the social contract

In which context do these irritating cases exist, in which the activating administration tries to seize access to society in general and to its 'clients' in particular through contracts?

At the end of the 19th century under the influence of liberal theories⁸⁸ the French Conseil d'Etat and the Tribunal des conflits realized that a welfare state administration would not be able to fulfil the gigantic task of taking full and active responsibility for a democratic-egalitarian society and thus also for the infrastructure of communication and transport, as well as elementary requirements of the individuals on its own, but needed the help of the economy. The corresponding adjudication by the courts centred on harmonizing the different needs with the help of law fairly early on: on one hand, the need of the administration to realize political programs quickly, even against opposing agreements; on the other hand, the need for long-term economic planning ability.⁸⁹

After the Second World War, German scholars in particular realized how much the administration's task of guaranteeing the existence of each individual was going to be radicalized in the light of the sweeping population migration into the cities.⁹⁰ However, to this day, it has rarely come to anyone's attention that interventionist

⁸⁵ Art. 11 of the Statute on Integration and Social Benefits of March 29, 1996 (850.1).

⁸⁶ § 18 of the Act on Social Support, Youth Support and Support for Disabled Persons of June 21, 2001.

⁸⁷ NEVILLE HARRIS, Empowerment and State Education: Rights of Choice and Participation, *Modern Law Review* MLR 68 925-957 (2005): p. 952.

⁸⁸ See e.g. RODOLPHE DARESTE, *La justice administrative en France; ou traité du contentieux de l'administration* (Paris, 1862), preface.

⁸⁹ This compatibilization of the public sphere with economic rationality in the area of concessions for the public service introduced itself in the decisions of the Conseil d'Etat of August 7, 1874 in the case of Hotchkiss (Rec. 824) and of December 26, 1891 in the case of Compagnie du Gaz de Saint-Etienne (rec. 789). The principle of damages resulting from unilateral intervention by the public body in administrative contracts as a so called rule "fait du prince" (made by the prince) started to persevere as general practice by the Conseil d'Etat, albeit not until the beginning of the 20th century. Decision of the Conseil d'État of March 11, 1910 in the case Compagnie générale française des tramways, rec. 216. See also FRANÇOIS BURDEAU, *Histoire du droit administratif (de la Révolution au début des années 1970)* (Paris, 1995): pp. 283-284. With the decision of the Conseil d'État of January 14, 1938 in the case Société anonyme des produits laitiers "La Fleurette", rec. 25, a respective obligation to pay damages was recognized as a result of statutory provisions.

⁹⁰ Importantly, in particular JÜRGEN SALZWEDEL, *Die Grenzen der Zulässigkeit des öffentlich-rechtlichen Vertrages* (Berlin, 1958): p. 3 and ERNST FORSTHOFF, *Lehrbuch des Verwaltungsrechts: erster Band* (Munich, 1973): pp. 35 onwards.

welfare state has a corresponding need to cooperate with society, as exemplified through the (broadly understood) area of social welfare and, more generally, through the state integration machinery.⁹¹ In a nutshell, this is firstly because the administration's 'clients' have become so diversified, which means secondly, the world in which they would normally be integrated in has become so estranged from the administration that that the administration has to rely on its 'clients' knowledge on the one hand and on society on the other hand. In this way, the administration seeks to access that private knowledge by cooperating and stabilizing this cooperation in the form of contracts.⁹² Even in this area of a contracting administration it is not sufficient to extend the increasingly proactive administrative competence under the principle of the reservation of statutory power, and then bring it back to the umbrella of judicial review and legitimizing legislation.⁹³ The aim is rather to stabilize an unstable relationship between two very different areas of society that rely on each other for concrete projects through a third, neutral element: that of contract under independent judicial review.

If we look at new phenomena such as the contracts between the administration and parents, parent groups or religious persons in the French suburbs that aim to get to grips with youth violence,⁹⁴ it becomes obvious that a political bias on

⁹¹ This can already be deduced from the fact that this form of cooperation is not addressed in current standard literature on the administrative contract: see e.g. HARTMUT MAURER, *Allgemeines Verwaltungsrecht* (Munich, 2004): pp. 357 onwards.; LAURENT RICHER, *Droit des contrats administratifs* (Paris, 2006). AUGUST MÄCHLER, *Vertrag und Verwaltungsrechtspflege: ausgewählte Fragen zum vertraglichen Handeln der Verwaltung und zum Einsatz des Vertrages in der Verwaltungsrechtspflege* (Zürich, 2005) see e.g. the reference in Fn. 88 (p. 34), that social support has to be approached by decree.

⁹² Tendencies in this direction especially in KARL-HEINZ LADEUR, *The changing role of the private in public governance: the erosion of hierarchy and the rise of a new administrative law of cooperation: a comparative approach*, 2007, downloadable at: <http://hdl.handle.net/1814/187>; PEER ZUMBANSEN, *Vertragsregimes im "Dritten Sektor": Zur Verortung des Verwaltungsrechts in Zeiten veränderter Handlungsformen*, in: Kötz/Rawert/Schmidt/Walz (ed.), *Non Profit Law Yearbook 2002* 61-85 (Cologne, 2003); THOMAS VESTING, *Die Staatsrechtslehre und die Veränderung ihres Gegenstandes: Konsequenzen von Europäisierung und Internationalisierung*, *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer (VVDstRL)* 63 41-70 (2004). In my opinion, Vesting focuses too strongly on the consequences of dissolving the territory and thus neglects the dissolution of sovereignty inside. Several other examples in KURT PÄRLI, IIZ: *Illusionäre Wirkungen – Gefahren einer fürsorglichen Belagerung*, in: Gächter (ed.), *Rechtsfragen zur interinstitutionellen Zusammenarbeit (IIZ)* (Bern, 2007). For more on the whole, see also NIELS ÅKERSTRØM ANDERSEN, *The Contractualisation of the Citizen - on the transformation of obligation into freedom*, *Soziale Systeme* 10 273-291 (2004).

⁹³ Although recently advocated by e.g. AUGUST MÄCHLER, *Vertrag und Verwaltungsrechtspflege: ausgewählte Fragen zum vertraglichen Handeln der Verwaltung und zum Einsatz des Vertrages in der Verwaltungsrechtspflege* (Zürich, 2005): pp. 385-386.; GEORG MÜLLER, *Zulässigkeit des Vertrages und zulässige Vertragsinhalte*, in: Häner/Waldmann (ed.), *Der verwaltungsrechtliche Vertrag in der Praxis* 25-37 (Zürich, 2007): p. 36.

⁹⁴ See for example OCELYNE CESARI, *Demande de l'Islam en banlieue : un défi à la citoyenneté*, 2007, downloadable at: <http://cemoti.revues.org/document1695.html>; report in *La Liberté* of

administrative contracts may often stand in the way of cooperation: which promising form of attempts at mediation between rebelling youths in the suburbs and politics could reveal itself as the extended arm of politics? French politics thereby consequently relies on mediation by the highly esteemed military: Military social workers in uniform, like a sort of 'Richoufftz', act as so called "général des banlieues" and aim to oblige adolescents to certain behaviour through the conclusion of a "contrat moral".⁹⁵

Admittedly, the point has been made a couple of times that these contracts do not qualify as real contracts in the sense of the law, but constitute or aim to be more of a new type of social contract respectively. However, today, a remake of the social contract, in which society hands over its powers to a centralized state in return for unity, security and welfare has become illusory. Society today lacks the ability to be absorbed by this central authority, i.e. to quasi create an all-embracing state. The trenches between different social rationalities run too deep: for example, the chasm between the existential needs of the inhabitants of the Banlieu or the religious rationality of the Imane and the French administration.⁹⁶ Striving for a new political unity by means of introducing a new social contract constantly fans out to result in a multitude of single administrative contracts instead, by which the administration ad hoc and constantly strives to regulate the resources that are difficult for politics to access, whilst recognizing that it needs to fulfil its greater tasks of establishing unity and welfare for the whole population. This is exemplified concisely in the French 'Contrat d'accueil et d'intégration', through which each immigrant commits themselves to respecting the fundamental values of the country, to obey the law and to participate in certain language and cultural training courses, in return for certain social benefits.⁹⁷ Thus, the great society umbrella social contract is fragmented into many small contracts, whereby the intention of the umbrella and centralized state authority aspired by the social contract is not realized. Politics today confesses that it is no longer in a position to realize the promises of the social contract by itself as a sovereign, but has to rely on frequently renewed, ad-hoc cooperation with society.⁹⁸

January 12, 2007, 2, Enfin, la banlieu sera paisible ...

⁹⁵ See Emmanuel de Richoufftz' blog for concise comments on the so called "général des banlieues" implemented by the government: <http://general.de.richoufftz.over-blog.com/>, visited last on 6/20/07; see also more recently the interview in the internet newspaper Linternaute of November 2005: <http://www.linternaute.com/actualite/interviews/05/general-richoufftz/general-richoufftz-chat.shtml>, last visited on 07/12/17.

⁹⁶ See also OCELYNE CESARI, *Demande de l'Islam en banlieue : un défi à la citoyenneté*, 2007, downloadable at: <http://cemoti.revues.org/document1695.html>.

⁹⁷ Code de l'entrée et du séjour des étrangers et du droit d'asile, Article 311-9. For example, Art. 54 of the new Swiss Foreigners Act (AuG) of December 16, 2005, passed in the referendum on September 24, 2006, BBl. 2005 7365, shows that this phenomenon is by no means restricted to France.

⁹⁸ Mentioned above previously: today's state is no longer able to ensure security using its own power: pp. 4-5.

C. New function of contracts between politics and society

The example of state regulation after the state

On the basis of another ruling of the Swiss Federal Court, *Schweizerischer Treuhänder-Vorband gegen Schweizerische Nationalbank* (109 Ib 146; 1983) it may be argued that the first two case groups, the cases on the civil service on the one hand and the cases on welfare administration on the other, constitute parts of a greater context that irritates the law. At the same time, this case may reveal the (future) function of administrative law.

The facts of the case *Schweizerischer Treuhänder-Vorband gegen Schweizerische Nationalbank* are as follows: During the so called Chiasso-affair (when at the end of the Seventies more than two billion Swiss Francs were brought into Switzerland and Lichtenstein, with the help of a major Swiss bank, allegedly in connection with illicit Italian earnings and tax evasion) the Swiss Federal Council called the Swiss National Bank and the Swiss banks to action. Without any statutory basis, the Swiss National Bank concluded identical, bilateral contracts with the overwhelming majority of the Swiss banks regarding the exercise of due diligence with regard to deposits (CDB).⁹⁹ As far as the competition amongst other competing trustee organizations was concerned, the new version of the contract in 1982 discriminated against the Treuhänder-Verband (Association of Trustees) on the rules of disclosure of the identity of third parties on whose account assets had been invested. The Association of Trustees 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. The Federal Court did not take up the complaint, on the grounds that the CDB was a private contract, and, accordingly, the National Bank's note to the Treuhänder-Verband was not an administrative decision that could be challenged. However, in a obiter dictum the Federal Court asserted that the Swiss National Bank

*"... has to comply with the constitutional basic rights analogously in its private-law activities [sic]."*¹⁰⁰

Thus, the Federal Courts defended the banks' and the Swiss National bank's approach by defining it as private law contracting, thereby dismissing the claim for judicial administrative review. As a result, the Court defended the efforts of the Federal Council, the Swiss National Bank and the majority of Swiss banks to create a new market order for Switzerland. The traditional unilateral course of action by the administration, without inclusion of the bank, lacked time, a legal basis and above all knowledge. However, in less than half a year the collaboration between

⁹⁹ On the whole picture, see my comments (with further references) in: ANDREAS ABEGG, *Regulierung hybrider Netzwerke im Schnittpunkt von Wirtschaft und Politik*, *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft (KritV)* 266-290 (2006).

¹⁰⁰ Ruling of the Swiss Federal Tribunal 109 Ib 146, 155 (1983; *Schweizerischer Treuhänder-Vorband versus Schweizerische Nationalbank*).

the National Bank and the Swiss banks lead to a new market order, to which most Swiss banks freely submitted themselves and which adapted more and more to the context-conditions of law, politics and economy in the course of the following year. The alternative to this evolutionary approach set in motion by spontaneous contractual agreement did not appeal to either the banks or to politics: the start of lengthy legislative proceedings – heavily influenced by party politics, less susceptible to the economy and as a result, less predictable for the economy, accompanied by media coverage about banking practices found little appreciation – which would have allowed for pressure of international politics to build up further.

From the viewpoint of a new and socially adequate description of society, this case exemplifies that a possible new role for politics *qua* administration would be to mainly confront other areas of society with its demands concerning social integration. The difficulties in forming society according to specific political goals were already evident at the beginning of the 20th century, and have become more and more apparent today. Thus, the term of regulation (and therefore also the term of the state) increasingly misses the point.¹⁰¹ The form of contract stands out particularly in regard to the question of how these irritations reach other areas of society and consequently trigger mutual adjustment.

Contracts between politics and society as a functional equivalent to the social contract

The problems described above are paradigmatic of today's problems in law, leading back to the most urgent questions of the 18th and 19th centuries on the legal form of the civil service and the legal diffusion of the welfare administration, but at the same time leading back to the importance of these questions today. By contrast, it has been argued that the administrative law was developed in the transition to the 20th century on the basis of the issues of civil service and that <(albeit less so) the welfare administration faces the very same questions about the legal nature and the leading principles of administrative contracts today, merely in a much broader context. However, the problem has been radicalized today, and places demands for new descriptions and legal solutions, where the administration lacks the knowledge in a particular area of society it has to regulate, and therefore depends on cooperation with the private sector in order to substantiate and base its tasks and reasons for its own existence. The above mentioned and highly diverging case groups are good examples of where the traditional concepts of sovereignty and social contract have failed in relation to heritage conservation, banking regulation by private contracts or the increasing tendency to contract with 'clients' of the social welfare state about desired levels of behaviour.

¹⁰¹ Continuing thought in Markus Pöcker's remarkable analysis: MARKUS PÖCKER, "Dual System": Regulated Self-Regulation or Autonomous Organisation? - Das "Duale System": Regulierte Selbstregulierung oder autonome Selbstorganisation?, *Ancilla Iuris* (anci.ch) 2 23-41 (2007).

Although the preceding analysis depicts administrative contracts today and during the 19th century as go-betweens for politics and society, public law and private law and therefore as a problem for modern legal theory and doctrines, they also qualify as a functional equivalent to the great social contract, which has become difficult to uphold today. Thus, focus shifts to contracts as a legal form that can sustainably support the co-evolution of law, politics and other social subsystems.¹⁰² The above mentioned question therefore remains to be answered: how do contracts absorb conditions of different contextual requirements in relation to rationalities of a project and act as mediators in a highly fragmented and centrifugally structured society? Even if the division of public and private law in this context still marks the point of departure for research on administrative contracts, the division as a division of contracts that serve political interests on the one hand and economic interests on the other hand is not the focal point. Rather, it is a matter of perspective and of how to condition a new social contract law to be open for new possibilities.¹⁰³

¹⁰² Recently: MARC AMSTUTZ/ANDREAS ABEGG/VAIOS KARAVAS, *Soziales Vertragsrecht* (Basel, 2006); REICHMAN, AMNON, *The Dimensions of Law: Judicial Craft, Its Public Perception, and the Role of the Scholar*, *California Law Review* (forthcoming).

¹⁰³ On this perspective more basically, see GUNTHER TEUBNER, *Contracting Worlds: The Many Autonomies of Private Law*, *Social and Legal Studies* 9 399-417 (2000).